

JUSTICE

“SEEN TO BE DONE” OR “SEEM TO BE DONE”?

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HONG KONG CHAPTER

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The principle of open justice finds its origin in the common law and retains its force in many common law jurisdictions, including Hong Kong. The principle is of constitutional significance. In the important House of Lords decision, *Scott v Scott* decided in 1913, Lord Shaw described the principle as “a sound and very sacred part of the constitution of the country and the administration of justice”. His Lordship went on to say, when rejecting the proposition that the courts could create new categories of exclusion: “to remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand”².

¹ This address draws on two earlier addresses J J Spigelman “Seen to be Done: The Principle of Open Justice” (2000) 74 *ALJ* 290, 378 and J J Spigelman “The Principle of Open Justice: a Comparative Perspective” (2006) 29 *University of NSW LJ* 147. The interaction with the principle of a fair trial is considered in another address J J Spigelman “The Truth Can Cost Too Much: The Principle of a Fair Trial” (2004) 78 *ALJ* 29. These addresses are accessible on the NSW Supreme Court website www.lawlink.nsw.gov.au/sc.

² *Scott v Scott*.

The constitutional significance of open justice is, of course, now manifest in Article 10 of the Hong Kong Bill of Rights. The Hong Kong Court of Appeal affirmed the principle recently in *Asia Television Ltd v Communications Authority* 2013 2 HKLRD 354 @ [19]-[36]. Chief Judge Cheung formulated ten “basic principles” relating to open justice. This was a comprehensive synthesis of prior case law on the centrality, the significance and the purpose of the principle, together with key categories of its application.

Seen to be Done

In the discourse of common law jurisdictions, the principle of open justice is most frequently expressed in the form of an aphorism attributed to Lord Chief Justice Hewart in his judgment in *R v Sussex Justices Ex parte Macarthy*³:

“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.”

³ *R v Sussex Justices; Ex parte Macarthy* [1924] 1 KB 256 at 259.

Lord Hewart's pithy aphorism encapsulated a proposition that had been long known and expressed in different ways. Another articulation is that of Lord Atkin, who once said: "Justice is not a cloistered virtue"⁴.

Lord Hewart was the Solicitor General in Lloyd George's government and, when F. E. Smith became Lord Chancellor, was promoted to Attorney General. British practice then was that an Attorney General had a right to be appointed Lord Chief Justice of England, if the office fell vacant during his term of office. When that occurred in 1921, Lloyd George refused to dispense with Hewart's services, or at least refused to risk a by-election. He promised to appoint Hewart as soon as he could. Accordingly, a High Court Judge aged 78 was appointed in his stead. Lloyd George protected Hewart by obtaining an undated, signed letter of resignation from that appointee. The very next year that new Lord Chief Justice was astonished to read of his own resignation in *The Times*. Hewart was Lord Chief Justice from 1922 to 1940.

These days Lord Hewart is probably best remembered for his publication *The New Despotism*, a series of newspaper articles published as a book in 1929. This was an attack on the rising power of the bureaucracy, which he expressed in intemperate and politically

⁴ *Ambard v Attorney General for Trinidad & Tobago* [1936] AC 322 at 335.

charged language, as well as advancing a ridiculous, conspiratorial thesis. Such conduct was unprecedented by a senior English judge and has never been imitated since. However, the basic themes continue to resonate today, as Lord Bingham indicated in his lecture entitled “The Old Despotism”, whilst distancing himself from the partisan vitriol of his predecessor⁵.

Must we attribute the open justice aphorism to Lord Hewart? If we do, the proposition that “justice must be seen to be done”, could hardly have a less auspicious provenance. Even the *English Dictionary of National Biography*, which usually confines its entries to the bland list of facts customarily found in a *Who’s Who*, could not contain itself in the case of Lord Hewart. It described him as:

“Brilliant advocate; less successful as judge through tendency to forget he was no longer an advocate”.⁶

Similarly, Lord Devlin wrote in 1985:

⁵ See His Lordship’s lecture “The Old Despotism” delivered in May 1999 and published in Tom Bingham *The Business of Judging: Selected Essays and Speeches* Oxford University Press, (2000) pp195-210. Most recently see Stephen Sedley *Lions Under the Throne: Essays on the History of English Public Law* Cambridge Uni. P., Cambridge 2015 esp @ 29-31.

