The Effect of Court Reforms on the Principle of Open Justice

Introduction

I am writing this submission as a Professor of Law at the University of Exeter. I was part of the Civil Justice Council’s Online Dispute Resolution Advisory Group, chaired by Richard Susskind. The Report of the Online Dispute Resolution Advisory Group stated that technology should be used to deliver innovative and new ways of working as opposed to merely delivering a means of systematising the traditional way of operating courts. It means considering how principles can be developed within the system rather than lost in the drive to substitute access to the court and tribunals.

My submission concentrates specifically upon the principle of open justice which was raised as a concern in the 2018 Report of the Public Accounts Committee. It focuses on civil justice in the main. I argue below that for the requirements of open justice to be delivered by court reform, the system itself should be designed with clear and transparent processes. This can be achieved by using technology to capture data which can be used to educate and inform the public. At present there is little data available on the types of cases going through the courts; outcomes of cases, amounts of claim, categories of claimants and defendants, etc. Civil justice has been defined as a ‘public good’, but there is a large research gap in terms of understanding what works and how to help the system to become more effective.

The impact of court reform on open justice

Open justice is recognised as a fundamental principle underpinning the justice system and as such, any substantive change in the justice system should consider how to find meaningful ways to deliver transparent processes to the public. In R v Sussex Justices ex p McCarthy, Lord Hewart CJ refined the idea, stating, “….a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done”. In Broadcasting Corporation of New Zealand v Attorney General, the court stressed the importance of public confidence in the justice system:

“It is a matter as well of maintaining a system of justice which requires that the judiciary will be seen day by day attempting to grapple in the same even fashion with the whole generality of cases. To the extent that public confidence is then given in return so may the process may be regarded as fulfilling its purposes.”

Open justice is written into Article 6 ECHR which preserves the right to a fair and public hearing. Systems should be designed so that the presumption is that cases will be heard in public even though the principle is never absolute. Open justice holds courts accountable through its demand for transparency. In theory, open justice allows the public to appreciate

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1 Civil Justice Council Advisory Group on Online Dispute Resolution Report (Civil Justice Council, February 2015), 1.3 & 1.4.
the role of the court as both an instrument of the constitution and the executive arm of the state. Symbolic access is signified, in the courtroom, by the presence of the public gallery and the press benches. In the case of *R (on the application of UNISON) v Lord Chancellor*, Lord Reed said that the court is more than a service to the user and access to the courts is not of value only to the particular individuals involved in a dispute but is fundamental to the rule of law and society. A recent survey has also found that the public value justice as much as health and education.

It is unclear how the HMCTS Reform Programme intend to meet the requirements of the open justice principle when processes will take place online rather than physically in a building where people can attend. In addition, the intention of the HMCTS reforms is that the number of hearings should be reduced. Alternatives are being considered in relation to different types of tribunal and court process. It is recommended, for example, that there should be early neutral evaluation (ENE), mediation or simpler cases resolved on the papers. The goal of the HMCTS Reform Programme is that only the more complex or higher value cases would go to a hearing. This policy is exemplified by the number of courts closing or subject to closure at the present time. Where it is likely that online processes and video hearings will replace the traditional courtroom the ability of the public to attend proceedings will be reduced. HMCTS has proposed a new system of ‘public viewing centres’, available in public buildings and would give people who attended, the opportunity to view virtual hearings as they take place. The idea of the public viewing centre is that it would act as a new form of open justice as it would operate to replace what people would previously have seen in open court. There is currently little detail available about how ‘public viewing centres’ would function, but practically, such devices would be unlikely to meet the weighty demands of the principle of open justice.

Transparency is vital to inform and educate the public about the workings of the court and thereby ensuring the accountability of the judiciary ‘Publicity is the very soul of justice. It keeps the judge himself, whilst trying, under trial’.

In the past, newspaper coverage of court trials was far more prolific than it is today. Local newspapers employed court reporters who would base themselves in the court building. In 2018, local newspapers are declining in number and consequently, there are fewer local reporters and less media coverage of what happens in the courtroom. Closure of courts also makes them more inaccessible to people who are, for example, working or have young families. The lack of regional or local press coverage is problematic for a system that relies on a more symbolic attachment to open justice. It is hard to know whether members of the public do attend as no data is currently collected on the reasons for public attendance at court proceedings.

