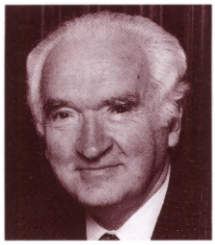
Do the courts have a future?

by Lord Mackay of Clashfern



Lord Mackay of Clashfern

The Society for Advanced Legal Studies was honoured to be able to welcome Lord Mackay of Clashfern as the speaker for its first Annual Lecture on 19 June 1998. The text of Lord Mackay's speech is reproduced below.

In 1978 I was a part-time member of the Scottish Law Commission and the Dean of the Faculty of Advocates. We had been facing a Royal Commission into the provision of legal services in Scotland and I had been much involved in preparing and giving evidence to that commission. I was invited, as the Dean of Faculty, to the International Bar Association meeting in Sydney and while there I had an opportunity of visiting some eminent Australian lawyers.

Since I was a member of the Scottish Law Commission, I was interested in renewing my acquaintance with members of the Law Reform Commission of Australia, but found that the pressure of appointments prevented me from ringing to make an arrangement until after ordinary office hours. However, I thought it was worth trying and I rang up, only to find the telephone answered by the chairman himself – Mr Justice Michael Kirby. He invited me round for a discussion and I went, flushed with interest in reform and development, particularly in relation to court procedures and legal services. Early in our discussion I asked him, 'How do you view the future direction of the courts?' His response was 'Do you think the courts have a future?' I had never hitherto thought to doubt that the courts had a future. Nevertheless this question has stayed with me ever since and when I was asked to speak on this very important occasion it came back to my memory forcefully.

RULE OF LAW

I have never doubted and I do not suppose Mr Justice Michael Kirby has doubted, that in a civilised society working under the rule of law, the courts are necessary for compulsory adjudication of disputes and for bringing into action the compulsory enforcement procedure of the state. Without such mechanisms it is difficult to imagine an effective rule of law. The alternative is a society with no effective means of adjudication of disputes or the application of state enforcement except by blind force, influenced perhaps by people's courts, where decisions on disputes depend not on some pre-existing rule of law but on the whim of the majority of those taking part.

To put the matter another way, if courts of law cease to have a place in our society it must sink into a state of anarchy and the rule that 'might is right'.

Against this background I am entirely sure that the courts in this country have a secure future. However I think the powerful question that Michael Kirby put to me is capable of being considered in a more detailed way, by studying the place that the court structure has in the life of the community and the effectiveness of its operation, as well as the standing which it has in the minds of the general public whom it exists to serve. This involves a study of :

- the judiciary, both professional and lay;
- the jury which is the judge of fact in most of our serious criminal trials in the UK;
- the court staff;
- the court buildings and their facilities;
- the provision for litigants, whether they be the state, corporations or private citizens;
- the witnesses – who have recourse to the court either voluntarily or under compulsion, whether as police or other professional witnesses or lay-people;
- the provision made for access to justice;
- the arrangements for the reporting to the public of judicial proceedings; and
- the accountability to the public for the way in which the system operates, in return for the resources which the state makes available to support it.

COURT STRUCTURE

My thesis is that the courts have a future as a valued part of the organisation of the state to the extent to which, in these various aspects, their arrangements are satisfactory and appreciated by the public. I begin with the judiciary. In no part of our society is there such elaborate provision made for the possibility of error and its correction than in our judicial system.

In practically every case that comes before our courts there is the possibility of an appeal by either party in the event of an adverse decision. Thus we have the magistrates' court with the possibility of an appeal to the Crown Court, or by way of case stated to the divisional court of the Queen's Bench . There is an appeal from the county court, possibly subject to leave to the Court of Appeal; there is provision for appeal from the Crown Court and High Court to the Court of Appeal and the provision of an appeal from the Court of Appeal – in many different types of case – to the House of Lords, although from England and Wales and Northern Ireland this is subject to the grant of leave either by the Court of Appeal or the House of Lords, whereas, from a final decision of the Court of Session in Scotland, there is an appeal as of right. Perhaps this is compensated for by the fact that there is no appeal at all to the House of Lords in criminal matters from the courts in Scotland. But the position is certainly one of a hierarchy of courts with the higher having considerable power to overturn the lower court.

