

Response to the Department for Constitutional Affairs consultation paper Broadcasting Courts

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In the United States the trial of Michael Jackson – the popstar accused of various acts including child molestation by a now 15-year old boy – highlights two main concerns about the delivery and the broadcasting of justice.

The first is, can justice be delivered if a court case becomes the focus of media attention? Concern about the media's impact has been at the forefront of the public debate about this trial after details of the prosecution's case were leaked to a US television station. The second concern is, how can confidence in the justice system be maintained if proceedings are not made more open to the public by broadcasting them? The importance of openness in the justice system is illustrated by the defendant's wish to put his side of the case to the public. With the consent of the judge, Jackson has been allowed to release a taped statement on his website in response to leaks of the prosecution's case.

This case has been described as the 'trial of the century' but television cameras have been banned from inside the court room. Instead E!, the US entertainment channel, and BSkyB, the UK news channel, are broadcasting re-enactments of the case to 'bring the trial to life'¹. To many this may sum up why justice and the broadcast media don't mix. To others it suggests that the broadcast media is uniquely placed to offer a front row seat in cases the public are interested in.

In the Department for Constitutional Affairs (DCA) consultation paper Broadcasting Courts, the approach to balancing the issues of justice and broadcasting by Lord Falconer, the Secretary of State for Constitutional Affairs and Lord Chancellor, is that 'justice should be seen to be done. But our priority must be that justice is done'².

The report acknowledges that broadcasting events in court can have a beneficial effect such as increasing the public's knowledge about the processes of justice. However it's feared that broadcasting court activities could jeopardise justice. For example it might generate pressure on vulnerable witnesses who won't turn up or encourage them to play to the cameras. In conclusion the authors of the report hope that the consultation paper will help government to decide whether any changes can take a form which helps, and does not hinder justice³.

I want to argue in favour of broadcasting the courts as intrinsic to the fundamental right for all to have open justice in Britain. While acknowledging the concerns made about broadcasting inside court rooms, my view is that the problems attributed to broadcasts are primarily caused by other factors.

Introduction

In his introduction to Broadcasting Courts Lord Falconer says that 'no change to make our courts more open and more accessible should worsen or jeopardise in any way the position of witnesses and victims or make witnesses reluctant to appear'². This assumes that increasing public access to justice and the justice process are inimical to each other. Contrary to Falconer's belief, justice must be done and be seen to be done to be truly open justice.

Audiovisual technologies allow more members of the public a closer inspection of justice in action. They allow all members of the public (rather than a small number of people who can sit in the public gallery) a chance to see and not just read about what goes on inside the court room. As Lord Woolf (quoted by Lord Justice Henry in *Storer v British Gas plc*, Court of Appeal (Civil Division), 25 February 2000) reminds us: 'The opposite of public justice is of course the administration of justice in private and in secret, behind closed doors, hidden from the view of the public and the press and sheltered from public accountability.'⁴ The public must be able to scrutinise the judges and the justice process.

Open justice, however, does not mean it should necessarily be broadcast. There are plenty of ways the public can gain access to justice in action such as reading court transcripts or sitting in the public gallery. But what broadcast technology can offer is a modern means to allow anyone the ability to see and hear what goes on 'live' in a court case and judge that process for themselves.

Technically it is not essential for open justice to be broadcast for people to know what's going on in the justice system. But at the heart of open justice is an active relationship between the justice system and the public. A democratic imperative to make open justice as public as it can be and the existence of modern broadcast technology that can allow this marks a new frontier in open justice. If broadcasting is banned – or, partially banned from certain trials such as jury and criminal trials – those in authority are denying the public their full potential in a modern democracy to judge the justice system for themselves.

Broadcasting is a long established method of recording events, whose effects on culture are familiar. Yet fears about the introduction of audiovisual recordings seem strangely alarmist. It's as if these technologies were newly invented and nobody knows the effects they may have on justice despite the fact that broadcasting has been allowed in some US courts for two decades and today some international tribunals are televised.

It cannot be assumed in our broadcast age that everyone participating in the justice process will automatically change the form of their participation at court just because proceedings are broadcast. This is not to ignore the fact that the introduction of broadcasting the courts in the public domain may change our culture. However the problems associated with broadcasting the courts on the justice process - as distinct from on our culture - are either unfounded or over-exaggerated.

1. Broadcasting courts can help to counteract sensational media coverage

A common criticism of broadcasting courts in Britain is that it may lead to the 'OJ Simpson effect'. In 1994 Orenthal James Simpson, the American footballer, was accused of murdering his wife. Mr Simpson was found not guilty but parts of the media covered the trial as if Simpson had been guilty anyway. The trial was widely perceived as a media circus.

Yet why is it assumed that broadcast technology will always create such sensationalist or partial coverage of court cases simply because some media decide to do so? What transformed the Simpson case in to a media circus was in part the way the participants inside and outside the court room acted. As argued in a 1996 editorial in Broadcast and Cable magazine, television 'did not control the headlines on Marcia Clark-s [prosecuting lawyer in the Simpson case] skirts.'⁵ That people respond in particular ways to the presence of cameras is not a function of the cameras themselves; different people respond very differently according to particular circumstances and the prevailing culture.

