The involvement of the public in the criminal process in the United Kingdom

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Good afternoon. It is a great pleasure to be able to address you on how we in the United Kingdom involve citizens in the criminal process.

I will address you on three topics: how members of the public have access to our criminal courts, our jury system, and how judges try to inform the wider public of their work. My colleague, Kate Thirlwall, will explain the long-established system of the magistracy in England and Wales, by which citizens who are not lawyers, but who are assisted by qualified lawyers, administer criminal justice.

Open Justice and Open Courts

It is an important principle in the jurisdictions of the United Kingdom that there should be open justice. This means that the courts, when hearing evidence or legal argument, are open to members of the public. Citizens can walk into the court and see and listen to the legal proceedings. Journalists also may do so and can report to the public on what has occurred in a trial.

But because members of the public are involved as members of a jury in deciding innocence or guilt of accused persons, there are measures by which the court can postpone the reporting of pre-trial hearings and (sometimes) the trials themselves until the conclusion of a case. This is to prevent publicity compromising the administration of justice.[1] When the court has made such an order, the restrictions on reporting end once trial is completed and the media are then free to report what has occurred.

[1] Contempt of Court Act 1981, section 4(2).

Exceptionally, the court may impose permanent restrictions on the reporting of matters where that is necessary in the interests of the administration of justice.[2] But it is only very rarely that the court has needed to make such orders, and judges are understandably reluctant to do so because the openness of justice is such an important principle. As Justice Brandeis said, sunlight is the best of disinfectants.

There are also limited circumstances in which the court is empowered by statute to exclude the public from a court when hearing a witness's evidence. In criminal trials in Scotland, the principal circumstance in which evidence is heard in a closed court is when the victim of a sexual offence is giving evidence.[3] It is also normal to require the media not to disclose the identity of the victim of sexual offences when reporting on a trial and for judges to anonymise the victim in any written judgment relating to the trial.

Apart from those exceptions, the clear and established principle is that criminal justice is conducted openly and in public view. To my mind, this important principle helps preserve public confidence in the criminal justice system in my country.

The Jury System

One of the most striking features – probably the most striking feature – of the jurisdictions of the United Kingdom and other common law jurisdictions in criminal trials is our jury system for trying people accused of serious crimes.[4] It is not the professional, legally-qualified judge who decides whether a person is innocent or guilty of a serious crime. That task falls on private citizens sitting as a jury. They are instructed in the law by the judge and must follow his or her instructions on matters of law. But the members of the jury alone decide on the facts. It is the members of the jury who decide whether the evidence which they have heard in court satisfies them of the guilt of the accused person.

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[2] Contempt of Court Act 1981, section 11.

[3] In England special measures are taken to protect the identity of the complainant who may give evidence from behind a screen or by video link and the identity of the victim may not be reported during his or her lifetime.

[4] 95% of criminal charges are decided by magistrates in England and Wales, because they involve less serious offences. Only about 1% of all criminal charges are determined by a jury because many who are accused of more serious crimes plead guilty to such charges.

There is no one model for a jury system. In England and Wales, the jury in a criminal trial consists of 12 people, and such a jury can convict a person only if at least ten of the twelve jurors are persuaded of his or her guilt. In Scotland, where I worked before I joined the UK Supreme Court in London, the jury consists of 15 people and at least eight of them must be satisfied of the guilt of the accused person before the jury can return a verdict of guilty. Thus, Scots law requires a smaller majority than English law, but it has other protections of an accused person, such as corroboration – the requirement that there is evidence from two independent sources which points to the guilt of the accused. Both jurisdictions have rules governing the necessary majority if jury numbers fall in the course of the trial though illness or other unforeseen reason.[5]

Citizens are generally under a legal obligation to make themselves available for jury service. When a group of people answer their summons to attend the court for jury service, they are selected at random to serve on a jury in a particular trial.[6] In the courts in which I sat, there had to be a group of at least 30 members of the public present for jury service before a jury of 15 people could be balloted.[7] Pieces of paper, each of which contained the name of a potential juror among that group, are placed in a bowl and are picked out at random by a court official, who is the clerk of court. Nobody is allowed to vet the members of the public who make up the jury: The prosecution or defence can object to a juror only in very limited circumstances.

