FOR MERCY'S SAKE

Why Labour should not axe trial by jury

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This Labour government has introduced a law that, if passed, will severely limit the right to challenge police allegations by having a jury – 12 citizens chosen at random – decide whether they are proven beyond reasonable doubt. This dramatic diminution in the right to trial by jury (at least half are likely to be scrapped) is said to be justified by the admittedly deplorable fact that the victims of crime must in many cases wait for several years before the defendant accused of harming them can be brought to court – a fact that is not attributed to jury trial but to successive governments failing to understand how their funding cuts damage the criminal justice system, and then to disruption caused by Covid. Evidence is now emerging to show that the plans to restrict jury trial will have no significant effect on reducing trial delays, but the Parliamentary debate still continues, driven in the case of some Labour MPs by "ideological" opposition to jury trial. This is bizarre, given the historical role of the jury in protecting dissidents and sustaining democracy: attacking juries must be regarded a betrayal of the values for which Labour purports to stand.

Origins of Jury Trial

The jury trial emerged in the 13th century to replace the superstitious reliance on trial by ordeal, where guilt was decided by dunking defendants in ponds to see whether they floated (guilty) or hit the bottom (innocent, if sometimes drowned). These charades were overseen by the local parish priest, who often accepted bribes to rig the trial (e,g. by choosing the

shallow end of the pond) and thus giving divine providence a bad name. In that crucible year, 1215, the Pope acted to ban priests from participating in ordeals, and this primitive system collapsed. What could replace it for more reliable fact-finding?

There was, at hand, the practice of the King's coroner (the "crowner" whose jurisdiction worries the gravediggers in Hamlet) who was charged with deciding the cause of death. He had power to summon men from the nearest town to determine this –they would squat around a dead body found in the road and infer from the wounds, and from local gossip, how and by whom he had been killed. There was also a more formal procedure for fact finding, which had been instituted by Henry III to resolve land disputes: a group of wealthy citizens from the district, summoned by a judge to decide between rival claimants on the basis of their knowledge of local history and customs. When adopted for criminal cases, their verdicts, delivered after solemn conclave, had some of the force attributed to the results of trial by ordeal before it fell into disrepute.

In time, the system of fact-finding by unanimous verdict of a dozen citizens became commonplace and commonly trusted, a unique English solution that had replaced a method rife with superstition and error. There may have been some question marks – one Shakespearean character noted that a jury might include one or two thieves more guilty than the thief they tried – but generally the verdicts were acceptable.

Moreover, and by happenstance, 1215 had been the year of Magna Carta, the outcome of a feud between a feudal King forced to accede to the demands of his powerful barons. Clause 39 provided:

“No free man shall be seized, imprisoned, dispossessed, outlawed exiled or ruined in any way nor in any way proceeded against except by the lawful judgement of his peers and the law of the land.”

In the interpretation of great jurists a few centuries later, this meant a right to trial by jury – i.e. the judgement of one’s peers. Clause 39 is still valid today, according to Parliament, as is clause 40: “to no one will we sell, to no one will we deny or delay rights or justice.” Since “justice” includes trial by jury, widespread abolition will be subject to constitutional challenge should the government legislation pass.

Jury Independence

In the seventeenth century, the jury became a crucial part of the country’s democratic governance – a transformation effected by men who should be historical heroes to Labour MPs and their local party members.

The first was John Lilburne – “Freeborn John” as he was hailed in 1640 by the people of London, as a youth tortured by order of the star chamber – the executive court of Charles I – for importing seditious books. Although whipped in public all the way down Fleet Street, he refused to answer their questions, establishing in due course the right against self-incrimination. He fought for Parliament against the King, was captured at Oxford and as a prisoner of war was, contrary to the law of wars, put on a trial for treason which would have meant his execution. Parliament was outraged and directed the Speaker of the House to publish its order that if the trial went ahead, royalist prisoners would suffer the same fate. But how to get this news to Oxford in time to save Colonel Lilburne? All roads were blocked, and there were no carrier pigeons. His wife, Elizabeth, persuaded the Speaker to give her an embossed copy of the order and she rode heroically

to deliver it to the King, who gave in to the threat and dropped the charge against her husband.

Lilburne then took to writing, and with a group of fellow polemicists – early investigative journalists, in fact – published tracts against the King and the royalist establishment. They were called “Levellers” and had much support in Cromwell’s army with their proto-democratic arguments – in the Putney debates, it was the leveller Thomas Rainborough who famously extemporised their case that “the poorest he that is in England” must have a voice in choosing the government he is to live under. But after the King's execution, the Levellers began to criticise Cromwell’s authoritarian regime: it was an “army junto” said Lilburne, run by “tyrants, weasels and polecats.” He was plainly guilty of an offence created by the new Treason Act, which punished by death any published allegation that the government was unlawful.

The Act did not allow counsel, so Lilburne defended himself – in one of the most significant trials in our history in which this radical and eloquent autodidact insisted that his judges keep the court open to the public and allow him to address the jury about the unfairness of the law under which he was being tried. But the army grandees, whose troops he had urged to mutiny, wanted him dead and the judges were placemen who would direct the jury to convict. When Lilburne begged for an adjournment of an hour to collect his thoughts for his final speech, they refused and even denied him a toilet break.