This is matched by the hierarchy of judges sitting in these various courts, the lay magistrates and the stipendiary magistrates – an unfortunate name for the professional magistrates but I regret that no consensus for a suitable replacement of their title emerged during my time as Lord Chancellor – the professional judges, district judges and circuit judges in the county court, the circuit judges and the high court judges in the crown court, and the high court judges in the High Court, the Lord Chief Justice, the Master of the Rolls, the President of the Family Division, the Vice-Chancellor and the Lord Justices in the Court of Appeal, and finally the Lords of Appeal in Ordinary in the House of Lords. Although it is the highest tribunal they rank after the Lord Chief Justice in order of seniority; then the President of the Supreme Court of England and Wales, the Lord Chancellor, who also presides when he sits in the House of Lords. Although the detail in Scotland and Northern Ireland is different there is a similar hierarchy of courts in these jurisdictions.

This hierarchy implies a discrimination between the judges at the various levels. We expect the Lords Justices to be senior in experience and, at least a match in quality, to the average High Court judge. Similarly those who are appointed to the High Court generally are thought to be experienced in weighty cases and to have attained a standard of professional eminence greater than is necessary for the circuit bench, although from time to time judges who would be perfectly suitable for the High Court bench, for domestic or other reasons, prefer to sit at the level of circuit judges. Two questions arise in relation to this system:

(1) is it necessary to have such a number of levels of court; and

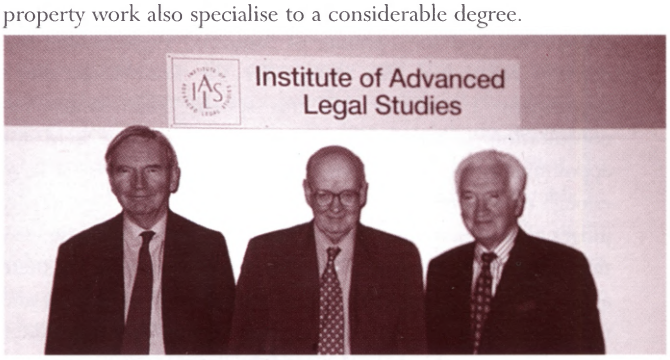
(2) is it appropriate to have judges who devote their careers to judging, gaining experience at the lowest levels and gradually moving up if they attain a satisfactory standard to the higher and highest levels?

The first question, at least in relation to civil cases, was addressed in considerable detail by the civil justice review which reported in 1988, and concluded that it was most important that cases were allocated to the correct level of court for the complexity and importance of the case in question. I believe that the evidence on which this recommendation was founded was extremely strong and, in the *Courts and Legal Services Act* 1990, it was given effect to by differentiating in this way between the county court and the High Court so that cases which were suitable for the county court went there and did not occupy and clog up the High Court. I think it is equally obvious that in criminal matters there are comparatively small cases which should be taken in the lowest court and serious cases which are taken in the higher court, although there is considerable controversy about precisely how the level at which a particular case is taken should be determined. But however these decisions are taken it is important that the manner in which they are taken should be widely accepted and respected. In Scotland, for example, the decision in relation to criminal cases is taken by the prosecutor acting under the parliamentary accountability of the Lord Advocate, whereas in England and Wales there remains a degree of choice to the accused. The principles on which this issue should be decided are, in my opinion, clear enough, namely that the case should be sent to the court best equipped to deal with cases of that kind effectively, but it is the application of that principle that gives rise to difficulty. I am not certain, speaking for myself, that the option of the accused fits into it.

Once the case has been disposed of at the level to which it is sent do we need the scope for appeals which presently exists? Subject to the consideration of the extent to which leave, either from the court of decision or the court to which appeal may be brought is necessary, I believe that the present balance is right and that it does command general acceptance.

SPECIALISATION

At this point I wish to comment on a matter which, at its most extreme, concerns the continuation of particular courts and, in its more minor form, contemplates differentiation between courts. This is the issue of specialisation. In 1978, there was a question in the common law world about the extent to which the work of the courts would be sent out of the courts to specialist tribunals, and I suppose one aspect of this title is concerned with the fact that we have an array of tribunals in the UK which carry out a great deal of work which could be done in the courts. These tribunals often have as their judiciary a professional lawyer as chairman, but with non-lawyers also participating in the decisions. What amount of specialisation in the courts themselves should we have? In the smaller jurisdictions, Scotland and Northern Ireland, the opportunity for specialisation within the court is more limited than in England and Wales. In England and Wales there is a degree of specialisation inherent in the present structure of the High Court, with its three divisions; within the Queen's Bench Division there is the specialised jurisdiction of the Commercial Court. Nowadays, the judges of the Family Division probably specialise in family work as their only work to a greater degree than the judges of the other divisions specialise, save that in the Chancery Division the judges who regularly do intellectual property work also specialise to a considerable degree.