The right of a citizen charged with a serious criminal offence to be tried by a jury of fellow citizens is a powerful tradition in the United Kingdom and in other common law countries. Historically, some writers have associated the right to trial by jury with clause 39 of the Magna Carta of 1215, which stated "no free man shall be taken or imprisoned … except by the lawful judgment of his peers or by the law of the land". Whether it was then envisaged that the only form of criminal trial for serious offences would be a jury trial may be doubted.[8] Nonetheless,

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[5] In England and Wales, the minimum number of jurors is 9. If there are 11 jurors the majority must be 10. If there are 10 jurors the majority must be 9. If there are 9 jurors the verdict must be unanimous. In Scotland, the court has discretion to direct that a trial should proceed so long as the number of jurors does not fall below 12, and a verdict of guilty in all circumstances requires a majority of at least 8 jurors.

[6] Juries Act 1974, section 11; Criminal Procedure (Scotland) Act 1995, section 88.

[7] Where a trial is predicted to last a long time, the jury panel is often about 75 people so that the court officials can identify people who can arrange their affairs to cope with the commitment.

[8] Anthony Arlidge and Igor Judge, "Magna Carta Uncovered" (2014), chapter 8.

whatever its origin, the jury has long been seen as an "integral and indispensable part of the criminal justice system" and also of "constitutional significance".[9]

A question, which lawyers who are familiar with trials conducted only by legally-qualified judges may ask, is "how are members of the public able to apply the criminal law and rules of evidence?" To answer that question I must give a brief description of a criminal trial, drawing principally from my experience in Scotland.

When people have been balloted to be members of a jury, a clerk of court makes sure that none of them has prior knowledge about the case. He will ask the jurors if they know the accused person, the complainant or any person named in the indictment (that is the document containing the criminal charge or charges against the accused person), or the circumstances of the offence.[10] The clerk of court gives them a general explanation of what their task will be. When the jury return to the court room and trial begins, the clerk of court formally reads out to the jury the charge or charges which are being made against the accused person or persons.

It is then the task of the judge to set the scene for the jury. This involves explaining to the jury what is their role and the essential legal principles which will govern their task. The judge explains to them that they alone have to decide what are the true facts, and that their decision must be based only on the evidence which they have seen and heard in court. They must follow the judge's instructions on the law, but they are the judges of the facts. The judge explains that the burden of proof is on the Crown (i.e. the prosecuting authority) to prove the guilt of the accused person beyond reasonable doubt and that there is no obligation on the accused person to give evidence. The judge then explains the procedure of the trial, how the Crown will lead the evidence of its witnesses, the defence may then cross-examine those witnesses, and the Crown may re-examine them on matters which have arisen on cross-examination. If the crime is of a nature that members of the general public would not readily understand, the judge may briefly explain in general terms the nature of the offence. Finally, the judge warns the jury that they are not to discuss the case with anyone outside the jury room, and that that prohibition includes discussions with family and friends when they go home.

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[9] *R v Mirza* and *R v Connor and Rollock* [2004] UKHL 2, [2004] 1 AC 1118, para 7 per Lord Steyn.

[10] In England and Wales, a list of witnesses in the case is read to the jury in open court and jurors will be asked whether they know any of the witnesses.

After that introduction, the prosecution makes an opening speech, explaining what the case is about, what the evidence is likely to be and why they will, by the end of the trial be satisfied that the defendant is guilty. He then leads the witnesses who give evidence which generally points to the guilt of the accused.[11] After the prosecution's case is complete, the defence can mount a legal challenge to the adequacy of the Crown's case[12] or they can, if they wish, lead evidence to support the conclusion that the accused person did not commit the crime or at least that the jury should have reasonable doubt as to whether he did.[13]

After the prosecution and the defence have completed the presentation of evidence to the jury, the prosecutor then makes a speech to the jury to explain to them why he or she says that they should find the accused person guilty of the offence or offences with which the accused is charged. Defence counsel then makes a speech to seek to persuade the jury that the defendant is innocent, or that they cannot be sure of his guilt.

It is then the task of the judge to give instructions to the members of the jury before they retire from the court to consider their verdict. The judge has the duty throughout the trial of making sure that the trial is conducted fairly. That role and his or her directions to the jury are the critical contribution of the judge to the trial process. It is in those directions that the judge tells the jury what they need to know about the law and the trial process in order to assist them to reach a correct verdict. Many judges prepare directions of law in writing for the jury. It is very common for judges to prepare a document called "a route to verdict" with a series of questions in a logical order which, if followed, will guide the jury to their verdict.

Those instructions include:

(i) An instruction to decide the case only on the evidence which they have seen and heard in court and not to be influenced by sympathy, revulsion or other emotion.