The transcript records his final request: “Sir, if you will be so cruel as not to give me leave to withdraw, I pray you let me do it in court. Officer, I entreat you – help me to a chamber pot!”

The judges were stunned into silence as a chamber pot was fetched by the sheriff. The official report notes “when the pot came, he made water and gave it to the foreman” who presumably passed it around to other jurors in need.

The judge’s summing up was a direction to convict: “If you have apprehended the dangerous things plotted in these books of Mr Lilburne, you will clearly find that never was the like treason hatched in England.” But the jury was not impressed: it took them only an hour to deliberate, and they acquitted Lilburne on all counts, – to noisy acclamation from a packed Guildhall where the trial was held. The independence of the jury from governments – even a government as threatening as Cromwell’s - had been demonstrated.

Cromwell was shaken by the result but nonetheless determined to silence Lilburne who quickly returned to leveller polemics. But he made a stinging attack on a corrupt MP, so they held him in contempt of Parliament – a crime triable by Parliament without the right to a jury. They fined him and sentenced him to banishment from the realm, with a death sentence if he returned. He did, after two years on the continent, and faced another trial on a charge of which he was clearly guilty - although Parliament’s behaviour in decreeing a death sentence if he returned from banishment was on any view disproportionate. His old supporters flocked to his cause– 6000 women signed a petition that the formidable Mrs Chidley presented to a trembling Praise-God Barebones, the leader of Cromwell’s Parliament. At his trial, Lilburne invited the jury to pass judgement on the morality of the act of banishment, but it was difficult to see how he could not be convicted. Nonetheless, the jury verdict was clear:

“John Lilburne is not guilty of any crime worthy of death.”

There was much rejoicing at his deliverance, a condemnation of the intemperate MPs who persecuted him, but the government was outraged. It’s Council of State, behaving like the Star Chamber, called each juror before it to demand an explanation. But the jurors all met beforehand, at the Windmill Tavern, and agreed to give the same answer: “I gave the verdict with a clear conscience, and I refuse to answer any questions about it.” This was an unparalleled act of defiance, and by it John Lilburne’s juries carved out a new role for that body as an independent protector of citizens against state persecution.

The Independence of the jury was established in practice – but not yet in law. That came a few years later through the courage of a true hero – not a dissident but an actual juror named Edward Bushell. In 1670 he was summoned to the Old Bailey and elected foreman of a jury to try two Quakers, William Penn and William Mead, accused of holding a seditious assembly, i.e. publicly praying, in the city. The Recorder of London directed them to convict, but Bushell and his fellow jurors refused to obey the direction. The furious judge locked them up until they agreed, and still they refused after two nights without food or water or even a chamber pot (a utensil, as in Lilburne’s case, of some importance in at the time). The only verdict they brought back was “not guilty, according to conscience.”

The Recorder had them thrown back into prison, whereupon Bushell challenged the legality of his order by bringing a writ of *habeas corpus* to demand their release. In a judgement which must stand as one of the most significant in English legal history, the Lord chief justice, Sir Robert Vaughan, decreed that a jury was entitled to act according to its own

conscience and its appreciation of the evidence, irrespective of judicial direction or expectation. Bushell's case is the foundation of the constitutional independence of the jury: it can do justice, whatever the law may be.

This power in a jury to take the law into its own hands was difficult for judges to accept until Lord Mansfield, a century later, very reluctantly agreed that in reaching a verdict which required "a blending of law and facts" jury members could follow "the prejudices of their affections or passions" and the result is "a matter entirely between God and their own consciences." Even modern judges sometimes need to learn the lesson that they cannot dictate to juries: John Stonehouse, the Labour MP who disappeared so his wife could claim on his insurance policies, was obviously guilty of fraud but when the judge directed the jury to find him guilty, that verdict had to be quashed.

Bushell's case remains relevant today and is commemorated by a golden plaque in the forecourt of the Old Bailey, where modern jurors may contemplate its significance as they ponder their verdicts.

Bushell's case was vital for the defence of the Republicans persecuted by the government after the revolution in France. Booksellers who sold the works of Tom Paine, and political reformers like Hone and Carlisle and Tooke, were initially acquitted and their celebrated advocate, Lord Erskine, was carried from court by the triumphant mob of their supporters.

The great historian EP Thompson, surveying this period in his classic "The Making of the English Working-Class," concludes that the jury system did afford reformers a measure of protection against a malevolent state – doubters should contrast the cruel and arbitrary treatment in this period of

their equivalents in Scotland, lacking the right to a jury and hanged by the brutal Lord Braxfield. South of the border, the jury became “the last defence of English liberties”

For which reason, of course, it came under attack from the government. Pitt was determined to crush Republican stirrings, so he introduced “special juries” of loyalists to try cases of sedition. They were “guinea men” paid a guinea a day and made well aware that this lucrative employment by the crown was contingent upon reaching verdicts in favour of the crown. There was still a right to challenge, which was as one defendant put it “like offering a man a basket of rotten oranges from which he was at liberty to take his choice.” It was a tribute to the advocacy of Thomas Erskine and the unpopularity of George III and his ministers that occasionally even “special juries” acquitted.

