Balancing the Need for Due Process, Fair Trials and Systemic Efficacy: The Benefits and Challenges of Technological Improvements and Greater Efficiencies for the Criminal Justice System*

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Summary: Technological developments continue to have a transformative impact on various aspects of our lives. While legal systems have often been regarded as resistant to these types of change, they have, in recent years, become much more open to taking advantage of digitalisation as a means of making criminal proceedings more convenient and efficient. It is crucial to ensure that criminal justice systems are fit for purpose, and that they continue to develop, to mirror social trends and developments. However, where these changes are adopted rapidly, and with little regard for human rights, technological developments risk worsening existing endemic challenges in criminal justice systems, including discrimination and over-incarceration. This paper considers: the factors that have contributed to the increasing use of technology in criminal proceedings in England and Wales; how technology is now shaping not just the appearance, but also the very nature of criminal proceedings; and how these developments might impact on fair trial rights.
Keywords: Criminal justice, trial, fair trial, human rights, technology, defendant, courts, efficiency, due process.

Efficiency and the right to a fair trial

Efficiency is an integral part of a fair and just criminal justice system. The European Convention on Human Rights and the International Covenant on Civil and Political Rights, for example, explicitly recognise that the right to a

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'hearing within a reasonable time',[1] or a 'trial without undue delay',[2] are aspects of the right to a fair trial.

There is no shortage of cases brought before the European Court of Human Rights (ECHR) on Article 6 grounds regarding delays in criminal proceedings. The Court has, on occasion, responded to these complaints with some degree of generosity towards states, recognising that delays, even if they last several years, can take place for various reasons, such as the complexity of the case,[3] or the conduct of the defendant.[4] However, it views systemic challenges that cause delays to trials much less kindly, and it has suggested that there is a positive obligation for contracting states to organise their justice systems in a way that they can fulfil their obligation to ensure a trial within a reasonable time.[5]

This obligation does not give countries licence to do whatever it takes to ensure that trials take place as quickly as possible. The European Court of Human Rights makes it clear that defendants are entitled to a 'fair' hearing within a reasonable time,[6] acknowledging that the need to ensure an efficient criminal justice system should not come at the cost of fairness to defendants. There are strong reasons why criminal proceedings may need to be complex and sometimes time-consuming and costly. For a system to produce fair results, there need to be various safeguards to ensure, for example, that the defence team has adequate time and facilities to prepare its defence. The serious implications of a criminal conviction on an individual, such as the deprivation of liberty for extended periods of time, mean that investigations have to be thorough, and this too can be a time-consuming process. This means that, in practice, efficiency and fairness may seem to be conflictual interests, and the driver for efficiency can become a corner-cutting exercise, rather than an integral aspect of fairness in criminal trials.

It is becoming increasingly difficult to ensure that trials happen within a reasonable time. There has been a general upwards trend in the caseload of criminal justice systems in many countries in recent years, at least according to prisoner statistics. Prisoners numbers have risen exponentially in the UK since the 1950s (Sturge, 2021b), and France's prison population has increased by 60 per cent just in the last 20 years (World Prison Brief, 2022). Governments could focus their response to this challenge of increasing the

[1] Council of Europe, 1950, Art 6(1)
[2] United Nations High Commission for Human Rights (UNHCR), 1966, Art 14(3)(c)
[3] ECHR, *Neumeister v. Austria*, App. No. 1936/63, para. 21
[4] ECHR, *I.A. v. France*, (1/1998/904/1116), para. 121
[5] ECHR, *Bara and Kola v. Albania*, Apps. Nos. 43391/18 and 1776/19, para. 94
[6] Ibid.

capacity of their criminal justice system to accommodate more defendants by, for example, putting additional resources into the judiciary and the court service, or significantly increasing the legal aid budget. However, it is not always easy to attract political support for increasing investment in criminal justice systems, and many governments are instead choosing to keep budgetary increases to a minimum, while focusing on improving efficiency, and cutting costs on individual cases.

