

Freedom of Speech for judges

In the article below **Lord McCluskey** argues that in order to improve our far from effective and efficient legal system , *'Delay, expense and arbitrariness have to be exposed.; we have to find ways of eliminating notorious faults.'* He makes a plea for judges to speak out believing that from their unique position they have much to add to the debate.

He concludes *'Judges must shed their traditional restraints and speak out with the authority that comes from daily exposure to forensic reality. They should do so before it is too late.'*

As Scotland's so called justice system lurches from crisis to crisis this is a particularly prescient comment.

In supporting Lord McCluskey's call it is worth observing that our experience with the judiciary in Scotland has always been a positive one and even when a judgement went against us we could see the logic and the reasoning behind it. This is more than can be said for the utterings of the Scottish Executive that appear more prompted by self interest than by any wish to improve the justice system.

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Judges must end silence and speak openly

LORD McCLUSKEY

NO-ONE doubts the importance in a democracy of a healthy legal system. Judges must be independent of the government. Courts must have efficient procedures for dealing with cases, whether criminal (State versus individual) or civil (individuals disputing their rights). Lawyers, whether acting for the State or representing litigants, should be capable and honest. Access to courts has to be affordable. And the decision-making processes should be transparent.

If you think we have such a system, you live in cloud-cuckoo-land.

Sadly, in all countries now and throughout history, we see systems that fall far short of the ideal. Judges become tools of government, prosecutors turn into persecutors, lawyers become avaricious or slipshod, expensive cases drag on interminably. We can claim little more for our system than that it stands comparison, in terms of reputation, efficiency, affordability and transparency, with the systems we see in other wealthy democracies, such as the United States, France and Italy, and is second to none in terms of the independence of the judiciary and the availability, at a price, of experienced and competent lawyers.

But the struggle to improve the system goes on: it is a work in progress. Everyone - citizen, politician, litigant - is entitled to add his voice, whether constructive or critical. Delay, expense and arbitrariness have to be exposed; we have to find ways of eliminating notorious faults. But, having said "everyone", there is one group whose members are uniquely qualified to know the system's weakness from the inside but who operate a self-denying ordinance. Refraining from public comment, they leave the field to others.

Who? Of course, it is the judges. Their tradition is not to respond to criticism, even when it gets personal, and to hope, mostly in vain, that the tiny minority who read and understand

reasoned legal judgments will explain them to the rest, who don't. Occasionally an Appeal Court will make an outspoken criticism of the system, but citizens who read the reasoned judgments of the Appeal Court are as rare as faithful spouses in Coronation Street. Judges speak as if in a soundproofed room: their lips move, but few hear their words.

Should they come out and join the public debate, abandon their monastic silence and engage in verbal, intellectual argument with politicians and newspapers? I pose the question knowing that some serving judges, including Lord Scarman, Lord Denning and a few Scots (including myself) did sometimes speak out and were not shot at dawn for doing so. I also appreciate that, behind the scenes, judges - usually collectively - contribute to the preparatory work that may result in legislative or other regulatory change. But the tradition is to stay out of sight, leaving the field to journalists and politicians. As Lord Bingham, then the most senior judge in the House of Lords, said, with more than a tinge of regret: "The old rule used to be that the best judge was the one whom readers of the Daily Mail had never heard of." In the Lords, he issued a formal statement, that serving judicial members "do not think it appropriate to engage in matters where there is a strong element of party political controversy".

It is difficult to differ from that as a statement of principle. But the danger lies in the fact that everything in our society becomes party political. Ever since Nixon realised waving the law-and-order banner was a vote winner, politicians have rushed into the realm of criminal justice. A judge - like Lord Bingham himself, holding strong views on the silliness of certain of our drugs laws - cannot express them in public without incurring the wrath of those who believe any reconsideration of drugs policy is the appeasement of wickedness. Politicians who talk about being "tough on crime, tough on the causes of crime" cast a party political shadow over the whole field of justice.

I reject the view that judges should bite their lips and remain silent just because politicians have chosen to make party political issues out of crime and punishment and human rights. Judges see criminals and victims every day. They hear detailed evidence about crime and police work. They observe prosecutors and defence lawyers slugging it out in court. They apply human rights law in real life, not just on paper. They are irritated by delay and familiar with all the excuses that are trotted out. Understanding the rules of evidence and procedure, they are well able to identify and suggest remedies for faults that obstruct justice. They know as well as anyone how waste and expense mount up. More importantly, they know how countless, spur-of-the-moment, ill-considered rules and regulations inhibit the creation of a coherent sentencing philosophy that might command public respect.

At present, the reform agenda is in the hands of politicians and civil servants who have little direct experience of how the justice system works. Politicians, reacting instantly to newspaper headlines about some apparently outrageous court happening, call for dramatic change: civil servants come up with paper proposals for reform that practitioners know will not work.

Judges, without fear of being labelled partisan, must find ways to enter the public debate to help devise sensible, practical solutions. They could start by making their own reasoned judgments more intelligible. Judicial reasoning is necessarily abstruse, because law and life are complex. But judges could help the public, and the media, to understand their decisions if they included in their judgments a precis, explaining in clear words the essence of their reasoning.

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