The best that can be said for this system is that it brought to prominence the greatest reformer of all, Jeremy Bentham, whose first book was titled “Elements in the Art of Jury Packing.” He condemned a system of vetting “which is become regular, quietly established and quietly suffered. Not only is the yolk already about our necks, but our neck is already fashioned for it.” In due course jury vetting ceased although Bentham’s rhetoric had to be revived in 1978, when it was discovered that a labour attorney general had secretly authorised the practice.

The great freethinker Charles Bradlaugh, prohibited from taking a seat in parliament because of his atheism, was prosecuted for blasphemy and sedition but acquitted by a jury. Intolerant MPs proved a greater a problem – they actually put Bradlaugh on trial, refusing his heartfelt plea that he should be tried by a jury of his fellow country men. The MPs found him

guilty, and the sergeant at arms took him into custody for contempt of Parliament, and locked him up in the Parliamentary prison, a small cell in the clocktower just below Big Ben. He remains the only person ever to have occupied it.

Scholarship

It was not until the late nineteenth century that scholars came to analyse Britain's unwritten constitution. The first to do so was the Oxford professor A.V. Dicey, concerned to show that our political arrangements were superior to those of other nations, despite (or because of) the unfettered sovereign power of Parliament. The jury appeared in his theory as a saving grace: parliament could not ban any book unless a 'jury of shopkeepers' were prepared to convict the publishers. Dicey was a complacent liberal – juries were made up of men of property (which remained a qualification for jury service until 1972) and were often shopkeepers – and were not tolerant of free speech when defendants were prosecuted for blasphemy or obscenity. Nonetheless, Dicey was influential, and his boast about the jury as a safeguard against reactionary governments was echoed for a century in university courses on constitutional law, despite the fact that in this straightlaced late Victorian period, the books of Zola, Flaubert and de Maupassant were all banned as was Havelock Ellis' pioneering work "Sexual Inversion."

Given the central part that jurors had come to play in the operation of the criminal law in England, and indeed in almost all British colonies, it is surprising that jury scholarship was ignored for so long. There was no significant study of the jury until a law lord, Patrick Devlin, produced a book based on a series of lectures in 1956. Devlin was the most intellectually

impressive lawyer of his day (he retired from the House of Lords judicial committee because he found his brethren boring) and he wrote with erudition and comprehension. He concluded:

“The jury system has for some hundreds of years been constantly bringing the rules of law to the touchstone of contemporary common sense… It serves two other purposes of great importance in the Constitution. The existence of trial by jury helps ensure the independence and quality of the judges. Our history has shown that the executive has found it much easier to find judges who will do what it wants than it has to find amenable juries. Blackstone said the jury was a safeguard against “the violence and partiality of judges appointed by the crown,” (Its further purpose was) to give protection against laws which the ordinary man may regard as harsh and oppressive. It is also an insurance that the criminal law will conform to the ordinary man’s idea of what is fair and just. If it does not, the jury must not be a party to its enforcement. They have in the past used their power of acquittal to defeat the operation of laws which they thought to be too hard.”

Devlin had no doubts that the jury was part of the unwritten constitution: a fundamental check of the power of the executive. It was, he concluded, “the lamp that shows that freedom lives.”

Recent cases

Lord Devlin’s proposition came true in 1985, when an Old Bailey jury refused to convict Clive Ponting, a civil servant who had passed information to Labour MP Tam Dalyell about the sinking of the Belgrano. The Thatcher government claimed it was justified in taking an action which killed several hundred young Argentinian sailors because the Belgrano was menacing British ships. The truth, exposed by Ponting, was that the

Belgrano was steaming away from the battle and had been no threat at all. He was charged under section 2 of the Official Secrets Act, which carried a maximum prison sentence of two years (so it would have been ineligible for jury trial under the Labour government's new Bill). Ponting relied on the obvious public interest of exposing the truth about this atrocity – an act that had split Thatcher's war cabinet (the attorney general, Michael Havers, had dissented) but the judge directed the jury that this was no defence at all, and they should convict. Instead, they acted in the spirit of Bushell's case and acquitted as a matter of conscience.

The power of a jury to do justice will always be inconvenient to a government, whatever its political complexion. Very recently, in 2023, a woman who stood outside at Crown Court which was hearing a case concerning climate protesters, held up a placard summarising the law declared in 1670: "jurors, you have an absolute right to acquit a defendant according to your conscience". She was arrested for contempt of court and prosecuted by order of an obscure barrister who had become the Conservative solicitor general, but the High Court threw out his attempt to re-write history. He tried to appeal, but the government changed and the new Labour attorney general quite rightly refused to waste public money pursuing the hopeless case. But a few months later, his government began its attempt to deny jury trial to all persons faced with up to 3 years imprisonment, or charged with an offence that would mean a lengthy or complex trial, or who had a right to elect jury trial rather than trial by magistrates.

It might be thought that Labour of all parties would be careful about messing with a system particularly venerated by most of its members and

supporters. It should have learned that lesson from the extraordinary events in 1978, when its attorney general – the planning lawyer Sam Silkin – allowed himself to become a patsy of the security services. He approved the prosecution of two young journalists from “Time Out” on official secrets charges carrying up to 30 years imprisonment, and he secretly ordered that the Old Bailey jury – and other juries – should be vetted. The ABC case – named after defendants Crispin Aubrey, (an environmental journalist). John Berry (a soldier) and Duncan Campbell (a 24-year-old freelance) – arose when they were arrested for talking one evening at Berry’s invitation about his service at the British communications base (Akrotiri) in Cyprus. Its monitoring functions were well known to the Cypriots and indeed to the Russians, but this case was the first time that GCHQ had been revealed to the British public.