A possible illustration of this trend is how, in recent decades, more and more countries have introduced plea-bargaining and fast-track trial procedures into their criminal justice systems. Research that Fair Trials carried out in 2017 for its report, *The Disappearing Trial*, found that before the 1990s, only 19 of the 90 jurisdictions surveyed for the research had any systems that allowed any form of plea bargaining or trial waivers (Fair Trials, 2017, p. 4). However, in less than thirty years, that number had risen to 66.

Plea-bargaining systems offer various benefits. By removing the need to resort to full trial proceedings for the adjudication of criminal cases, plea-bargaining procedures can significantly reduce the time and resources associated with criminal proceedings (Fair Trials, 2017, p. 8). There are also potential benefits for defendants, for whom plea bargaining might offer the possibility of avoiding pre-trial detention and anxious uncertainty regarding the outcome of their cases, and a crucial opportunity to minimise their sentences. However, the human rights risks of plea-bargaining systems cannot be ignored. Trials are an important means by which the conduct of police and prosecuting authorities can be publicly challenged and scrutinised, helping to ensure that those exercising law-enforcement powers are held accountable for their actions. Further, there are serious concerns that plea-bargaining processes can coerce defendants to confess or plead guilty, especially where there are inadequate safeguards or controls to ensure that defendants make their choices freely, and on a properly informed basis.

Technological solutions

In recent years, technological developments have been playing an increasing role in influencing how criminal justice is done, motivated strongly by a desire to keep costs down, and to improve efficiency of criminal proceedings.

In England and Wales, plans to make use of technological developments to improve the efficiency of the criminal justice system have been considered by various governments. In 2016, the UK Ministry of Justice (MoJ) published

'Transforming our Justice System', a paper which proposed reforms designed to take advantage of the 'power' of technology to modernise and improve the justice system (MoJ, 2016). This paper envisaged a future in which all cases, be they civil or criminal, are started online (Ibid., p. 6), and proposed certain types of cases to be handled entirely online. A notable policy proposal made in this paper was that automated processes would be greatly expanded for minor criminal cases, so that people accused of crimes could have their cases resolved immediately, via an online portal, without the need to go to court (Ibid., p. 9).

Although the Ministry of Justice identified and recognised that these reforms had to have justice, proportionality and accessibility at their core (Ibid., p. 5), the paper was quite short on the details of how these objectives would be met. While it acknowledged that a significant minority of households in the UK lacked internet access, and that people aged over 65 would find it especially challenging to adapt to these changes, there was no specific suggestion of the ways in which everyone, irrespective of age or socio-economic circumstances, would be ensured equal access to justice (Ibid., p. 7).

The past few years have seen a notable acceleration in the adoption of the proposals set out in 'Transforming our Justice System'. While some of the proposals in the paper might have been inevitable, there were, no doubt, significant factors that pressured the government to enact them into legislation.

First, there have been drastic cuts to the criminal justice system in England and Wales in the last few decades. Criminal legal aid, in particular, bore the brunt of these cuts, and spending fell by over a third between 2010 and 2020 (House of Commons Justice Committee, 2021). The court service has also faced drastic cuts in recent years, but it is not just the funding that has been reduced. The physical availability of courts has been significantly affected. During approximately the same period, between 2010 and 2019, about half of all magistrates' courts in England and Wales closed down (House of Commons Library, 2020).

Second, the COVID-19 pandemic has forced governments to rethink fundamentally how criminal justice is done. Criminal justice processes are built around a series of interpersonal interactions and meetings, many of which simply could not take place at the earlier stages of the pandemic, due to the very legitimate need to save lives and the health system. Inevitably, court hearings had to be adapted in the interests of public health and safety. Faced with the alternative prospect of shutting down the system in its

entirety, the government passed emergency legislation in 2020 – the Coronavirus Act – to make it possible for more court hearings to take place remotely,[7] via video link, and this rapidly accelerated the digitalisation of court proceedings that had been planned several years earlier.

However, the expansion of remote court hearings did not ensure that courts operate at full capacity, because the Coronavirus Act did not result in *all* criminal court hearings taking place remotely. This, coupled with the fact that court capacity has been greatly reduced on account of the decade of cuts to the court service, resulted in an exponential increase in the backlog of criminal cases before the courts. Pre-pandemic, the backlog of cases waiting to be heard by the Crown Court was below 40,000, but this number exploded to over 60,000 by the middle of 2021 (MoJ, 2021). Around the same time, about 13,000 cases – approximately a quarter of that backlog – were cases waiting to be heard for more than a year (Ibid.).