From left to right: the Rt Hon The Lord Nolan, Chairman of the Board of the Institute of Advanced Legal Studies; the Rt Hon The Lord Steyn, President, Advisory Council of the Society for Advanced Legal Studies; and the Rt Hon The Lord Mackay of Clashfern.

Shortly after I became Lord Chancellor, after discussion with my judicial colleagues, I thought it was undesirable that there should be no judge in the Court of Appeal with substantial patent experience. In the light of the circumstances then prevailing, I encouraged the view that judges of the Chancery Division other than the patent specialist should take patent cases, but on the whole this did not prove particularly satisfactory, because extra time was often taken up in a non-specialist judge becoming sufficiently familiar with the background of patents to deal adequately with the few cases that the non-specialist was likely to get. Fortunately, in due course, it became possible to have a judge with substantial patent experience in the Court of Appeal and indeed also, as a result of the opening of patent work to non-specialist judges, to have a judge in the House of Lords who has patent experience at first instance. On the other hand, the specialisation of the

Commercial Court does not involve the judges there in devoting the full extent of their first instance experience to commercial work, although those with special aptitude for it tend to be occupied with it to quite a substantial degree. The idea that we should have completely specialist courts has, I think, not found favour in England and Wales and for my part, I believe that this jurisdiction is well served by refraining from going down too specialist a road. While the complexities of modern society have to a degree fragmented the law, I feel that if the law is to be an effective and prized structure in our country, the principles upon which it operates should be coherent and over-specialisation is apt to lead to fragmentation. In present circumstances I feel there is no danger of substantial areas of work presently done by the courts being taken outwith the court structure, although there is scope for some of the work done by way of judicial review being done by an appeals system in which a degree of specialisation may well be appropriate, for example, in relation to homelessness.

JUDICIARY

I come now to deal with the judiciary. In our tradition in this country, and indeed throughout the common law world, professional judges have been appointed from persons who have attained the appropriate degree of seniority and experience and reputation in the legal profession. In England and Wales full-time judges have been appointed only after part-time service as recorders, assistant recorders or deputy high court judges. Judges up to the level of circuit judges have been appointed after interview and in recent years following an application in response to advertisement. The advertisement system is to be extended to High Court judges. In many jurisdictions the appointment of judges is in the hands of a judicial appointments commission and the Institute of Advanced Legal Studies has recently researched this matter for the Lord Chancellor's department. I consider that this system under which full consultation is carried out and interviews are held for appointment, where the field of possible appointees is large enough to require it, is likely to produce at least as high quality judges as any competing system, and I do strongly take the view that the personal responsibility of the Lord Chancellor for these appointments, against the background of the conventions and traditions that today surround his office, is sufficient guarantee of the fairness and independence of the appointments process. I say without fear of contradiction and with a certain degree of satisfaction that the present judiciary in the UK is of very high quality indeed and I believe fundamentally commands the respect of the British people. Lay magistrates are nominated by local advisory committees and appointed by the Lord Chancellor, except in the Duchy of Lancaster where the appointments are made by the Chancellor of the Duchy. A system of interviews is used to determined suitability. Generally this system has worked well and has produced over 30,000 lay magistrates in England and Wales.

The principal complaint that I have heard in regard to the professional judiciary is the relatively small number of women and of ethnic minorities that are represented on the bench. In view of the way in which our judges are appointed the appointments are bound to reflect to some extent the pattern of the senior ranks of the legal profession. In my opinion this is the primary reason for the present situation. I believe that it has shown some improvement over recent years and that the pattern within the profession is improving. I personally have not been in favour of any artificial method of boosting the representation of women and ethnic minorities in the judiciary. I believe the only rule that can properly be applied is to appoint by merit and that everything possible should be done to encourage those who have merit to apply; I believe the Lord Chancellor is vigorously pursuing this policy. So far as the lay magistracy is concerned the main complaint has been in relation to imbalance in the political affiliations of magistrates. The method used for ascertaining the affiliation is to enquire on application for which party, if any, the applicant votes. With large fluctuations in political affiliation from time to time this method certainly has its drawbacks, but over the years efforts have been made to ensure that the possibility of going on the magistrates' bench has been widely advertised and people from all political parties have been invited to apply. The Lord Chancellor is again vigorously pursuing attaining the best possible political balance on the lay bench.