That it should remain a secret forever was the opinion of a government witness whose very name was alleged by the prosecution to be an enormous secret, so he was called “Colonel B”. When he appeared under that acronym he was recognised by Campbell at once and readily agreed under cross-examination that he had regularly appeared – even in cartoons – in army publications. In effect he blew his own cover, and some left-wing magazines – "Peace News" and (appropriately) “the Leveller” – published his name. The attorney general immediately obtained a national security secrecy order, which could not of course affect proceedings in parliament, where a number of Labour MPs (Chris Price, Jo Richardson and the young Robert Kilroy-Silk) outraged at the bogus secrecy, blurted out the forbidden name. Silkin sent a directive to every newspaper ordering them not to report on the debate, but this foolish attempt to infringe the right to report Parliament was rudely rebuffed and became a constitutional crisis of his

own making. The National Union of Journalists, holding their annual conference at Whitley Bay, became the target of Scotland Yard when the Colonel's name was written in the sand – by the time police cars arrived from London, the tide had risen.

On the morning of the opening day of the trial, leading counsel for Campbell (Jeremy Hutchinson QC, the Erskine *de nos jours*) struck up a seemingly idle conversation with the court clerk. "Has there been any interest in the jury panel for ABC case?" "None at all" came the reply "not since about six weeks ago, when the prosecution applied in closed court to get hold of a list of the jurors so they could be vetted". Hutchinson was thunderstruck – a junior counsel was sent scurrying to the LSE law library, to obtain a copy of Bentham's "Elements of the Act of Jury Packing" large sections of which were read in his motion to have the whole case declared unconstitutional. The publicity was massive, especially when it emerged that Silkin had secretly agreed with police and security services that they could maintain clandestine surveillance on potential jurors in order to challenge those who appeared to have quite 'strong' political views. Some 42 juries had been thus surveilled in the past few years in cases of class that Silkin admitted "was impossible to define precisely" but "when, broadly speaking, strong political motives were involved". He was immediately taken to task by EP Thomson:

"Mr attorney general," what rule of law may hang upon the phrase "it is impossible to define precisely" the cases to which it might refer? If law is now to rest upon such a nice terms as "broadly speaking" who is to speak and how broad may that speech be? If a person is to be deprived of his juror's rights (which I had once supposed to be a right and duty inherent in

a citizen) because of "strong political motives", who is to determine whether his views be "strong"? Yourself, or the DPP? The prosecution? Or the police? Whichever it may be, you are taking a liberty. The liberty of the people."

A defence campaign was supported by many Labour MPs, and calls for Silkin's resignation were demanded in some constituency parties. He was succeeded, in the new Thatcher government, by Michael Havers, a criminal barrister well aware of the danger of meddling with jury trial. The campaign itself had been led by a young solicitor from the National Council of Civil Liberties, Harriet Harman, who published a short book on the subject and toured the country condemning the attorney general. The ABC trial itself fizzled out when the crown's case was disproved – the judge threw it out and gave the defendants conditional discharges for minor offences. The case is important, however, for EP Thompson's reminder:

"time and again, when judges and law officers, mounted on high horses, have been riding at breakneck speed towards some convenient despotism, those shadowy figures – not particularly good or especially true – have risen from the bushes beside the highway to fling a gate across their path. They are known to historians as the gang of twelve."

Jury reform

There has, in recent years, been some tinkering with jury trial – in 2003 it was uncontroversially removed in a few cases where there was evidence of jury tampering. Most reforms have improved the system: the introduction in 1967 by Roy Jenkins of majority verdicts, for example, and in particular the change in 1972 from those amenable to selection as jurors – hitherto only property holders, now all citizens on the voting register. This reform altered

the make-up of the jury, from those who were mainly “male, middle-aged, middle minded and middle class” to a true “microcosm of democratic society” as one Law Lord put it. It marked an important change of principle, from the idea that only “sound” citizens with a “stake” in society should serve, to the democratic principle that “the poorest he” as well as the richest, should be included to serve in “the people’s court.” Younger jurors, post 1972, were resistant, for example to obscenity prosecutions so commonly brought by police. In 1979, when a youthful jury acquitted “Inside Linda Lovelace” after a judge had told them that “no book could be more obscene”, the DPP announced that he would no longer bring prosecutions against the written word.

A less helpful reform was to impose a ban on jurors’ freedom of speech. This was a consequence of a “New Statesman” interview with a juror in the Jeremy Thorpe case, who explained that whilst they all thought he was guilty of conspiracy to murder they had felt unable to convict because of the bounty offered by a newspaper (The Daily Telegraph) to the main witness against him. Instead of prosecuting the newspaper, the “New Statesman” was put in the dock for contempt of court. It was acquitted by the Lord Chief Justice because there was no law at the time against jurors recounting their experiences – the defence produced some 50 examples, from Graham Greene to Alan Coren and Simon Hoggart, all endorsing the system of trial in which they had participated.