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[11] In England and Wales, the prosecutor and the defence may each make speeches to the jury setting out the nature of the evidence which they intend to lead. In Scotland, there are no such speeches and instead the Crown commences its case by leading its first witness.

[12] This is a submission of "no case to answer" which is made at the end of the Crown's case.

[13] In England and Wales, rather than referring to "reasonable doubt", judges tell the jury that they must be "sure" of the guilt of the accused person.

(ii) An impartial explanation on how they might assess the quality of the evidence which witnesses have given, distinguishing between a witness's credibility (i.e. honesty) and the reliability of his or her recollection. This is given at a general level and does not involve any comments about the evidence of particular witnesses.

(iii) There may also have to be instructions on specific types of evidence when the rules of criminal evidence (e.g. hearsay) are in play.

(iv) General directions of law: the judge will explain the presumption of innocence which means that the prosecutor must prove the guilt of the accused person. The question for the jury is whether the Crown has proved its case against the accused person. The judge will explain the standard of proof, stating in simple terms what is the requirement of proof beyond reasonable doubt. In Scotland, where the rules of criminal evidence require the corroboration of essential facts, the judge will explain the requirements of corroboration and what are the essential facts which must be corroborated.

(v) If the defence has not given evidence, the judge reminds the jury of the presumption of innocence and that the accused is under no obligation to give evidence. Similarly, if there has been evidence led by the defence, the judge reminds the jury that the burden of proof is on the Crown and that the accused has to prove nothing. If a defence witness causes the jury to have reasonable doubt of the accused person's guilt, they must acquit the accused person.

(vi) The judge then gives the jury specific directions relating to the trial itself. The judge gives the jury directions on the legal definitions of the offences with which the accused person is charged.

(vii) In English law it is the practice of judges to summarise the evidence which the witnesses have given in an impartial manner.[14] In Scotland, we do not summarise the evidence but may give the jury some neutral guidance (which the jury is entitled not to follow) on what they might think are the principal areas of factual dispute in the light of the arguments which the Crown and the defence have advanced.

[14] But the judge directs the jury that it is their view of the evidence that counts and that they are free to disagree with any view which the judge expresses.

(viii) Finally, the judge explains the verdicts which the jury may reach and the majorities which are required in order for them to return a guilty verdict.[15] The judge explains to the jury that they can delete from the charge any matters which they consider not to be proved so long as what remains is an offence.[16]

(ix) The judge invites the members of the jury to appoint a foreman to chair their discussions and speak for them when they return to court. The judge tells the jury that they can take whatever time they need to reach their verdict and then invites them to retire to the jury room to consider their verdict.

The jury then retires to the seclusion of their jury room to decide on their verdict. Juries normally are able to reach their verdict without further directions from the judge. But if they require further legal instructions from the judge, they can ask a court official to arrange that they return to the courtroom where their spokesperson can ask the judge for further directions.[17]

Once the jury have reached a verdict or verdicts (if there are several charges), the spokesperson asks a court official to re-convene the court and they return to the court room where the spokesperson will state the jury's verdict or verdicts in the presence of the accused person. Normally, as the charges involve serious crimes, the judge will order the preparation of background reports on the accused person before sentencing him. The judge then thanks the jury for their contribution to the administration of justice and discharges them. Thus, the jury often does not witness the sentencing of the accused but may see the outcome later in the newspapers or in the media.

From this description you will note that the jury does not give reasons for the verdicts which they have reached. This affects the way in which an accused person can appeal against his conviction. If there is an appeal by the accused person against his conviction, the appeal court will not have a statement of the jury's reasoning. It will have a report by the trial judge on the

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[15] In English law, the jury is instructed to try to reach a unanimous verdict but, if they cannot, the judge may, after a fixed period of deliberation, give them permission to reach a majority verdict – ie at least 10 of the 12 jurors must be satisfied of the accused person's guilt. This step cannot be taken until the jury has been deliberating for more than 2 hours and 10 minutes. In a serious case the judge will wait much longer before giving a majority direction.

[16] This practice is not followed in England and Wales.

[17] In England and Wales, the jury writes a note for the attention of the judge.

grounds of appeal,[18] a transcript of both the evidence and the judge's directions to the jury, and any documentary or other evidence which is relevant to the appeal. The appeal court, in deciding whether there has been a miscarriage of justice, will therefore focus on two things. First, the court will consider the adequacy and fairness of the judge's directions to the jury, if they are challenged, and a misdirection by the judge will invalidate a conviction if it has led to a miscarriage of justice. Secondly, the appeal court asks itself whether there was evidence led in the trial which entitled the jury to come to their verdict.