One of the most troubling aspects of this hugely inflated backlog of cases is that while these cases are waiting to be heard in criminal courts, many defendants are also waiting to go to trial, often in pre-trial detention. As of 2021, trials were being listed for hearings as far back as 2023, and it was being estimated that some would even need to be listed for 2024 (Casciani, 2021).

Numbers of people being held in pre-trial detention beyond the 'custody time limit' – the legal time limit on how long people can be detained pre-trial in most cases – has been going up. Fair Trials' survey of lawyers in 2020 found that these time limits were being extended 'routinely' (Fair Trials, 2020), and according to the recent statistics, out of the roughly 12,000 people on remand custody in England and Wales, more than a third were being held in detention beyond the custody time limit, and out of these, there were more than 1,500 people detained pre-trial for a year a more, and almost 500 people were being detained for more than two years (Fair Trials, 2021b, 2021c). It is clear that this is having a very real and very disturbing impact on people's welfare and on their rights. Last year, suicides in prison increased by 28 per cent, and remand prisoners accounted for 40 per cent of those suicides (Dimsdale and Saunders, 2022).

Fair Trials carried out a survey of remand prisoners in 2021 to get a better understanding of their experiences of being on pre-trial detention during lockdown. There were several who reported immense mental and physical suffering because of having to spend extended periods of time in detention, often in appalling conditions. The conditions they were in, and the length of

[7] Coronavirus Act, 2020, ss. 53–6 , and schedules 23–6

time they were having to wait, were, in some cases, inducing people to plead guilty to crimes they had not committed, just so that they could get out as soon as possible (Fair Trials, 2021a).

The UK government is not ignorant of these challenges, and it has turned to technological solutions, broadly consistent with those proposed in the 2016 paper, which involve the expansion and continuation of the use of remote video and audio hearings, and the introduction and expansion of automated processes for dealing with minor offences.

Remote and automated criminal justice proceedings in England and Wales

In 2022, the UK Parliament enacted two laws that advance the digitalisation of criminal proceedings in England and Wales. The first is the Police, Crime, Sentencing and Courts Act, which includes provisions that will make permanent those measures in the Coronavirus Act that expanded the use of remote hearings in court proceedings. The second is the Judicial Review and Courts Bill, one of the key objectives of which is to take more proceedings out of courts to be dealt with through papers, and through online platforms.

Remote hearings

The European Convention on Human Rights does not explicitly mention under Article 6 that criminal trials have to take place physically, in person. However, the Strasbourg Court has stated that the defendants' presence at the trial is a necessary precondition to the effective exercise of their right to defend themselves in person, and for the effective examination of witnesses. In the case of *Marcello Viola v. Italy*,[8] the link was made between the right to be present and the right of effective participation in criminal proceedings.

However, the Court has also recognised that video link *is* a permissible means by which criminal hearings can take place. The baseline position, according to the Court's jurisprudence, remains that hearings should take place in person, and that any deviation from this rule, such as the use of video link, has to be in pursuit of a legitimate aim, and measures must be in place to ensure that, overall, the due process requirements under Article 6 of the Convention are met.

In the case of *Marcello Viola*, the Court was satisfied that the risk the defendant posed to others amounted to legitimate aims for the purpose of

[8] App. No. 45106/04, para. 53

justifying the deviation from that general rule requiring an in-person hearing. The applicant was regarded as a particularly dangerous individual, and there were risks associated with transferring him from his place of detention. The Court also took into consideration that the video-link hearing was conducted with the intention of ensuring that the trial took place within a reasonable time.

Although *Marcello Viola* seems to recognise that remote court hearings can be Article-6 compliant in certain circumstances, there are some concerns that remote hearings might not always be capable of ensuring the overall fairness of the proceedings.