Nonetheless, and against the wish of the government (Lord Hailsham in particular) a crossbench majority of MPs thought they were protecting jury trial by criminalising jurors who spoke to newspapers. They equally criminalised genuine researchers into juries, as well as any juror

whistleblower who wished to alert the public about juror misbehaviour. That does sometimes happen: there was a murder trial jury who thought to use a Ouija board to contact the dead victim and ask about the identity of her assailant, and a hung jury whose foreman resolved their differences by tossing a coin.

Jury misconduct of this extreme kind is rare. More commonly, however, juries do get it wrong, and in serious cases – see the miscarriages of justice inflicted on Irish defendants accused of IRA crimes. But juries in these cases were hardly to blame – subsequent inquiries demonstrated that they had been misled by incompetent forensic science evidence or by prosecutors who had failed to disclose relevant evidence of innocence. Nonetheless, the danger that a jury may convict the innocent is real, and has been met, up to a point, by rights of appeal and a body – the Criminal Cases Review Commission – which can investigate the guilt of persons convicted of serious crimes and refer doubtful cases back to the Court of Appeal.

The Quality of Mercy

Far more common are cases where juries acquit defendants who were probably guilty. This is entirely appropriate where the prosecution is judged to have failed to prove their guilt beyond reasonable doubt. But some acquittals amount to “sympathy verdicts” where a jury acts pursuant to its conscience and refuses to convict because, for example, it thinks the defendant has been the victim of oppressive police conduct or is pitiable and has suffered enough. Bushell's case gives it the power to temper the wind to the shorn lamb, and to respond to the appeal, once made by Marshall Hall defending a beaten and broken woman who had killed her

aggressor and been charged with murder: “look at her, gentlemen of the jury. God never gave her a chance. Won't you?" This may seem the last plea of a desperate advocate, but it does illustrate perhaps the most important role of the system of trial by jury: the power to show mercy.

Shakespeare, in the trial scene of “the Merchant of Venice”, immortally established the quality of mercy as essential to justice: “earthly power does then show likest God’s, when mercy seasons justice”. Other systems allow for mercy at some future date, through powers in the ruler to grant pardon or the government to grant early release, but in British criminal law it may be said that mercy is a quality built-in through the power of a jury to acquit when the defendant deserves mercy. This was a part that English juries notably played in the brutal late 18th and early 19th centuries, when the death-penalty was visited on all who stole goods valued at more than 40 shillings. But juries did the valuing, and very often, for stolen goods worth many pounds, the value they recorded was 39 shillings, so thieves would avoid the gallows (even if it meant transportation to Australia).

There are some cases where the strict application of law would mean a punishment that the defendant does not deserve, and jury trials offer a way out of an unnecessarily cruel disposal of woeful or (in the case of political protesters) principled defendants. “Judges will not refuse to convict if they think the prosecution oppressive or unfair” warns Alan Moses, a respected former appeal judge who is opposed to the reforms.

The power of a jury to show mercy to any defendant who deserves it is an important safeguard for real justice, especially in the cases from which it will be withdrawn. Proponents claim that abolition for cases where the maximum sentence is three years (amendments propose five years) will

remove jury trial from cases that do not matter, but the opposite is true – as Moses points out, “the impact of conviction in less serious cases will change the life of a defendant forever". These are usually offences of dishonesty, which may henceforth disqualify a defendant from future employment and public office. Government ministers who deride having jury trials for shoplifting, for example, do not understand how important they are to innocent defendants charged with this squalid offence. Besides, the Bill removes juries from many cases of importance, if the government decides they will be ‘long’ (how long – more than a week?) or ‘complex’ (ie when it thinks jurors will be too stupid to unravel them).

Other reasons

Reasons for keeping trial by jury, and for rejecting the government's plan to deny it to so many defendants, include:

- The system of trial by jury is a unique English institution which has served for centuries to provide a form of criminal justice that is acceptable and respected by the people of this country, and in most other Commonwealth countries where English law and institutions have been adopted.
- The jury serves as a safeguard against authoritarian governments which may impose draconian laws upon an unwilling populace, or attempt to persecute political opponents.
- The determination, by 12 citizens of evidence tested by prosecution and defence, is a surer guide to the right result, reflecting common sense and common values, than the personal view of a judge or a bench of magistrates.

- A jury trial (always under the supervision of a professional judge) is much superior to a trial before lay magistrates, a group of amateurs with the time and money to devote to punishing those from a different class. The prospect of doing so inevitably attracts authoritarian personalities and local worthies who (in the experience of most barristers) tend to side with the police. Magistrates may have improved since the days of Dickens' Mr Fang (within whose courts "enough fantastic tricks are daily played to make the angels blind with weeping") but the reputation for being “prosecution minded” has stuck. For good reason – 41% of appeals from magistrates’ verdicts of “guilty” are upheld, and 47% of appeals succeed against the sentences of magistrates impose over-long sentences. They are not representative of the community – only 3% of them are manual workers and none are unemployed. It is entirely wrong to view them in any way as substitutes for twelve jurors, but the government proposes to increase the sentencing powers of magistrates from one year to two years. Given the fact that they go wrong in 49% of sentencing cases, this is a bad move and will only increase prison overcrowding.
- The most obvious alternative, of trial by judge alone, has one apparent advantage over jury trial, namely rational and written reasons for the conviction, compared with a foreman’s monosyllabic grunt of “guilty.” Some defendants may prefer this, and as we shall see there is no good reason why they should not have it – possession of a right (in this case, to trial by jury) must imply the right to waive that right, if there is a satisfactory alternative. But judges do not enjoy the public confidence that juries have earned over the centuries: they

are not representative of the public, come from an upper middle-class and may lack understanding of contemporary social and moral attitudes. Chris Mullin, the crusading Labour MP who exposed the wrongful conviction of the Birmingham six, had no compunction about blaming the judges, at trial and on appeal, for getting the facts wrong when giving their reasons. Those reasons will sometimes span hundreds of pages, and judges will have to take time off – sometimes days – to write them out, and courts will in any event have to spend days to hold "allocation hearings" to decide whether cases fall into "non-jury" categories. These new-fangled procedures will not save time or reduce the backlog.