⁶ *The Concise Dictionary of National Biography*, Vol II, Oxford University Press (1992) p1413; see also *Simpson Biographical Dictionary of the Common Law* London, Butterworths (1984) pp237-238.

“Hewart ... has been called the worst Chief Justice since Scroggs and Jeffries in the seventeenth century. I do not think that this is quite fair. When one considers the enormous improvement in judicial standards between the seventeenth and twentieth centuries, I should say that, comparatively speaking, he was the worst Chief Justice ever.”⁷

Lord Hewart may very well have presided over the worst conducted defamation trial in legal history:⁸ one Hobbs suing the *Nottingham Journal*. Of the litany of misconduct found by the Court of Appeal to have been committed by Lord Hewart during the course of this trial, it is sufficient to note the following:

- Rulings were made against the Plaintiff without calling for submissions from Counsel for the Plaintiff.
- His Lordship accused the Plaintiff, in front of the jury, of fraudulently concealing documents and failed to withdraw the accusation when informed that the document had in fact been disclosed.

⁷ Lord Devlin *Easing the Passing: the Trial of Dr John Bodkin Adams* Bodly, London (1985).

⁸ *Hobbs v Tinling and Company Limited* [1929] 2 KB 1.

- He permitted two days of cross-examination on matters of bad reputation, including allegations of criminal conduct which had never been particularised.
- His Lordship received communications from the jury which were not disclosed to counsel.
- He failed to give the jury any summing up or any directions as to the limited use they could make of cross-examination of the plaintiffs.
- He failed to leave critical issues to the jury.
- When the jury indicated a tentative view in favour of the Defendant, his Lordship orchestrated an early end to the trial, before they changed their minds.
- He then refused to permit an adjournment of a second defamation trial against the same Defendant - suggesting the same jury should hear the second case immediately. He thereupon entered judgment for the Defendant in the absence of counsel for the Plaintiff.

The reputed author of the aphorism “justice must be seen to be done”, never indicated to the jury that they were entitled to ignore his Lordship’s numerous expressions of opinion on the facts or his adverse

comments about the veracity of the Plaintiff, upon which grounds of appeal the Court of Appeal found it unnecessary to rule, being content with the observation of Lord Justice Scrutton, in accordance with the demure standards of the time, that:

“I regret that, with much better grounds available, it was thought right to insist on them.”⁹

Many would wish that appellate courts were still so reticent.

Again I ask, must we continue to attribute the important aphorism about open justice to such a judge?

The last word from the *Nottingham Journal* case belongs to Lord Sankey. In his judgment, his Lordship said, with reference to the false accusation of fraudulent non disclosure of documents, that it was “unfortunate that the Lord Chief Justice did not appreciate” the correctness of certain submissions made to him. Lord Sankey concluded:

⁹ *Hobbs v Tinling* at 33.

“The Bar is just as important as the Bench in the administration of justice, and misunderstandings between the Bar and the Bench are regrettable, for they prevent the attainment of that which all of us desire - namely, that justice should not only be done, but should appear to have been done.”¹⁰

His Lordship cited no authority for this proposition. Perhaps he was indulging in a little whimsy. Alternatively, perhaps Lord Sankey, who six years earlier had merely concurred with Lord Hewart’s judgment in *Rex v Sussex Justices*, was giving us a hint as to the true origins of the aphorism. For myself, I am content for the future to quote Lord Sankey.

The Scope of the Principle

The principle of open justice is one of the most pervasive axioms of the administration of justice in common law systems. Jeremy Bentham, no friend of the common law – he suffered from the naïve delusion that all law could be written down with uncontestable precision

¹⁰ At 48.

in what he called a Pannomion - once encapsulated the argument for open justice:

“Publicity is the very soul of justice. It is the keenest spirit to exertion and the surest of all guards against improbity. It keeps the judge, while trying, under trial.”¹¹

The fundamental rule is that judicial proceedings must be conducted in an open court to which the public and the press have access. A court cannot agree to sit in camera, even if that is by the consent of the parties. The exceptions to the fundamental rule are few and are strictly confined. As I have indicated, the inherent power of a common law court to develop new circumstances in which the public may be excluded is now spent. Sitting in public is part of the essential nature of a court of law and any new exception to the principle can only be created by statute¹².