For example, a defendant's access to effective legal assistance could be undermined if they appear at their trial remotely. In some cases where hearings take place via video or audio link, the defendant and the lawyer are not even in the same room, and that carries with it the risk that the two parties will not be able to communicate properly. This has serious implications for the rights of the defence. If the quality of communication is impeded by the fact that defendants are not meeting their lawyers in person, the ability to build rapport and trust, which can be key to effective legal advice and representation, could be undermined. This is especially a challenge for children or people with disabilities, who often need additional assistance to communicate effectively and to understand and follow the proceedings.

The type of set-up and the type of facilities that are available to enable client–lawyer communications will also have an impact on how lawyers carry out their basic tasks. This includes taking instructions, providing advice, and checking on the welfare of their clients. The quality of legal representation could also suffer if, for example, lawyers' ability to advocate, make applications and challenge witnesses are affected by the use of video or audio link.

It is also crucial to recognise that not all defendants appearing remotely before trials are represented by a lawyer. It should be taken into consideration that the ability to navigate the legal process, to understand the proceedings, to communicate, and to participate – all of which can already be difficult without any legal assistance – could be made significantly more challenging if defendants are not present in court.

Another significant issue is the question of how remote hearings affect the right to effective participation, especially for those whose ability to participate is limited, for example, by psychosocial or intellectual disabilities, which are not always easy to detect. Data collection is quite poor on defendants who need communication or other appropriate assistance to participate in their criminal proceedings, but evidence from the Equality and Human Rights

Commission (EHRC) suggests that there is a significant over-representation of people with disabilities in the criminal justice system (EHRC, 2020).

Research conducted by the EHRC in the UK has found that the barriers to effective communication and participation that defendants with disabilities face already are, in many cases, compounded where they attend hearings remotely. The report also highlighted that remote hearings sometimes left defendants isolated from sources of support they needed. They found themselves totally alone attending court hearings from a room, without a lawyer, appropriate adult or an intermediary, in scenarios where additional in-person support or assistance to help with communication challenges, or just to put them at ease, could have been beneficial (EHRC, 2020).

The UK government's response to these criticisms is that judges have discretion to decide whether remote hearings are appropriate, applying the interests-of-justice test and, in particular, taking into account whether the defendant's right to effective participation will be undermined by the use of live link. However, this does not take into consideration the fact that most, if not all, criminal justice systems do a poor job overall of identifying these additional needs. According to research conducted by the National Appropriate Adults Network in the UK, about 22 per cent of people in police custody are so-called 'vulnerable' suspects, but only 6 per cent were being identified as such by the police.

As there is increasing reliance on, or even preference for, telecommunications over in-person meetings, criminal justice systems are removing opportunities for defendants to have their communication and effective participation needs identified, and for reasonable adjustments to be made to criminal procedures on that basis. The fewer opportunities that defendants have to come face to face with their lawyers, the court and other stakeholders in the criminal justice process, the less likely it is that their disabilities will be detected. In the absence of any reasonable adjustments made to their proceedings, it is inevitable not only that they will face worse outcomes, but that there will also be a worsening of the disproportionate over-representation of people with psychosocial or intellectual disabilities in the criminal justice system, including in prisons.

The threat to the rights of people with disabilities seems especially difficult to justify, given that there is only little evidence suggesting that remote hearings have their intended beneficial effect at a system-wide level. Remote hearings were supposed to make criminal justice systems more effective by freeing up court capacity and speeding up court processes, but there is no clear evidence that this is happening. Even the government does not seem to

be entirely convinced that measures like this will significantly reduce the backlog of cases. It seems that its current objective is to reduce the backlog by 7,000 cases by 2025. That means that by 2025, the backlog of cases will still be over 30 per cent above pre-pandemic levels. Parliament has understandably criticised the government for not being ambitious enough (House of Commons Committee of Public Accounts, 2022).

Rather than making criminal justice more efficient, there is evidence that remote hearings might end up skewing criminal justice outcomes. Research conducted by the Sussex Police and Crime Commissioner has shown that people whose cases were heard remotely were more likely to receive prison sentences and less likely to receive community sentences than those who attended their hearings in person (Fielding, Braun and Hieke, 2020). These findings were also consistent with earlier research conducted by the Ministry of Justice that found that people taking part in criminal proceedings remotely were more like to plead guilty and to end up with custodial sentences (Terry, Johnson and Thompson, 2010).