Lawyers who practise in other legal systems, in which professional judges decide the innocence or guilt of the accused person and give short reasons for their decisions, sometimes express their surprise at a process of decision-making by jury in which no reasons are given. But the European Court of Human Rights has confirmed that such a system is compatible with the European Convention on Human Rights.[19]

People sometimes ask: how reliable is the jury system of criminal justice? My personal experience is that juries take their responsibilities in the administration of justice very seriously and reach discerning verdicts which are justified by the evidence. I can recall one case in which the jury acquitted an accused person when I, if I had been the decision-maker, would have been prepared to convict. But their decision was in no way perverse.

I recognise that one judge's experience is hardly a reliable test. But such research as is available supports the efficiency and fairness of the jury system in the United Kingdom.

There has been only limited academic research into the decisions of juries in the UK. In our law it is a criminal offence for a person intentionally to disclose information about the discussions by members of the jury in their deliberations in court proceedings and to solicit or obtain such information.[20] Thus research as to why a jury came to a verdict in a particular case is forbidden. But that is not a complete bar on research, as I will seek to show.

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[18] In Scotland there is a statutory obligation on the trial judge to produce the report. In England and Wales, it is very rare for the appeal court to have a report from the trial judge.

[19] See, for example, *Gregory v United Kingdom* (1997) 25 EHRR 577, 594 para 44.

[20] Juries Act 1974, section 20D (England and Wales); Contempt of Court Act 1981 section 8 (Scotland and Northern Ireland).

In 2010 the Ministry of Justice published a report by Professor Cheryl Thomas of the Centre for Empirical Legal Studies at University College, London.[21] The report, which expresses her findings and views and not the official views of the Ministry of Justice, was the product of 18 months of research in which more than 1000 jurors in England were interviewed anonymously. The study comprised three principal components. First, there was a series of case simulations in which people were summoned to act as juries in simulated trials. The researchers used the computerised random selection, which the Court Service operates, to make their juries representative of juries hearing real trials. Secondly, there was a large scale statistical analysis of jury verdicts in Crown Courts. Thirdly, the researchers conducted a survey, after juries had reached a verdict, of the recollection of members of juries of the media coverage of the trial, which they had been involved in, and as to whether they had used the internet to discover facts about the case in which they had acted as jurors.

The results of the research were generally positive for the jury system but also confirmed areas where our practice could be improved. Among the positive findings were conclusions that there was no evidence of racial discrimination against defendants from ethnic minorities. Altering the racial composition of juries in case simulations did not produce different results. Nor did the evidence support suggestions or rumours that juries in some geographical areas were less likely to convict than those in other areas.

There was evidence of a greater tendency for juries to convict of crimes for which there was direct evidence of wrong-doing, such as causing death by dangerous driving or being involved in the supply of illegal drugs, than when the juries dealt with crimes which depended on a person's state of mind, such as that of the defendant in attempted murder. This is not surprising; a professional judge would face the same difficulty.

The report also concluded that juries were efficient. They were unable to agree a verdict in less than one per cent of the cases which they heard.

There were three areas in which the report identified scope for improved performance. They were: (i) making sure that the jury fully understood the judge's legal directions, (ii) providing the jury with clear guidance of what to do if a member of the jury appeared to be guilty of

[21] Cheryl Thomas, "Are juries fair?" Ministry of Justice Research Series 1/10 (2010).

misconduct and (iii) preventing jurors from researching for facts relating to their case on the internet.

Judges have been aware of these sensitive issues for quite some time. In relation to the first, I and others have long recognised that it is asking a lot of a juror to listen for over one hour to a judge's directions on the law and to understand and remember those directions. Successive Lord Chief Justices of England and Wales have called for judges to shorten the length of their directions. I worked hard in criminal trials to keep my directions to under 40 minutes and I invited jurors to take notes of what I said if they wished.

It can readily be appreciated how central the judge's directions are to a fair trial. For example, if a defendant asserts that he acted in self-defence, the judge has to explain that there are two elements to that defence: first, the defendant must believe it was necessary to defend himself and, secondly, he must use only reasonable force to do so. The jury must understand and apply both tests to the evidence if it is to do its job correctly.