With regard to the magistrates' courts there has been a long standing differentiation between the provincial stipendiary magistrates and the London stipendiary magistrates. I personally believe, in the light of the recent studies, that this distinction should no longer apply, that a stipendiary magistrate should have nationwide jurisdiction but the allocation of stipendiary magistrates by locality should continue as the primary method by which their services are made available. There should be a degree of flexibility for exchange or for dealing with particular cases to encourage a degree of specialist expertise among the stipendiary magistrates, at the same time fostering the most important link with the lay magistrates, which comes from particular stipendiaries working with a particular group of lay magistrates. My impression has been that the anxiety about stipendiary magistrates amongst lay magistrates is mainly in areas which hitherto have not had the services of a stipendiary magistrate. Where stipendiary magistrates do serve, the lay magistrates and the stipendiaries normally have a good relationship, with a high degree of mutual understanding of their respective roles and aspirations.

SUPPORT FOR THE COURTS

I turn now to the staff supporting the judiciary. In the county court, the Crown Court and the higher courts, the support staff is provided by the Court Service Agency, an agency of the Lord Chancellor's department. The creation of the agency has provided a focus for the work of the staff in the courts which did not hitherto exist. This has been an impetus for improvement in the service given to the public and to the judiciary since it occurred. I am sure there is room for greater improvement and the new structure is, I think, conducive to this. I believe that the judges are appointed essentially for their quality as judges; they are entitled to look, for the administrative support needed, to officials whose primary ability is in administration. A high degree of consultation is required since the ultimate responsibility for the central part of administration rests with the judiciary. Listing of cases, which is the essential function of court administration, is ultimately a judicial one, as can be seen by considering who determines an application to be dropped from the list or to be moved up the list. This, ultimately, must be a matter for decision by a judge. On the other hand the day-to-day listing – as anyone who goes into a listing office of a busy court on a Thursday afternoon or a Friday morning will see – is a task for someone who has the majority of their time to devote to it; so where the

system has worked best, in my opinion, the resident judge gives clear instructions of a general kind to the listing officer and is willing to discuss special cases with the listing officer as they arise.

CRITICISM

The main criticism, in relation to the magistrates' courts, is the inconsistency of treatment as between one magistrates' court bench and another in respect of similar offences.

In recent years the technical support available to the court service has greatly increased. The 'Crest' system in the Crown Court and the new computer system being provided in the county court, as well as the computer support available to the judges, all mark considerable steps forward but, like any such development, they require adjustment in the methods of working as well as a capacity to embrace new developments in the technology as they occur. Nothing is more damaging to the reputation of the courts than badly reproduced orders or the admission that the court file has been lost and that questions about the case cannot be answered. I hope that these difficulties are gradually being eliminated by the new support available. In the magistrates' court, on the other hand, the support is provided by local arrangements.

The magistrates' courts have traditionally seen local justice administered in the community by members of it. This is a feature of our system which is much appreciated by visitors from other systems. In many of these the local community feel excluded from the justice process. Our system of jury trial, but perhaps particularly our system of lay justice, provides a very effective counter to this type of difficulty.

When Ley Vey reported in favour of a national organisation for support of the magistrates' courts the government, of which I was a member, took the view that this was not right. On the other hand we agreed with the view, which was fairly generally accepted within the magistrates' courts, that their administration required improving. The provisions of the *Police and Magistrates Courts Act 1994* were intended to provide a framework within which that could occur – including provision for the reduction of the number of magistrates' courts committees, which are the committees responsible for the local administration of the court service – as well as provisions for making them more effective to deliver what an efficient service requires. In addition an inspectorate was set up to monitor the performance of the magistrates' court and I believe this has become a respected and appreciated innovation. The lay magistrate requires advice on the law applicable to the case which is being considered. This is provided through the Justices' Clerk, who must be a qualified lawyer, and through the court clerks who work under him. If it is feasible to attain a position in which all the court clerks are also legally qualified I consider this would be a useful improvement over the present position, where only a proportion of court clerks are fully qualified as lawyers, although many of these have quite considerable experience and expertise in the questions of law that arise in the magistrates courts.