- Jury service is a civic duty in this country and few fail to do it: citizens turn up as members of society to serve the common good, and they usually take pride in participating. To cut this opportunity in half would mean a real loss of community spirit.
- Jury trial is a proud boast of British justice, compared to trial by government appointed judges in authoritarian countries. The conviction rate in Russia and China, for example, is 99% – the state is a hardly ever wrong. Most Commonwealth countries, which have laws that closely follow British examples, may find support for curtailing jury trials to serve their own authoritarian purposes.
- A diverse jury, usually with a few representatives of ethnic communities, serves as some guarantee of fairness and non-discrimination in dispensing justice. We know this from the 2017 report of an inquiry by none other than David Lammy, now the architect of jury destruction, for offences with which ethnic minorities are disproportionately charged. He concluded:

> "juries are the success story of our justice system. Rigorous analysis shows that, on average, juries – including all white juries – do not deliver different results for BAME and white defendants. The lesson is that juries are representative of local populations – and must deliberate as a group, leaving no hiding place for bias or discrimination."

The backlog

The government's current attack on jury trials has come about because it has been alleged to be a solution – indeed, the only solution – to a serious problem that has arisen in criminal justice, namely the appalling backlog in trials. The delay, between arrest and conviction, is in some cases up to 4 years, to the severe inconvenience of victims and witnesses as well as defendants, and this causes abandonment of prosecutions where evidence disappears or witnesses have lost interest. This is undoubtedly a disgrace – a denial of Magna Carta's great promise that "to no one will we sell, to no one will we deny or delay right or justice". As Gladstone more pithily put it, "justice delayed is justice denied."

There is general agreement on the cause: the crisis itself began with the austerity policy of the Conservative-led government in 2010 and onwards, which saw the ministry of justice, responsible for the courts, become the soft target of severe cuts in public expenditure. Many courts were closed, or restricted in the trials they could hold, the judiciary was not kept up to capacity, legal aid was shrunk so much that some criminal solicitors and barristers left the profession, the probation services became understaffed, and so on. Ministers were weak and failed to act (the minister at the crucial

time was Chris “failing” Grayling, followed after a short spell by Liz Truss, who had no idea of how to handle the portfolio). It was under-investment – in infrastructure as well as people – that set the stage for Covid, which forced courts to close and trials to be adjourned and as a result, accelerated the increasing backlog. The current crisis cannot therefore be attributed either to jury trial or this Labour government, which has been called upon to fix it. In December 2024, it decided to do so by asking Brian Leveson, a 76-year-old retired appeal judge, to find a solution.

Quite why Leveson, and only Leveson, was selected for this task has never been explained. He did review the efficiency of the Criminal Justice System in 2015 and clearly had an eye on reducing jury trials during that review. And was (and still is) Investigatory Powers Commissioner, meant to keep an eye on MI5 and MI6. He had become known to the public by chairing an inquiry into the practices and ethics of the British press. His proceedings were widely reported, by a press always impressed by its own importance, and resulted in a report of over 1000 pages. But with any result? His proposal for a government appointed regulator, a “Press Recognition Panel” came to pass, with a royal charter no less, but after 10 years has had no impact. He made a number of recommendations for improving press responsibility, but the government has not implemented them – understandably, in one case, where he suggested that the press should be pressured to cooperate with it by being ordered to pay the costs of feckless litigants whose cases failed – legislation was drafted but governments quailed at bringing forward a law that seemed unjust. Nonetheless, he was undoubtedly sincere in his belief that his solution of abandoning most jury trials would work to cut delay in those which remained and he produced his

400-page report with commendable speed in June 2025, six months after his appointment in December 2024.

It may be for this reason that it spent no time considering the advantages of jury trial or any of the matters – Bushel's case and the like – so far mentioned in this account. There was reference to Magna Carta – the quote about not delaying justice – and the view was expressed that the jury had no place in the Constitution, a view with which other lawyers would disagree. In somewhat apocalyptic language, he saw removal of juries as the only way of averting a crisis that could end the criminal justice system. But he did not look closely at alternatives and admitted that his preferred solution would take several years before it could take effect and have an impact on the backlog.

Alan Moses, another retired Court of Appeal Judge with an extensive background in criminal law, came up with a much speedier solution. It was to deploy a task force of retired judges (there are plenty still functioning, given the now premature statutory retirement age of 70) which would examine all cases in the backlog and winnow out those that were not worth pursuing (estimated at one third) and indicate others that could be dealt with by mediation or plea bargaining.