As I have said, it has become increasingly common for judges to give each member of the jury a written copy of their legal directions to reduce the risk of them remembering only part of a particular direction.

Secondly, handling misconduct: when directing a jury at the outset of a trial it is the practice for a judge to tell jurors that if they encounter anything which causes them concern they should give a written note to the clerk of court so that the judge can act promptly to address the problem. This is a clear direction. But the report disclosed some uncertainty among jurors of how to act if they encountered misconduct. The report therefore recommended that jurors be given written guidelines on their conduct so that people would know how to respond to evidence of misconduct.

Thirdly, judges have been aware for some time of the danger that jurors may be tempted to conduct their own private research on the internet for facts relating to the case which they are hearing. Carrying out such research and informing other members of the jury of the results of that research are criminal offences.[22] Judges instruct the jury to decide the case based only on

[22] Juries Act 1974, section 20A (England and Wales).

the evidence which is led in court and warn against conducting research on the internet. Some trials have had to be abandoned because such warnings have not been obeyed. Judges can order jurors to surrender their electronic communication devices for the duration of a trial.[23] The report suggests that the written guidelines on jury behaviour should also flag up the obligation not to conduct such private research.[24]

While there is always room for improvement, public attitude surveys have shown continuing strong support for the jury system, trust that a jury would come to the right decision, and a belief that a criminal trial by jury is fairer than such a trial by a judge. Whether or not that belief is correct, the jury system involves citizens in the process of criminal justice. The facts of the case are decided upon not by the administration or professional judges but by a group of randomly selected citizens.

I generally share the public's confidence that juries usually reach the correct decision on the evidence which they have heard in criminal trials, particularly in relation to straightforward criminal charges such as assault and murder, or the supply of illegal drugs. My one doubt about the efficiency of the jury system relates to cases concerned with complex financial crimes, which often require long trials involving technical evidence and which place a heavy burden on a jury. I think that there is a case to be made for such offences to be tried by a tribunal or court which includes specialists either in place of or in addition to members of the public.[25] But there are many distinguished lawyers who would not agree because they see the jury system as a fundamental part of the constitution of the United Kingdom.

Explanatory accountability

Finally, I wish to say a few words about how judges seek to explain their work to the public in order to preserve public confidence in our systems of justice.

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[23] Juries Act 1974, section 15A (England and Wales).

[24] This is now being tried in a number of pilot courts.

[25] The Criminal Justice Act 2003 empowers the court to conduct a trial without a jury (a) when a fraud case would involve a lengthy and complex trial (section 43) and (b) when there is a serious risk of jury tampering (section 44).

In the past court proceedings were reported by journalists who were present in court. Open justice still uses that means of communication and reports of high profile criminal proceedings are common news items in newspapers and on radio and television.

In recent years, the courts have adopted other means to improve the communication to the public of criminal proceedings. It is now regular practice for judges to prepare sentencing statements which explain why the judge is imposing a particular sentence on a convicted person. Judges read out these statements in open court and, in high profile cases, communications officers of the court service issue the statements to the media, after the sentence has been imposed, to promote accurate reporting.

There have been experiments of filming for television a court hearing where the judge pronounces a sentence and the hearing of a criminal appeal. The hearings of appeals in the UK Supreme Court, including criminal appeals, are broadcast live on television and on the internet. But judges remain understandably reluctant to support the televising of criminal trials at which witnesses have often to give evidence of harrowing events.

Conclusion

The distinguished British philosopher, Onora O'Neill, began her BBC Reith Lectures in 2002 with a quotation from Confucius: "Trust should be guarded to the end: without trust we cannot stand".[26]

It is of central importance to the administration of justice that the public have confidence in the criminal justice system. There is clear evidence that in the United Kingdom our fellow citizens appreciate the involvement of citizens, who do not have legal qualifications and who are not professional judges, in the criminal justice process. Jury service can place a significant burden on a citizen, if he or she is involved in a long and complex trial. It is also a heavy responsibility. Similarly serving as a magistrate, about which my colleague will speak, also involves a heavy commitment of time and effort.

[26] Onora O'Neill, "A Question of Trust", The BBC Reith Lectures 2002, p 3.

No one system of criminal justice suits all countries and societies. But I hope that, by studying comparative law, lawyers in each country can learn from the experience of others and find things which are useful for their own systems. Judges in every country have a shared task of giving justice to our fellow citizens. I hope that by open discussion we can learn from each other in our performance of that task.

Thank you