¹¹ Bowling (ed) *Works of Jeremy Bentham* (1843) Vol 4 at 316-317.

¹² *Scott v Scott* [1913] AC 417 at 473, 477; *Dickason v Dickason* (1913) 17 CLR 50 supra; *McPherson v McPherson* [1936] AC 177; *Russell v Russell* (1976) 134 CLR 495; *John Fairfax Publication Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344 esp @ [51]; *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* [2004] 3 WLR 611; *Prince Jetri Bolkia v Brunei* [2007] UKDC 62 @ [15]; *Al Rawi v The Security Service* [2011] UKSC 34; [2012] IAC 131 esp @ [10]-[11].

The principle of open justice informs and energises fundamental aspects of common law procedure and is the origin, in whole or in part, of numerous substantive rules.

For example, the requirement of due process or natural justice or procedural fairness – both the obligation to give a fair hearing and the importance of the absence of bias in a decision-maker – is in part based on the importance of appearances¹³. In common law jurisdictions the test of reasonable apprehension of bias is an objective one. It is a question of what fair minded people – not just the parties, but the public at large – might reasonably apprehend or suspect.

How significant the appearance of proper conduct in the administration of justice must be is a matter that can vary over time. It is inconceivable that today, in any common law jurisdiction, including Hong Kong, that a court of appeal would decide two cases in the same way as the English Court of Appeal did in about 1970.

In one case the Court of Appeal held that a trial did not miscarry despite the fact that during the accused's counsel's address to the jury

¹³ See *Re Pinochet* [2000] 1 AC 119; *Pullar v United Kingdom* (1996) 22 EHRR 391 at [30]; *Webb & Hay v The Queen* (1994) 181 CLR 41 at 47 and particularly the list of cases set out in n 36; *Murray v Legal Services Commission* (1999) 46 NSWLR 224 at 242 [6]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

the chairman of Quarter Sessions kept sighing and groaning and was heard to say “Oh God” a number of times¹⁴.

In the other case the Court of Appeal rejected an allegation that a murder trial miscarried when the judge appeared to be asleep for 15 minutes. The Court was satisfied, by perusal of his summing-up, that he must have been awake. The mere appearance of being asleep was not enough. The Court referred to the principle that “justice must be seen to be done” as a “hallowed phrase” and dismissed the appearance of the judge as being asleep as a “facile” application of the principle¹⁵.

An important manifestation of the principle is also the foundation of judicial accountability. I refer to the obligation to publish reasons for decision. This obligation requires publication to the public, not merely the provision of reasons to the parties¹⁶.

¹⁴ See *R v Hircock* [1970] 1 QB 67.

¹⁵ See *R v Langham* (1972) Crim LR 459.

¹⁶ See, e.g. *Public Service Board v Osmond* (1986) 159 CLR 656 at 666-667; *Pettit v Dunkley* (1971) 1 NSWLR 377 at 382; *Housing Commission of NSW v Tatmar Pastoral Co Limited* (1983) 3 NSWLR 378 at 385-386; *Soulezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 273, 277 and 281. For a detailed treatment of the relationship between open justice and judicial reasons, see Jason Bosland and Jonathan Gill “The Principle of Open Justice and the Judicial Duty to Give Public Reasons” (2014) 38 *Melb.Uni.L.Rev* 20.

Judges can no longer rely on the advice which Lord Mansfield gave to a general who, as Governor of an island in the West Indies, would also sit as a judge. Lord Mansfield said:

“Be of good cheer – take my advice, and you will be reckoned a great judge as well as a great commander-in-chief. Nothing is more easy; only hear both sides patiently – then consider what you think justice requires and decide accordingly. But never give your reasons – for your judgment will probably be right, but your reasons will certainly be wrong”¹⁷.