Prohibiting cameras from court is no guarantee that other non-broadcast media organisations won't report a case sensationally. The right to freedom of expression means that anyone can offer their view of a case – including a sensationalist one. One-sided broadcast coverage of a case is no reason not to allow cameras in courts. The implication of a ban is that nobody is allowed to decide what they think the news is or the main issues of a case apart from participants inside the court room.

That said the public does not need to see the court process to know what happened during a case and for justice to be open. Aside from media reports the public can gain access to court transcripts and judgements via new court and public inquiry websites. Yet seeing justice for oneself would allow the public to gauge other factors that court transcripts may leave out. These include the vocal emphasis of participants- testimony and their physical expressions. Or, the atmosphere in the court room such as whether police guards were present, which critics have argued suggests unfairly that a defendant is presumed guilty. The more people are able to see and hear such actors, and able to debate them, the better the chance of a fair trial.

Today discussion about broadcasting the courts seems fearful and sensationalist. It is not broadcasting that has generated a culture of sensationalism in public discourse; broadcasting technologies are simply the means through which a sensationalist view can be projected. Broadcasting may amplify cultural trends yet if the current cultural approach to court matters remains unchanged such trends will remain regardless of whether broadcasting is allowed. Changing these cultural trends requires not less but more broadcasting – allowing the public to see justice in action and decide for themselves what is sensational or not.

2. The justice process can never be pressure-free

According to research in the US it is rare that broadcasting has a negative influence on the performance of participants such as witnesses, juries or victims in a way that affects the outcome of a trial. For example a 1991 New York State Bar Association Committee survey of those with experience of broadcast court cases in New York concluded that, 'there is no pattern of specific harm in specific cases and no substantial evidence that cameras adversely affect the outcome of trials.'⁶

Nevertheless there are some people who say they find it difficult to appear in court under the gaze of the other participants, let alone the world via broadcast technology. The effect of TV cameras in a courtroom is also said by some to encourage participants to play up to the cameras. But to blame broadcasting the courts for this is to misunderstand the cause of the problem. Broadcasting can be used as a scapegoat when participants – especially witnesses – are problematic, emotionally vulnerable, feel unable to attend or resist appearing in court. This is a broader problem that already affects court cases, and which needs to be addressed in its own terms.

With or without broadcasting courts, a court is a public place with most of its proceedings susceptible to public scrutiny. It can never be guaranteed to be free from pressure unless we remove a fundamental principle of justice the right to a 'fair and *public* hearing' [italics added] according to Article 6 of The Human Rights Act 1998 on a right to a fair trial⁷, which is a cornerstone of democracy.

What needs changing in the justice system is the current assumption that court participants automatically need protection from the glare of publicity in a public court room. This trend is far more debilitating to justice than the effects of a more open justice system. For example increasing the anonymity of plaintiffs and witnesses in the English legal system has been critically discussed in terms of harming the rights of defendants to a fair trial, eroding their ability to cross-examine an accuser face-to-face.

The focus of criticism about broadcasting the courts tends to be on the behaviour of court room participants. But this confuses the effects of the broadcast media inside the court room with that outside it. Inside the court room the processes of justice and its broadcast must be tightly controlled to ensure fairness. Failure to do this could mean that justice succumbs to 'tele-litigation' – a term introduced following the Simpson trial to describe how television cameras transformed the trial 'in to a media spectacle that altered the legal process.'⁸ The proper check on this tendency is the due care and attention of those involved in the case. The judge and jury are relied upon to assess the truth, and to discern distortion. There is no evidence to suggest they are any less able to do this when it comes to judging any effects broadcasting may have on participants' behaviour.

It is true that broadcasts would change our culture beyond the courts. What is a specialised part of public life, involving the objective and forensic assessment of evidence which could lead to conviction of a defendant, can all too easily degenerate in to a public spectacle. Yet this is the inevitable part of allowing free speech in the public arena and is a separate issue to what happens inside a court room. Even if public debate is sensationalist, inaccurate and partial, participants inside the court have a different role to play in the process of justice. The public, media and court participants- mode and reasons to judge court events may be different but they are all important to open justice.

Open justice relies on the ability of court participants such as judges and juries to cope with the pressure of being able to differentiate between the public debate of an issue and the fair deliberation of evidence presented to them in court regardless whether courts are broadcast. As a US legal analyst has commented on the how the jury members are chosen in the Michael Jackson case, 'At the end of the day, you are not going to find minds that are empty [of knowledge about the extensive media coverage of the celebrity] but you are going to find minds that are open.'⁹

3. Privacy in the justice system is not the same as secrecy or denying open justice

Today the tendency to shroud certain parts of the justice system in secrecy (such as allowing more witnesses and plaintiffs anonymity) is a worrying one in terms of a right to a fair trial. This is a different issue, however, to the debate about long-standing traditions of keeping private from the public and the media certain material presented in court cases. According to Article 6 of the Human Rights Act 1998 on the right to a fair trial:

'the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'⁷

For example, much detail of cases heard in the Family Courts involving minors and the intimate details of adults' family relations are kept private. Nearly a century ago, the House of Lords recognised that cases involving children are an exception to the general principle that justice should be done in public. According to Lord Shaw of Dunfermline:

'The affairs are truly private affairs; the transactions are transactions truly intra familiarum; and it has long been recognized that an appeal for the protection of the court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs.'¹⁰

Currently there is much debate about opening up the Family Courts more, not least because of the criticism of cases such as those involving child contact issues between separated mothers and fathers. It is argued there is a public interest in allowing the public to judge all the proceedings for themselves.