In other words, there is some evidence to suggest that remote hearings might have the opposite effect to what was promised. By putting more people into prison, they could be putting additional pressures on the penitentiary system and its resources.

Remote police interviews

The right to have a lawyer present while being interviewed in police custody has been, at least in theory, a defence right that suspects in England and Wales have been able to exercise since at least the 1980s. However, for the same reasons that court hearings could not take place during the pandemic, the national lockdown in 2020 raised questions about how police interviews were going to take place in compliance with social-distancing requirements.

The solution for the challenge was almost exactly the same as for court hearings, which was to make use of video- and audio-link technology. This was made possible not by any changes to the law, but by the police, lawyers, and prosecutors agreeing to the 'Joint Interim Interviewing Protocol' ('JIIP'),[9] a guidance jointly agreed by the parties on how police interviews should be conducted during the pandemic. This protocol means that rather than attending the police interviews of their clients in person, lawyers can do so remotely via video or audio link.

[9] 'Joint Interim Interviewing Protocol between the National Police Chiefs Council, Crown Prosecution Service, Law Society, the Criminal Law Solicitors' Association and the London Criminal Courts Solicitors' Association'

It is doubtful whether the level of assistance suspects can get from their solicitor by phone or Zoom is the same as what they would get in person. Legal assistance at this very crucial stage of the criminal justice process is critical, not just because it is important to have legal advice. There is a wide range of crucial services that lawyers can provide to suspects at this point, including, by checking on the welfare of their clients, identifying any particular needs they might have. The presence of lawyers in the room could also act as a helpful deterrent against the abuse of police powers and could help to modify their conduct.

Once again, the people worst affected by these changes are those who have impairments and conditions that affect their ability to communicate and participate. This is evident from the research Fair Trials conducted jointly with Transform Justice and the National Appropriate Adults Network (Transform Justice *et al.*, 2021). There were concerns raised by appropriate adults that the quality of legal advice suffered noticeably where it was provided remotely, as opposed to in person. Appropriate adults often got the impression that lawyers were only half-interested in what was happening during interviews. Some were reported as multi-tasking – for example, driving or speaking with members of their families during interviews, which left suspects unconvinced that their lawyers were doing their best to help them. There were also complaints that lawyers tended to spend less time with their clients before and after police interviews, which affected the level of support they provided and the extent to which suspects were able to understand what was happening in their cases.

Automated justice

Technology is also being used increasingly to replace fully what is commonly understood to be criminal proceedings. The recent passage of the Judicial Review and Courts Act means that it will soon become possible for certain minor offences for which there is no risk of imprisonment to be dealt with through a process known as 'automatic online conviction and standard statutory penalty'.

This online process will give people the choice of pleading guilty to the crime of which they have been accused. If they plead guilty, they are automatically convicted and they receive a penalty, most probably a fine. This will all be done without any judicial, or even human, oversight. The automatic online conviction procedure represents a fundamental shift in the way that criminal justice is delivered. Human decision-making is a fundamental aspect

of a fair criminal justice system, and impartial human oversight is the only way in which fairness, lawfulness and proportionality of criminal justice proceedings can be guaranteed.

There are similar processes already in existence for dealing with minor traffic offences in various parts of the world. However, these types of offences are often regarded as being more administrative in nature, and they tend not to appear on criminal records.

This automated process is different because it seems possible for individuals convicted in this way to end up with a criminal record. The significance of having a criminal conviction, even for a minor offence, cannot be downplayed; criminal convictions can have significant implications for people's lives and opportunities. People with criminal convictions can be banned from entire professions, like nursing, social care or teaching; they might be prevented from travelling to certain countries, and foreign nationals may find that criminal convictions can affect their immigration status. Criminal convictions can also have a significant impact on future criminal justice decisions. They could make a difference, for example, to bail and sentencing decisions in a different criminal matter in the future.