Numerous other specific rules are influenced by the principle of open justice. To give a few examples: the prohibition of undue interference by a judge in proceedings; the prohibition of improper conduct by a court officer with respect to the trial¹⁸; the determination of the weight to be given to the public interest when ruling on a claim of

¹⁷ Quoted in Jackson *Natural Justice* (2nd ed, 1979) p97.

¹⁸ See, e.g. *Cleaver* (1953) 37 Cr App R 37 at 39-40; *R v Racz* [1961] NZLR 227 at 232; *Yuill v Yuill* [1945] 1 All ER 183 at 185; *R v Barney* [1989] 1 NZLR 732; *Re JRL*; *Ex parte CJL* (1986) 161 CLR 342 at 349-350.

privilege¹⁹; the proposition that a permanent stay of criminal proceedings will be extremely rare²⁰.

The principle of open justice raises many issues about the administration of justice relevant to the media. In the landmark case of *Attorney General v Leveller Magazine*, Lord Diplock said the principle of open justice requires that the Court should do nothing to discourage fair and accurate reports of proceedings²¹. This has been described as a “strong” but not a “mechanical” rule²². However, it is appropriate to speak of a right to publish a report of court proceedings²³.

Access by the media to legal proceedings and judicial decisions is, perhaps, the most frequent source of litigation about the principle of open justice. Matters involving the requirement of a fair trial, such as suppression orders and pre-trial publicity, or other public interests, such as protecting the right to privacy or commercial confidentiality, give rise to difficult judgments, because conflicting public interests must be balanced.

¹⁹ See *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582 at 593-594; *Alister v The Queen* (1984) 154 CLR 404 at 415; *Ellis v Home Office* [1953] 2 QB 135 at 147.

²⁰ See *Jago v District Court (NSW)* (1989) 168 CLR 23 at 50; *Subramaniam v The Queen* (2004) 79 ALJR 116.

²¹ See *Attorney General v Leveller Magazine* [1979] AC 440 at 450; see also *John Fairfax & Sons v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 476-479; *Hodgson v Imperial Tobacco Limited* [1998] 1 WLR 1056 esp at 1068-1073; *Amber v Attorney General for Trinidad & Tobago* [1936] AC 322 at 345.

²² See *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 at 603.

²³ See *Esso Australian Resources Ltd v Plowman* (1995) 183 CLR 10 at 43.

Public Confidence

Perhaps most significantly, the principle of open justice is essential for the maintenance of public confidence in the judiciary and the administration of justice. Indeed, that was, properly listed as Principle 1 by the HK Court of Appeal in the *ATV* case.

In this respect a critical function of open justice is to ensure that victims of crime and the community generally understand the reasons for criminal verdicts and sentences²⁴. The significance of this function was well expressed by Chief Justice Burger, in *Richmond Newspapers v Virginia*:

“Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people’s consciousness the fundamental, natural yearning to see justice done - or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is “done in a corner [or] in any covert manner.” It is not enough to say

²⁴ See *Jago v District Court (NSW)* supra at 49-50; *Pearce v The Queen* (1998) 194 CLR 610 at 622 [39]; *R v Jurisic* (1998) 45 NSWLR 209 at 221.

that results alone will satiate the natural community desire for “satisfaction.” A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society’s criminal process “satisfy the appearance of justice”, and the appearance of justice can best be provided by allowing people to observe it.

.....

People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case.”²⁵

Similarly, Lord Steyn put it:

“A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all

²⁵ *Richmond Newspapers Inc v Virginia* 448 US 444 (1980) at 571-572,

who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the value of the rule of law.”²⁶

It is the combined effect of the numerous manifestations in specific legal rules based on the principle of open justice, together with the institutional strength of an independent judiciary and an independent legal profession, that underpins public confidence in the administration of justice. This is, in my opinion, the principal social contribution of the principle. There is no doubt in my mind that Hong Kong’s inheritance of the common law tradition, now reinforced by the provisions of the Basic Law and the Bill of Rights, justifies such public confidence.

²⁶ *Re S (A Child) (Identification: Restrictions on Publication)* supra at 607. See also *R v Legal Aid Board Ex parte Kaim Todner (A Firm)* [1999] QB 966 at 977.