This contribution to the Broadcasting Courts consultation paper is primarily concerned with the introduction of audiovisual technology to the process of justice already held in open court. But it is worth pointing out that insofar as the courts are being granted increasing powers to decide on the outcomes of intimate, family matters, it is of concern that the courts' remit to make judgements on such areas and extract private information is being extended.

The overriding issue for this area of justice is not so much whether existing private court matters should be broadcast, but whether private, confidential matters should be made public in open court at all. If it is decided they should be revealed in court then the argument that they should also be broadcast follows.

It can only be for the good of justice that areas of the judicial process including the Family Courts become more open. It can only help enlighten the discussion about what kind of evidence on intimate matters the courts should be allowed to preside over in the first place. However this is not the same as arguing for the increased exposure of private information. There are good reasons why participants should be allowed to keep certain information private from the courts, public and media. Allowing participants privacy in the justice system is not the same as advocating secrecy or denying open justice to the public.

Conclusion

Many of the problems attributed to broadcasting the courts have little to do with audiovisual technology. Cultural influences occur outside of the court room and it is the role of court participants to judge these soberly insofar as they affect the process of justice inside the courts. The fear that broadcasting will change participants' behaviour in a way that affects the outcome of trials is exaggerated. That the justice system should protect vulnerable or intimidated witnesses is an issue to do with standards of justice rather than whether courts should be broadcast.

There are areas of the justice process which may require that participants need privacy. However the issue of privacy is separate to that of open justice suffice to say that this argument in favour of broadcasting courts applies to what happens in open court.

Deciding to broadcast the courts or not won't inevitably alter our culture already prone to sensationalism. Yet at a time when the courts are under increasing scrutiny – not least because of the significant changes in the judicial system in recent years and the enactment of new laws – allowing more people to see and hear the justice in action will at least aid knowledge and debate about open justice in our culture. Above all to further the relationship between the justice system and the public in a democratic society to achieve the full potential of open justice the courts should not be broadcast in part but in full.

About the author

Tessa Mayes is a journalist and author specialising in media, sociology and law. She is a regular contributor to The Sunday Times, Cosmopolitan magazine, spiked-online.com and the British Journalism Review. Her television credits include reporting for the BBC, ITV, Channel 4, Carlton Television and Sky News. 'Restraint or Revelation? Free speech and privacy in a confessional age', a spiked-report by Tessa Mayes was published in 2002. She is the author of *Disclosure: media freedom and the privacy debate after Diana* (1998).

¹ Ted Harbert, president and chief executive officer of E! Networks quoted in 'E! to air Jackson trial re-enactments', Law Center, CNN website, www.cnn.com, 12 January 2005.

² Introduction by Lord Falconer, Broadcasting Courts, consultation by The Department for Constitutional Affairs, p.5, November 2004.

³ Conclusion, Broadcasting Courts, consultation by The Department for Constitutional Affairs, p. 73, November 2004.

⁴ Quoted by Lord Justice Henry in *Storer v British Gas plc*, Court of Appeal (Civil Division) [2000] 2 All ER 440, [2000] IRLR 495, [2000] ICR 603, [2000] 1 WLR 1237, 25 February 2000.

⁵ 'Inferior court decision' in *Broadcast & Cable* Sept 2 1996 vol 126 no.37 p.86, quoted in -Court on Camera: Electronic Broadcast Coverage of the Legal Proceedings,- by Dr. Paul Mason, source 6, published on Picturing Justice - the online journal of law and popular culture website <http://www.usfca.edu/pj/camera-mason.htm>

⁶ Final Report to the House of Delegates, New York State Bar Association Special Committee on Cameras in the Courtroom, 31 March 2001. http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/NYSBA_Reports/Ordered_by_Topics.htm

⁷ Article 6, The Human Rights Act 1998, <http://www.hmsso.gov.uk/acts/acts1998/80042--d.htm>

⁸ *The OJ Simpson Trials: Rhetoric, Media, and the Law*, by J. Schuetz and L.S. Lilley (eds), Carbondale: Southern Illinois University Press, 1999, p6

⁹ Kendall Coffey, a legal analyst and former US attorney, quoted in 'The Jackson Twelve, Shortcuts', the Guardian, p. 4, 1 February 2005. <http://www.guardian.co.uk/g2/story/0,,1402814,00.html>

¹⁰ Lord Shaw of Dunfermline, *Scott v Scott* [1913] AC 417, (1913) FLR Rep 657. Passages 483 and 692 respectively, quoted by Justice Munby, re: B (a child) (disclosure), Family Division, [2004] EWHC 411 (Fam), [2004] 2 FLR 142, 19 March 2004.