It is especially concerning that this type of automated decision-making system creates a very significant incentive for people to plead guilty. The automated conviction procedure allows people to plead guilty seemingly at the click of a button – a remarkably easy and convenient way to do so, in comparison to having to physically go to court at a designated time and come face-to-face with a judge.

It is untrue that people plead guilty only to crimes they have committed. In reality, people plead guilty for all sorts of different reasons, even if they are factually innocent.

First, it is central to the design of most plea-bargaining systems to entice suspects to plead guilty with the reward of a lighter sentence, or some other benefit. This alone has shown to be a basis for people pleading guilty to crimes they have not committed, illustrated potently by cases in the US of people who pleaded guilty but were later exonerated due to DNA evidence (Innocence Project, 2022).

Second, people are also motivated to plead guilty to avoid costs and time associated with going to trial (Helm, 2019). Being able to avoid a trial altogether means lower legal fees if they are engaging a lawyer. Their cases will also be resolved in a fraction of the time it would take if their case proceeded to trial. That incentive to avoid a trial is greater if the expected

waiting time is longer. The average time it takes for a trial to take place at the magistrates' court in England and Wales is 160 days (Sturge, 2021a). In this context, the idea of getting criminal trials finished as quickly as possible might become an extremely attractive option for many defendants. For some, whose socio-economic circumstances might make it difficult for them to find time off work or to hire a lawyer, it might seem like the only logical option.

The European Court of Human Rights has recognised that there are basic procedural requirements that need to be met for plea-bargaining processes to be compatible with the right to a fair trial.[10] In particular, it has stated that the bargain needs to be made where there is full awareness of the facts of the case and the legal consequences, and the decision is made in a genuinely voluntary manner. Where plea decisions are made in traditional court settings, there are various ways of ensuring that the defendant does indeed make that decision voluntarily and knowingly; because they might be making that decision with the benefit of legal advice, the decision would be made with some judicial oversight. However, it seems very difficult to imagine how this might be done where there is no human oversight over this process and the defendant is making this decision alone on a computer or a mobile device. There is simply no mechanism for ensuring that the guilty plea was entered voluntarily and knowingly.

Defendants could be assisted through this process, and the online platform could be designed in a way that people are directed to information that helps them to make their decision knowingly, and they might, for example, be required to tick a box to say that they have understood the relevant rights. However, this does not take into consideration the fact that not all defendants are alike. A disproportionate number of defendants face additional challenges that affect their cognitive abilities and their way of thinking.

Unless there is a way of ensuring effective screening of defendants to identify any conditions that might make them unsuitable for the automatic online conviction procedure, it seems unlikely that this system will comply with fair-trial rights standards.

Conclusions

Efficiency is an important feature of a fair criminal justice system, and countries are obliged to make sure that their criminal justice systems are efficient. However, this is extremely challenging in the current environment,

[10] *Natsvlishvili and Togonidze v. Georgia,* App. no. 9043/05, paras 91–2

at least in the UK, due to a combination of decades of underfunding of the legal system, the impact of the COVID-19 pandemic, and the failure to reduce numbers of people entering the system.

There has been a trend towards tech solutionism – the belief that technological developments provide the key to solving the efficiency challenge. This is being done with the expansion of remote hearings and the introduction of automated decision-making processes. However, there is insufficient persuasive evidence that considerable efficiency savings are being made in this way. In fact, these new developments could make the system less fair and produce less favourable results for defendants.

These systems promise to deliver convenience for lawyers, prosecutors, and judges, and it is often claimed that they help to improve efficiency. However, people most at risk of injustice are those who are already most vulnerable to human rights violations. There is a serious risk that such systems undermine the ability of people with disabilities to participate effectively in their own proceedings, resulting in disproportionately worse outcomes, and the worsening of their over-representation in the criminal justice system.

Much of the focus is on how to make the system cheaper and more efficient to increase the capacity of the justice system. However, it cannot be ignored that there is another solution, which is not to create more capacity, but simply to reduce the numbers of people coming into the system. Considerations around who should be in the criminal justice system – and for what reasons – are often notably absent in these types of discussions. It is always the right time to question whether we are over-criminalising, and over-incarcerating – and whether these are the real challenges to address, rather than trying to cut corners in criminal justice systems.

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