INCONSISTENCY

The main criticism that I have been aware of in relation to the magistrates' courts is the inconsistency of treatment as between one magistrates' court bench and another in respect of similar offences.

Consistency is an important aspect of justice but the impact of local circumstances, which will often differ from one locality to another, is also an important consideration and, insofar as local circumstances differ but are still properly taken into account, a degree of inconsistency must arise. On the whole I believe that the reputation of our magistrates' courts with the general public is reasonably good and I believe that these courts are not under threat. The system of lay justice has served England and Wales well over many centuries and I strongly believe that it will continue to do so in the years ahead.

COURT FACILITIES

The facilities, particularly buildings and ancillary facilities to which I have already made some reference, as well as information technology, are a most important part of the court structure. In former times we had very beautiful court buildings incorporating magnificent courtrooms usually providing very handsome scale which emphasised the dignity and authority of the court. However very little provision was made for court offices or for the jurors and witnesses who had to attend. The facilities provided for them were often in very marked contrast to the magnificence of the courtrooms. This has provided a considerable obstacle to modernising these buildings to provide modern ancillary facilities while at the same time retaining the grandeur of the former courtrooms. For example, one sees this in the Crown Court in York where considerable thought and effort was put into the renovation, and I think a reasonably successful outcome has been achieved. Even there though, the difficulty of attaining, in these circumstances, efficient modern office accommodation is apparent. To meet today's requirements of the courts it has, therefore, often been necessary to leave these old, grand courtrooms and build anew. It is important that the court continues to have a central and important place in the community and this often involves building on expensive sites which are difficult to obtain in central locations. The new courtrooms certainly do not match the grandeur of the old. On the other hand I think that the designers of court buildings in recent times have been able to combine a degree of dignity and formality in central locations with a modern standard of office amenities and accommodation for jurors and witnesses. Many of these court buildings have achieved recognition in architectural awards and at the same time have proved satisfactory to the users.

An interesting question arises in this connection about the extent to which court facilities should be spread. It is obviously more convenient for a local community to have a court within it than to have to travel some distance. On the other hand there is considerable advantage, from the point of view of court administration, in having a number of courtrooms together. This greatly facilitates listing and also enables the consequences of sudden changes in the list to be more readily accommodated with less inconvenience to parties and witnesses than where the court operates with only a single or a small number of court rooms available to it. The question of where courts are to be built, and of what size, is one which attracts a great deal of interest and lively and sometimes acrimonious debate. Since the provision of a court building will have effect for a considerable time in the future some appreciation of population trends for the future is also necessary. On the whole I think on this aspect too the courts have been able, over the years, to achieve a reasonable balance which commands respect among the public.

Although, to take an example from another jurisdiction, when I was recently in New Zealand I learned that the decision not to have a permanent High Court sitting in Dunedin, taken many years ago, is still a matter of debate there.

ACCESS TO JUSTICE

If the courts are to command continuing respect it is essential that they provide a reasonable service across the whole of our community. It has often been said that the courts are open only to those who are poor enough to be legally aided, or extremely wealthy to be able to afford what is required to finance litigation. To the extent to which this is true the courts fail the community and their reputation in it suffers. In our country any individual is entitled to represent himself and litigants in person are not uncommon. The only costs that such a litigant in person has to bear are the court fees chargeable at the various stages of the litigation in order to proceed with the litigation, but because of the rule that cost follows success, such a litigant is exposed to the costs of the lawyers who have acted for the opponent if the litigant in person is unsuccessful. It is also said – and with manifest truth – that it is very difficult for a lay person to cope unaided with the procedures of the court, as well as to have such a grasp of the applicable law as to match that possessed by the lawyers who may oppose him. This has lead some to argue against the present general rule that cost follows success. I heard this debated in the American Bar Association some years ago when it was strongly urged that this rule, which is not a general rule in the US, should not be introduced there as it has a dampening effect on litigation. It does certainly have a dampening effect on litigation in the sense that anyone contemplating litigation in the civil courts has to take account of this and therefore, unless the prospects of success are reasonably good, the litigant is unlikely to embark on the litigation. On the other hand to abandon this rule has the effect that a wealthy person can ultimately put a poorer opponent to huge trouble at least, and if he considers it necessary to have legal assistance considerable cost which, even if he turns out to be a hundred percent right, he will have no means of recovering. While, no doubt, there are arguments on both sides, I believe the reputation of our courts for fair dealing is enhanced by the knowledge that a person who causes litigation by taking up a position which the court finds ultimately to be unsound, should bear the cost to which the opponent has been subjected in order to attain the result which the court considers to be just.

on the internet

http://www.usnews.com/usnews/issue/970421/21medi.htm

Should TV be in the jury rooms of the US?