Seem to be Done

There are many reasons to believe that elsewhere in the People's Republic of China, justice has not generally been "seen to be done", but merely "seem to be done". For a decade or so I had frequent interchange with the judiciary of the Peoples Republic. That came to an end some five years ago, when I resigned as Chief Justice of New South Wales. So I am a little out of touch. It appeared to me, during that interaction, that many of the practices of judicial decision-making in the PRC, particularly those which fail to implement the numerous sub-rules of the principle of open justice, were such, in their cumulative effect, as to give rise to limits on public confidence in the system.

The first of a number of occasions on which I participated in delegations to lecture at the National Judges' College in Beijing was in November 2001, in the immediate aftermath of the promulgation of a new Code of Conduct for the judges of China. This was very early in the transformation of the Chinese judiciary, from a body that presided in military style uniforms, to the public manifestation of institutional autonomy, both in court dress and in a significant investment in court infrastructure. This Code established, for the first time, a duty on

judges to give reasons for their decisions. Many of the judges, particularly the older ones, expressed dismay about this completely novel requirement.

At this stage, the judiciary were still significantly influenced, and in some areas dominated, by the early appointments to the judiciary in the immediate aftermath of the devastating Cultural Revolution. The creation of a new judiciary happened to coincide with the downsizing of the People's Liberation Army. Indeed, by proclamation issued on one day, some 55,000 former officers of the PLA were appointed as judges throughout the country. No doubt the training of these former officers was useful to ensure that decisions would be made, but it was not a background with a tradition of explaining themselves in writing.

This tradition has been superseded by a new generation of legally trained judges. I anticipate that the significant changes I witnessed have continued since I lost contact with the PRC judiciary.

As I have indicated, the conduct of justice in open court is one of the key elements that creates and maintains the reputation of the judiciary for independence. Such a reputation is, as I have said, vital to ensure public confidence in the administration of justice. The conduct

of legal proceedings in open court, and the delivery of reasons after argument and submissions in open court, ensures that a person, not directly involved in the proceedings, has no influence on the outcome of those proceedings. The independence of the judiciary in this sense was not obviously a feature of the administration of justice in the PRC as I witnessed it. Influence by persons extraneous to the proceedings, on behalf of one of the parties to the proceedings, can occur more readily in the absence of open justice.

In my numerous meetings with Chinese judges, they were frank about the extent of corruption in the judiciary. Nothing is more corrosive of open justice than judicial corruption. I would be interested in finding out how the present anti-corruption drive is impinging on the judiciary.

I did discover that it was no longer the case that the first document on any court file was the instruction from the Party as to the outcome of the case. That practice had stopped. However, there was every reason to believe that, where thought appropriate, such communications still occurred. The judicial leaders I spoke to acknowledged the Constitutional authority of the Party.

There are other practices which are not in accordance with open justice, as we understand it in common law systems. Judges refer matters for “advice” to higher levels in the hierarchy of the court, or in the court structure. The principle that an individual judge is independent, not only of parties but of his or her superiors, is not accepted in the PRC. Indeed, when I told Chinese judges, particularly other Chief Justices, that I myself could not tell another judge of my court how to decide a case, I was met with complete disbelief. What, after all, is the point of being a chief justice? In such a system, the real decision-making process may appear to be opaque.

In such respects the distinction between “seen to be done” and “seem to be done” is fundamental. It is very similar to the distinction between “rule of law” and “rule by law”. These are completely different ideas.

The words *fazhi guojia* in Article 5 of the Constitution of the People's Republic of China can be translated in either way. (The same is true of the terminology *negara hokum* in Bhasa Indonesian). Official translations to English of the 1999 Constitution generally translated these words as “socialist country ruled by law”. After considerable

debate within the Chinese legal profession and judiciary, as well as international commentary on the distinction, the 2004 Constitution is now generally translated in official documents as “socialist country under rule of law”. This also only “seems” to be the case. The original translation appears to be more accurate.

Economists often speak in terms of an economy having a “comparative advantage” with respect to a particular product or service. There is no doubt in my mind that the administration of justice in Hong Kong has such a comparative advantage, by reason of the acceptance of the full gamut of rules and practices that are based on the principle of open justice.