Another acceptable way for Parliament to deal with the crisis would be simply to pass a national law requiring trials to be listed for hearing within two years from arraignment. Those not ready in that time would be transferred to a fully resourced regional courts centre, which would have to deal with them within a further six months. There would be no need to axe juries, only to employ more judges and court staff.

It has become clear that the problems associated with the present backlog can be dealt with by greater efficiency in a range of contributing factors. Cardiff Crown Court has a manageable backlog, due to its local context and Liverpool has reduced its backlog, thanks to listing changes and Crown Prosecution Service ownership of cases, that can be copied in other city court centres. Preston already has successfully copied and adapted, reducing its time from plea and directions hearing to completion of case by 16%.

For example, one potential cause of delay is that many defendants are brought to court late from prison – out of around 110 reports from barristers at court, one quarter of their clients are brought over 5 hours late, with an obvious result that the trial day does not start on time or at all. Trials have a leisurely timetable, starting (at best) 10:00 and the day finishes at 4.30: the backlog would be cut if they were able to work normal hours, from 9 to 5. Some of the worst delays involve the making of decisions on whether or not to charge. In many cases, there is a long delay between police investigations and the Crown Prosecution Services decision when finally presented with the investigation file. In one study of sex offence cases that took 3 years to come to trial, 2 years of those delays occurred at the investigation stage – slow policework, forensic science problems, log jams at the CPS. These are all matters which significantly contribute to the backlog, and efficiencies across the board would reduce it significantly without the need to cap jury trials.

The Leveson report “experts” said that his proposal would save court time by 20%, although Leveson relied on his personal impression without

evidence that they might cut delay by as much as 50%. It is accepted that this is finger in the air stuff and based on uncertain assumptions.

However, the Institute of Government, a highly regarded and non-partisan research body, which evaluated his report, has declared that the difference in court savings by Judge-only trials will be minimal – between 1 and 2% The abolition of much of the jury system should not be based on speculation.

The Courts and Tribunals Bill

The government has now incorporated many of Leveson's recommendations in its Courts and Tribunals Bill introduced to parliament in February 2026. From this draft legislation it can be seen how this ill-conceived plan to demolish jury trial may in fact cause more delays than it could ever serve to reduce. This is because:

1. It does nothing to reduce the long delays at the investigation stage, after arrest, and until the CPS decides to charge.
2. Those charged by police with offences currently carrying a right to elect a jury trial will go through newly devised "allocation proceedings" where they will lose that right if it appears to the court to be more suitable to have a non-jury trial or if it appears to the court that the value of the property involved exceeds a sum to be set by the government. This means, for all 80,000 cases in the backlog, more time – days perhaps – will have to be set aside for novel pre-trial proceedings featuring arguments about suitability and value of stolen property. There will be legal challenges to the government's proposal that such legislation should apply to defendants who have already been charged or are awaiting trial. Applying these changes

retrospectively amounts to a fundamental injustice, undermining legal certainty and the long-standing principle that individuals should be tried according to the rules in place at the time of the alleged offence.

3. The right to jury trial may be retained at the outset if the defendant, when convicted would be likely to receive a sentence of more than three years imprisonment. But how on earth is the court to know what the appropriate sentence will be unless it hears the evidence? The prosecution allegations (which cross-examination may destroy) and evidence in mitigation? This again bodes ill for court timetables, which will be clogged by preliminary hearings of considerable length – mini trials, in effect, to predetermine the likely sentence.
4. All complex or lengthy cases must be tried without a jury if the court considers this appropriate, unless to do so would not be in the public interest. These are not questions which courts have previously considered: they will, over many prehearing days, have to hear the evidence and argument on both sides in each case and deliver judgments which will take time to write and are likely to be appealed (the draft Bill wrongly attempts to block any appeal, but this may not be acceptable to MPs and probably not to the House of Lords). In every such case there will be pre-hearings, and further time allocated for judgement writing. The Bill does not even indicate what amounts to a 'lengthy' case or a case that is 'complex'. It will require no doubt lengthy pre-trial hearings to decide whether cases lasting more than a week are 'lengthy' and whether all fraud cases are 'complex'.
5. Every case tried without a jury, whether it ends in conviction or acquittal, will require a written judgement, invariably (judges are not

succinct) of considerable length. They will need to take time off to write it and will be unavailable for that time to hear other cases.

These considerations – and there are others – will impede the work of reducing the backlog. Once Leveson is seen for what it requires of court time and resources, jury removal may well be a cure worse than the disease.

Jury waiver

Ironically, the government's draft legislation does not adopt Leveson's most interesting recommendation – a new entitlement to what is termed "jury waiver" – the right of a defendant to decline trial by jury and opt instead for trial by judge alone. Leveson does not seem to realise the purpose of such a reform: he notes that it has been introduced without objection in Canada and Australia (he might have added, in many states of America) and said "I do not see any legitimate reason why a defendant should not be provided with a choice". In fact, jury waiver came about in these jurisdictions partly at the urging of criminal bar associations and for very good reason: they were concerned to better ensure the human right to a fair trial.