The size of both court fees and legal fees is a matter of some controversy at the present time. I do not consider it wise to enter into any detail on this subject except to remark that, in my opinion, it is highly desirable that the court should have a way of recompensing itself for the waste of court resources which result from late changes of position by the parties. Even at the appeal stage this can happen. On my recent trip to New Zealand I heard of substantial allocation of Court of Appeal time which was suddenly rendered unnecessary because of a change of position by the litigants in which it was really impossible for the court to use the time with other cases. This factor is one which calls for substantial disincentives and I hope that the reputation of the court for efficiency will not continue to be damaged by the dislocation caused to its arrangements by late changes of plea. To an extent this has been recognised in the criminal courts where the scope for financial compensation is extremely limited by the provision with regard to timeous pleas of guilty.

QUALITY OF LAWYERS

It is important for the reputation of the courts that their judgments and decisions should command respect amongst our citizens. In our system this depends not only on the quality of the judiciary but also on the quality of the representations made by or on behalf of the parties in the course of the litigation. In other words the strength of the court depends not only on the strength of the judiciary but also on the quality of the lawyers who appear before it. This is a matter which depends on appropriate qualifications in those who appear and that they conform to the rules of conduct required for the honest and efficient administration of justice. This was the basis of the reforms in relation to rights of audience legislated in the *Courts and Legal Services Act* 1990. I believe that changes in this area are best evolved, rather than by sudden, huge changes. Conversely, as these reforms have been developed, I understand the Lord Chancellor is contemplating simplification of the procedure, perhaps to the point of abolition. I can only say that the idea of the system embodied in the 1990 Act was to try to secure the maximum amount of agreement between the branches of the legal profession and the judiciary on what should occur. There are deep-rooted traditions and quite strong feelings and culture associated with these matters which, at least in the early 1990s, it was appropriate to accommodate.

WITNESSES

Our court system depends to a huge extent on the assistance provided by witnesses, the police and professional witnesses. The reputation of our courts and, indeed, the continuation of their function, depends to a critical degree on the willingness, particularly of lay witnesses, to give evidence. There are three aspects of this matter which I believe are critical to the reputation of the courts.

Inconvenience

The first is that witnesses should be put to only the minimum of inconvenience in order to provide their assistance to the courts. This involves them being asked to come only when their evidence is to be required. To my mind this depends to quite a substantial degree on good preparation. Even with good preparation there are recognised limits, for example, a previous witness may so depart from his or her statement that the case collapses. Notwithstanding these limitations it is, in my judgment, essential that the court insist that the parties before it should have in place all the necessary steps to ensure the minimum inconvenience to witnesses before the court. To an extent this also depends on the administration of the court itself and I believe that if the court is to have the reputation which we all seek for it, the number of cases in which a date is provided for a trial and the court itself departs from that date, should be reduced to the absolute minimum. Preparation by the parties and due attention to providing to the court a realistic estimate of the time the case is likely to last are important factors in this connection as well. Much ingenuity is available in the legal profession. I sincerely hope that this aspect will receive continued attention in the time ahead.

Facilities

The next important aspect of witness care is the provision of facilities within the courts. In recent years I believe considerable improvements have been made in providing facilities for witnesses. For example, in relation to those who have children, it is now possible to bring the children to the court precincts and have toys and other facilities available to keep the children entertained while their parent is required, and generally provide reasonable accommodation to enable them to be comfortable and safe during the necessary period of their parent's attendance.

Treatment

The third aspect of this matter is the way in which witnesses are treated during their actual participation in the court process. It is, in my judgement, fundamental that the court should exercise control to prevent a witness being badly treated while giving evidence. Fair, rigorous cross-examination is perfectly necessary but bullying or hectoring cross-examination is not. In my experience the best cross-examiners have been the most courteous and polite and it was impossible to detect from their manner of putting questions whether the answers they were receiving were in accordance with what they wished or not, but obviously different methods suit the variety of personalities possessed by our cross-examiners. The law would be dreary and the courts not likely to enjoy a particularly good reputation if all our advocates were of the same pattern. The judge carries the ultimate responsibility for ensuring that witnesses before the court are properly treated and the strong endorsement of this principle by the Court of Appeal (Criminal Division), under the leadership of the Lord Chief Justice in relation to the cross-examination of rape victims, is in accordance with the principle which I am seeking to enunciate.