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4 *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51.
7 There were 491 County Courts in 1847 but now only 173 and more are set for closure. See: Ministry of Justice, ‘Fit for the Future: transforming the court and tribunal estate’ (Ministry of Justice, 2018).
The use of data to enrich open justice

The introduction of new digital processes, through the HMCTS Reform Programme challenges the assumption that the ‘hearing’ is the main focus of the court process: the only event where justice can be observed taking place. Online exchanges or asynchronous proceedings are likely to take up a far larger percentage of court time than in the past. One consequence of the proposed changes is that, as far as civil justice is concerned, there is a growing priority on dispute avoidance and dispute resolution so that the hearing itself becomes less of an ‘event’. The HMCTS Reform Programme intends that, where appropriate, determination will be made on the papers and active case management and ODR tools will encourage settlement. Consequently, if the rules on open justice only focus on the transparency of the hearing, rather than the proceedings more generally, there is the potential that the system will see much of its work taking place behind the scenes.

The greater use of data to inform the public as to the types of cases before the courts, length of times taken to go to court, settlements and hearings would greatly enhance public understanding of justice. Data flags used to collect information, such as types of cases etc, could be created to make data available to inform court users as to the working of the court beyond merely the hearing. One successful example of this is the Civil Resolution Tribunal in British Columbia. Data is published on a regular basis, detailing case types, resolutions, etc. This information is available on a regularly updated and accessible website allowing for greater transparency concerning the types of cases handled and the point of resolution as so providing information to the public. Data is actively collected and compiled, based on a concept of ‘continuous improvement’. It allows the Tribunal itself to have a much greater understanding of public engagement with its services and so permits a cycle of continuous amendments and changes centred upon how different elements / services are being utilised. This is one method of enhancing transparency that moves the working of the court away from a focus on the ‘hearing’.

The HMCTS Reforms are not currently designed with the principle of transparency in mind. Whilst some data can be collected the current method of collecting information makes it difficult to comprehensively understand the needs of court users and for researchers to be able to access sufficient data to effectively assess and evaluate the way the system is used. The current design also makes it difficult for HMCTS to feedback to the public any real data on the effectiveness of the system for particular cases, etc.

Conclusion

11 Sir Geoffrey Vos, ‘Debate on how the adoption of new technology can be accelerated to improve the efficiency of the justice system’ (The Foundation for Science and Technology, 20th June 2018).
14 This system was praised by the LCJ: Lord Burnett, ‘The Age of Reform’ Sir Henry Brooke Annual Lecture, 7th June 2018.
Digitalisation of court processes has the opportunity to deliver so much more than efficiency of court services. It can increase access to justice through the process of designing a court process that also aims to deliver legal education as a means of increasing the transparency of the justice system. Technology brings opportunities to open the courts wider than the physical doors of the court building can swing. The aim of the open justice principle is to promote confidence in the justice system as a whole and the online court offers the possibility to build a public legal education approach into the structure of the new system through the collection of data which can be used to inform and educate the public and provide a base for deep research.

The principle of open justice can be modernised and reviewed. It should be more than merely reproducing a public gallery which requires people to visit a court, which could potentially be a distance away, as is currently proposed by HMCTS. In *R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates’ Court*, the Court of Appeal said that as court proceedings become more paper-based, transparency requires that documents used in court should be available to the media. The hearing itself had been conducted in open court but Lord Justice Toulson said that, “The practice of the courts was not frozen”, and that as court practices changed then the principle of open justice should alter to suit its purpose which is “...to enable the public to understand and scrutinize the justice system, of which the courts are the administrators”. Similarly, this principle should apply to JMCTS Reforms.

HMCTS Reform could give greater attention to planning new processes to reflect transparency and open justice principles to enable greater public understanding and easier evaluation and to demonstrate a true commitment to research and evaluation. Design of processes around the collection of data enables greater understanding and a more open system, meaning the effect of reforms is much easier to measure.

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15 *R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates’ Court* [2012] EWCA Civ 420

16 *R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates’ Court* [2012] EWCA Civ 420, 80.

17 *R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates’ Court* [2012] EWCA Civ 420, 79.