Defence lawyers were anxious that their clients, on their advice, should not be forced to have a jury in cases for example where police had inadequately prepared or brought it under a misapprehension about the law: why should the defendant be forced to wait, when a judge would throw it out immediately? Most importantly, in cases where the press had whipped up prejudice against a defendant, a trial before a judge alone in such circumstances would be more likely to secure a fair trial. There would be less need to worry about jury prejudice if defendants could choose to avoid it. There may be no legitimate reason to object to jury waiver, but

there is an important human rights reason to allow it, namely fairness. It would help to reduce the backlog: although most defendants and their lawyers would doubtless prefer a jury trial, some for good reason would not.

There is a view that some crimes are so heinous that a jury must be empanelled to give a community verdict, and Leveson himself thought that the prosecution should be able to object to a defendant's election. Nonetheless, it would count as an improvement in the rights of defendants, who could not be forced to undergo a jury trial if they could choose an alternative which would be speedier, if the prosecution were unsound, or more fair at a time of media or public prejudice. To take a topical example, if ever police were to prosecute Peter Mandelson or Andrew Mountbatten-Windsor, there would be a problem with the massively prejudicial publicity associated with their links to Jeffrey Epstein. They might prefer to be tried by a high court judge sitting alone and if this bill passes, they will have no alternative. That is because their trial will be "lengthy" and certainly "complex" so they will lose their right to be tried by jury in any event.

Labour's responsibility

So as the Courts and Tribunals Bill begins its Parliamentary passage, what reasons can be adduced for a Labour government trying to demolish substantially a hitherto proud and much-admired part of British heritage? The Bill has been driven by Leveson's somewhat exaggerated claim that unless jury trial is largely scrapped there is a real danger that the entire criminal justice system will collapse. This is not in fact a real danger, and in any event the government has already moved to inject more funds, to appoint more judges, to scrap the austerity era mistake of capping court

hours, to bolster legal aid and so on. There is no danger of collapse, but there is a serious problem of court delays, which can be redressed in ways other than by diminishing trial by jury. To some extent government action is already doing so: courts have introduced measures that reduce delays, as in Liverpool and Cardiff, and there are other reforms that can be introduced to prevent unacceptable and inefficient time-wasting by police and the CPS at the investigation stage.

In debates thus far, the only speeches to support the governments have been made by those concerned by the plight of victims, waiting up to four years for justice. This concern is real and justified but is not met logically by diminishing trial by jury which is as much a right of victims as it is of those they accuse. Some thirty groups concerned with violence against women have joined a demand that sex abuse cases should continue to be tried by jury: under the Bill, many in future will not. There is also that study of rape cases which had taken 3 years to come to trial: on average the first two of those three years had been taken up by lengthy police investigations, forensic science delays, and Crown Prosecution Service ineptitude – the jury trial element was completed within a year. There is merit in the proposal, promised in Labour's 2024 election manifesto, to have speedy, specialised courts for sexual assault cases, where victims can be made comfortable and both judges and jurors given training in how to approach the evidence.

However, as the Bill progresses, the question must be asked of Labour MPs, and of those who select them. How have they come to betray a principle that has been so important over the centuries for those who have dissented or stood for progress? For an institution which is renowned for

providing not only justice but mercy in the criminal law? Already, many Labour MPs have indicated they will not support the Bill, but not enough to stop its passage in the Commons, even if joined, as is likely, by MPs from all other parties. This is a Labour initiative, and unless it is withdrawn, the government will face rejection by people whose support for jury trial may be demonstrated at the ballot box. The Bill is being driven by David Lammy, although he is in conflict with himself given his previous enthusiastic endorsement of jury trial. So the main work has fallen to his deputy, Sarah Sackman KC. She (like Sam Silkin) is a planning lawyer who seems unwilling to consider even the suggestion of time limits on the new law, i.e. allowing it to operate only until the backlog is reduced to a reasonable level. She is MP for Mrs Thatcher's old constituency, but whether she could carry her local party with her on demolishing jury trials is yet to be put to the test. The proposal was not in the Labour manifesto when it was elected, and no opinion poll has shown it to have public support – quite the contrary. When asked what the most important right would be in a British bill of rights, a remarkable 89% answered “trial by jury.”

Nonetheless, this attack on jury trial has a momentum that must be halted. Its progress is dependent on the assent of Labour MPs who should act before it is too late to stop their party being tarnished for demolishing an institution which can be considered as part of English heritage. The backlog in trials poses a serious challenge, but it is important for MPs to understand that jury trial played no part in causing it: that was the doing of Tory austerity, in which the justice system was perceived as a soft target for defunding, with ministers and officials heedless of the consequences. Most importantly it was Covid, which closed courts and directly resulted in building up the backlog four-fold, although still the Conservative

government failed to act. Brian Leveson's proposal to curtail trial by jury failed to take account of the value of this institution, did not sensibly consider alternatives and is in any event unlikely to work.

The Courts and Tribunals Bill seeks to implement some of his recommendations, although it omits jury waiver (which would help to reduce backlog and be justified on grounds of fairness to defendants) and the changes it makes will take up more time than the court system can afford. The proposed reforms take the axe to a substantial proportion of jury trials (half at a rough estimate), disadvantaging not only defendants but all who are proud of the way in which justice has been delivered, through majority deliberation of a dozen community representatives, more in touch with current values than judges or magistrates and able, in their own way, to show mercy when the law does not allow for it. Given its record of support for progressive causes, for free speech and peaceful political protests, the Bill does seem a betrayal of Labour traditions and values. MPs who vote in favour will be on the wrong side of their party's own history.

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