PUBLIC ACCESS TO THE COURTS

The next aspect of the courts' reputation with the public that I wish to consider is the manner in which the public become informed of the activities of the courts. In former times the broad-sheets would cover the closing speech of Marshall Hall to a jury. In this way the public were kept closely in touch with at least some aspects of what went on in court. Nowadays it is clear that the general public receive most of their information from television. Is there not a danger that the courts will be marginalised by not allowing television in court?

Televise the courts?

That the public are interested in court procedures is evident from the popularity of such programmes as Rumpole, Kavanagh QC and, from across the Atlantic, Perry Mason and LA Law. The televisual following of OJ Simpson's and Louise Woodward's trials showed that the appetite of the public for live television coverage in court is considerable. I personally saw quite a lot of the coverage of the Louise Woodward trial on television and I must say I found it quite informative on the procedure of that particular court. I was not certain that the commentary provided alongside it was appropriate while the trial was going on, particularly as the commentary I heard was ultimately shown to be at odds with the way the jury viewed the case. In England and Wales the televising of court is absolutely prohibited by statute passed to prevent photography in the days before television. In Scotland there is no statutory provision although until quite recently the practice was similar to that in England. In the days when radio was the principal means of disseminating information, I do not recollect calls for radio transmissions live from the courts, but there is certainly a strong call, now supported by responsible opinion from the General Council of the Bar, in favour of televising the courts here.

Scotland's example

Because there was no statutory provision in Scotland the Lord President, then Lord Hope of Craighead, after very careful consultation with the profession in Scotland and having had a detailed report prepared for him by Lord Cullen, now the Lord Justice Clerk, the second most senior of the Scottish judges, decided that it would be worth permitting television in court but subject to stringent restrictions. These included provision that the jury was not to be filmed, that the consent of all those involved would be required, that they would be able to withdraw that consent up until the time when production took place, that none of the programmes would be broadcast until the time-limit for any appeal had run out and that the presiding judge should be willing for the final production to be broadcast. These conditions were accepted by the broadcasting authorities for the purposes of the Scottish experiment but are extremely burdensome.

The subsequent broadcast evoked mixed reaction from those who saw the full programme as broadcast. I think most people in this category felt that they had learned something new that they valued about the way in which Scottish courts dealt with cases coming before them. The fact that none of the programmes were broadcast live removed a certain amount of the immediacy. On the other hand no-one who had not been keeping abreast of cases being tried in Scotland would have had the detail of the cases in their minds until they saw the programme.

on the internet

http://www.scu.edu/Ethics/practicing/events/sponsored/massmedia/abo

Analysis and discussion of the ethical aspects of media in a court room with particular reference to the OJ Simpson trial.

The BBC produced edited highlights to an invited audience from the legal profession and the judiciary in England and Wales at which I was also present. I had seen the fuller broadcast programmes before. The edited highlights did nothing to allay the concerns of those who were fearful that the broadcasting of court proceedings might not be a beneficial development to the administration of justice and I think this was at least in part due to the selection and the treatment of the highlights in this special programme. Since that time the courts in Scotland have admitted the cameras to formal sittings of the court, for example the swearing in of a new judge, the swearing in of the Secretary of State for Scotland and the swearing in of the law officers. There have also been broadcasts of parts of appeal cases.

I am inclined to the view, in the light of the Scottish experiment, that a documentary programme along the Scottish lines would not be prejudicial to the administration of justice and would inform the public in a way that would not be possible otherwise. Formal proceedings in court could, I think, be televised without damage to the administration of justice but in present circumstances I think there is a risk in respect of live broadcasts of trials.

TV at the ECJ

A considerable time ago when I was the Lord Advocate representing the UK Government in the Court of Justice at Luxembourg in a Danish Fisheries case, the court allowed the cameras in to film the judges and the parties and the formal calling of the case, and then the cameras went out. The television company was the Danish television company and I later saw the programme as broadcast on Danish television and that series of shots at the beginning of the judicial sitting were used to give an account of the proceedings and the way in which they were conducted. I think this did give an added interest and a certain air of authenticity to the report.

