We should be cautious about televising trials as they would do little to bolster public faith in the judicial system and provide for open justice. Alternative solutions should be sought

Blog Admin

The recent spate and profile of super-injunctions has once again opened up the debate over whether to televise courtroom proceedings. Arguments have been made that such a development would serve to bolster public confidence in the judicial system and would represent a clear manifestation of the principle of open justice. However, ***Emmanuel Melissaris*** *urges caution and suggests that such benefits are not at all clear and the execution of justice could be complicated by such a change.*

The idea that courtroom proceedings should be televised, which has remained largely dormant since the O.J. Simpson trial controversy, has recently resurfaced partly in the wake of and as a response to the controversy sparked by super-injunctions. Lord Neuberger MR suggested that some parts of some trials could be televised some of the time so as to bolster public confidence in the judiciary. The Director of Public Prosecutions, Mr Keir Starmer QC, soon followed suit: "It is the modern way of making sure the public actually see justice".

As far as I can see, two interlinked arguments are produced in support of televising trials. First, it is suggested that it will go some way to satisfying the principle of open justice, a manifestation of the rule of law. The second argument is one of policy: televising trials will bolster public confidence in the administration of justice. I will not question whether it is the case that public confidence is dwindling. Let us accept it as a fact.

The issue then is whether televised trials, should anyone bother to watch them of course, will appropriately actualise these two requirements. I believe this is not as obvious as it is made out to be.

The principle of open justice

The Royal Courts of Justice

Let me start with the openness principle. This requires, among other things, that decisions be tightly, clearly and coherently reasoned and that they be made available, accessible and intelligible to all. Of course, the actualisation of this requirement is subject to constraints, both pragmatic and principled. It does not establish a positive duty on the part of the judiciary to go to such lengths as to keep everyone informed at all times about everything that goes on in the justice system. And it is subject to limitations, when it clashes with the rights of the parties or other principles. For example, vulnerable witnesses should be protected and criminal proceedings should be excluded for the fear of putting undue pressure on the parties in light of the seriousness and impact of criminal offences. Nevertheless, it does establish a duty to take reasonable steps so as to make the business of the justice system as easily accessible as possible. At first sight, broadcasting trials on television would achieve this to some extent.

At the same time, though, the principle implicitly requires that information becomes available undistorted. As a means of communicating information, television has two central characteristics. The first is its immediacy and pace. It does not allow one properly to process signals and facilitates the unreflective acceptance of first impressions as true. Secondly, it has the ability of mixing that information with isolated visual stimuli which are peripheral to the substance but at the same time determine how this substance is perceived. This is why television lends itself to opinion-formation by sound bites and why presentation becomes so important, indeed central, to it. The upshot of televising trials will very likely be the generalised misreading of what is at stake, both in law and in relation to the parties' interests, thus ritualising the distribution of justice and undermining the principle of openness rather than safeguarding it.

This is not to say that misreporting and misunderstanding does not currently take place in other ways. The Press customarily and for reasons of its own sensationalises judicial business. But there is an important difference. The justice system may not be able to control how information is going to be used but it should steer clear of making that information available in a way that will all but guarantee that it will be misperceived and distorted. At the same time, it is the case that participation in trials is difficult and often places the public in uncomfortable or even undignified positions. Viewers are being searched and scanned and, in some instances, placed in glass boxes, unable to observe proceedings in any meaningful way. But I should think there are alternative solutions to these problems. The risk of miscommunication of judicial business can be tackled in other ways such as, for instance, the Dutch model of dedicated press magistrates assigned with the task of explaining things to the Press and the public. And, in light of the lack of space in courtrooms, public participation can perhaps be facilitated by broadcasting trials in a dedicated room in courthouses, where viewers will still have the sense of significance of proceedings and, perhaps, be able to interact with legal officials (such as a press judge).

Lord Neuberger correctly argues that part of the principle of openness is that the public should be at freedom to discuss the application of the law by the courts. A concomitant point is that, being under scrutiny and critique, judges will have a further incentive to provide full and convincing legal reasons for their decisions. But there is a very fine line here and the risk of crossing it is high. In light of the inevitable sensationalisation and trivialisation of the legal issues and stakes, such dialogue and critique may be on the wrong footing from the outset. Very importantly, it will very likely blur the boundaries between law-application and law-enactment. Many will expect judges to do the “right thing” whether this coheres with valid sources of law or not. This may give rise to the worrying possibility that judges will not act on the incentive to meet the formal requirement of full and coherent reasoning but rather to allow their decisions to be substantively influenced under the pressure of public opinion thus encouraging judicial activism, which the idiosyncracies of the common law already allow to some extent. And it should be noted that the danger is present in civil law contexts just as much as in the criminal law. Private law may not capture the public’s imagination as much but it still deals with very important political matters of distributive and corrective justice.

Bolstering public confidence

Moving on to the second argument in support of televising trials, namely that it will bolster public confidence. This, I think, suffers from similar problems. I suspect that under these conditions public confidence can only be enhanced in two extreme ways, which pull in opposite directions. The first is by entrenching the distance between the judiciary and the populace. It is, after all, a common reaction for non-experts to trust experts or authoritative figures even though, and often precisely because, the latter are unintelligible to laypeople. This, however, already threatens the principle of open justice instead of affirming it.

The second problem is the exact opposite. One’s trust may be proportional to one’s understanding. But legal issues are more often than not extremely complex and more nuanced, and indeed narrower, than most people believe. Having snapshots of trials will not help one to grasp the intricacies of law and legal reasoning. It will only create the expectation that legal practice be simplified in ways that are not possible without losing detail and depth, which are central to justice. This is not to say that the justice system should be reserved for privileged experts. On the contrary, I believe that political dialogue and the democratic process should be such that everyone has a firmer knowledge of public norms. But turning back time and trials into Dickensian spectacles is not the way to go about this.

So, should we televise trials? If there really is an issue of public confidence and the working of the principle of open justice, I think the jury on this should stay out, and off the air, for a little while longer and consider alternative solutions too.

The author is grateful to Prof. Linda Mulcahy for critical comments and valuable information in the writing of this post.