Why not?

In England and Wales the statutory provisions exclude the possibility of formal sessions in court from being filmed and the result is that the only opportunity that the television cameras have of filming judges in judicial robes are on such occasions as the crossing from Westminster Abbey to the House of Lords after the judges' service at the beginning of the legal year; services in the circuits provide a similar opportunity. I doubt whether these films contribute much to the public understanding of the administration of justice.

It has become usual in recent years for the accounts of judgments in cases that are highlighted by the news bulletins on television to be accompanied by photographs of the parties or their lawyers emerging from the Royal Courts of Justice at The Strand, or from whatever other court they may emerge. I consider that in present circumstances formal shots such as I have described, now allowed in Scotland, are suitable for giving an authentic background to a report and I also believe that it has become extremely important for the judiciary in cases which are likely to excite the public interested to prepare alongside the full detailed judgment a succinct summary of what is being decided. This exercise in succinctness may have a value of its own. I understand that those who receive training to appear on television are invited to make a statement for a certain period of time and then to make the same point in half the time and in a quarter of the time. Some of those who have had this experience have told me how beneficial it is. In any event, I believe that an authoritative statement from the court itself against the background of shots of the court building or of people emerging from the court, are the most effective ways, in present circumstances, to keep the court in reasonable position in this age of television to impinge upon the public consciousness and to prevent the courts from being marginalised. Indeed, over the last few years I would think interest in court proceedings and decisions has not waned in the least and that, if anything, the interest for news bulletins of court decisions has considerably increased.

With the development of technology it is possible to envisage the court records being made by video as a regular feature. Audio-recording is perfectly common and if video-recording were effective and became the common rule it would, I think, cease to have effect on the way that people reacted.

House of Commons select committees are often filmed on video and, from my own experience, once you have become involved in the discussion with the committee you completely forget the existence of the recording. I believe that if video-recording were a common feature of court proceedings the same result would apply. But in present circumstances, where such recording would by no means be common, I can see that it might have a deleterious effect on the actual conduct of the proceedings and produce an unnecessary strain on the witnesses. This position however, will, I think, have to be reviewed from time to time as technology develops, so that the courts of law can remain in a real sense open to the public, with the public getting a full opportunity to know what is taking place.

JURY RESEARCH

As an incidental to this aspect of the courts' position I would like to refer briefly to jury research. I personally have been committed to the view that properly conducted jury research is valuable to the proper development of jury trials and a clause to this effect was introduced in the Contempt of Court Bill, but was deleted by the House of Lords after very powerful debate in the House of Lords when the Bill, which became the *Contempt of Court Act* 1981, was considered there. In my view jury research could produce helpful information on the way in which juries are handled and help increase their effectiveness as a means of securing justice.

SEPARATION OF POWERS

The final aspect I wish to touch on, is the question of accountability to the public for the way in which the system operates, in return for the resources which the state makes available to support it. I consider it fundamental that the judiciary should be in control of the court system but that ordinary judges should have security of tenure. The solution then is to have the head of the judiciary the only judge without security of tenure, a member of the executive and accountable to Parliament as such. This unique solution is, to my mind, most valuable and notwithstanding weighty opinions to the contrary, I hope it will be retained.

CONCLUSION

It is vitally important that the way in which our courts – civil and criminal – operate is kept under review and the civil justice review and the review presided over by my distinguished colleague the present Master of the Rolls have made most important contributions to this effect. The results are still in the course of being put into practice and I believe that when they are in full operation they will greatly enhance the effectiveness of the courts of justice in dealing with civil cases. The Royal Commission on criminal procedure and the continuing work of the Home Office and the Lord Chancellor's Department, together with the CPS and the other prosecuting agencies will, I believe, contribute to improved effectiveness in the criminal process. I hope that in due course research into the way in which juries react to what they hear and how that can be most effective in producing enlightenment and justice should be part of this development. The jury trial is a very important part of our system of criminal justice; I personally am not anxious to diminish its effect without seeing if there are other ways in which the problems that jury trial has faced in dealing with complex cases can be resolved, other than by the elimination of jury trial from them.

As we approach the new millennium I do believe that the courts have a future, that they have an important and honoured place still in our nation, and that the continual effort being made to keep them up-to-date and to improve their effectiveness will maintain that position into the foreseeable future.

Lord Mackay of Clashfern