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'"SOMETHING MORE, SOMETHING LESS": THE CONTEMPORARY MEANING OF OPEN JUSTICE'

WEDNESDAY 16 OCTOBER 2019

1. I would like to begin by acknowledging the traditional custodians of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their Elders, past, present and emerging. For many years, our legal system failed to recognise their unique culture and connection with this land, leading to a cycle of oppression and disadvantage from which escape was difficult. Change was slow in coming, and even now, is ongoing. As a result, many Indigenous Australians today will, unfortunately, still face harsh treatment at the hands of our system of justice.

2. The reality of the treatment of Indigenous people can be confronting. But it is not something which will improve by being ignored. While it may be uncomfortable to acknowledge, the visible presence of injustice should challenge us to do better. Indeed, it is only when we are content for injustice to remain invisible that the truly pernicious problems emerge. The invisibility of the treatment of Indigenous Australians over many years led to not only to a lack of general public knowledge of the manner in which they had been mistreated, but to a perpetuation of such mistreatment.

3. I do not think anyone here needs to be reminded of this history. But, I think it does have something to say about the significance of "open justice" for our legal system at large and its importance. Just as a lack of transparency contributed to a significant extent to a lack of knowledge about the mistreatment of Indigenous Australians, in more recent times,

publication of their ongoing mistreatment in the media has led to a better appreciation of the injustice perpetrated on them and places a real pressure on those who have the power to do so to remedy those injustices. This demonstrates that "open justice" is more than a rather technocratic notion about "transparency" and "accountability" in how the courts administer justice, concerned only with how material filed or produced in court should be made available to the media.[1] To be sure, "transparency" and "accountability" are important, but I do not think they lie at the heart of the concept.

4. Rather, these values depend upon the unstated assumption that those who will be responsible for the administration of justice will be courts. This may be true now. In fact, it is almost trite.[2] But it is important to retain a sense of perspective. It was not always the case in this country, and it is still not the case in many places around the world. As we see in our own history, there is a great temptation for governments to keep the administration of justice "hidden", not simply by closing the courts to the public, but by finding a way to take a dispute outside the purview of courts altogether. This "justice" may be of a more summary or arbitrary form than that dispensed by a court applying rules of law. Inevitably, in the absence of any fixed rules or outside scrutiny, it becomes perverted.

5. It was these circumstances which enabled the relationship between Indigenous Australians and European settlers to be governed by prejudice rather than law. No doubt encouraged by the inflammatory rhetoric of the press at the time, as well as the acquiescence of the government, the settlers were uninhibited from dispensing their own vigilante justice with senseless violence on a scale the size of which may never be known. There was a failure of "transparency" and "accountability", not just because this was done out of the public view,

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1 See, eg, Supreme Court of New South Wales, *Practice Note SC Gen 2*: *Access to Court Files*, 4 October 2019.

2 At the federal level, this is made clear by *Commonwealth Constitution* s 71; see also *New South Wales v Commonwealth* (1915) 20 CLR 54. At the state level, the position is less clear, but due to the number of matters arising in federal jurisdiction, the same principle will often apply: see *Attorney-General (NSW) v Gatsby* [2018] NSWCA 254.

but because it was done without any semblance of due process or commitment to the rule of law and in circumstances where the perpetrators escaped with impunity.[3]

6. We are fortunate that we live in a society where we, on the whole, no longer tolerate this kind of behaviour. Where it has been found to occur, we expect that it will be punished through the courts. The alternative is not something which we often contemplate. But that does not mean that it is something which it is safe to forget. To avoid the possibility of temptation, we insist that justice will be administered by courts who are obliged to apply the law and that they will do so in public. It is only through the union of both of these ideas that we can ensure that the public can be confident that their society recognises and respects the rights of individuals and groups who are subject to its laws.

7. It seems to me that this is the true consideration which motivates reliance on the principle of "open justice", and the real reason why it has been described, on a number of occasions, as a "constitutional principle"[4] which goes to the heart of our conception of judicial power.[5] Now, I do not mean to say that this motivation or rationale has the status of a legal principle which ought to be directly applied in lieu of the more traditional definition of "open justice". I merely aim to point out that, when we look beyond our immediate circumstances, the idea has a wider significance than we normally appreciate. In short, I would say that it reminds us that the antithesis of "open justice" is not, as some might assume, a courtroom which closes its doors to the public in a particular case. Rather, it is a state, or any other entity with a significant degree of power or influence, which attempts to resolve disputes in secret outside the courts charged with applying the law.

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3 The "Myall Creek Massacre" was one of the few cases where there was condign punishment: see *R v Kilmeister (No 1)* [1838] NSWSupC 105; *R v Kilmeister (No 2)* [1838] NSWSupC 110.

4 *R (Miller) v Prime Minister* [2019] UKSC 41, [40], citing *Scott v Scott* [1913] AC 417.

5 See *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J); *Hogan v Hinch* (2011) 243 CLR 506, 530–5 [20]–[27], 541–2 [46] (French CJ), 552–4 [85]–[91] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

8. I have placed some emphasis on this idea, not as a sign of eccentricity, but to help keep things in perspective. Fortunately, in Australia, we are not presently in danger of falling into a situation where the state can dispense an arbitrary and summary form of justice to its citizens in secret outside the reach of the law.[6] We have a robust and independent system of courts which has proven capable of resisting attempts by the government to place its exercises of power beyond review.[7] In this task, the courts are aided, in no small part, by the media and whistleblowers who are prepared to call out overreach, abuse of power, and maladministration when it occurs, whether by the government or others, including the courts, and bring it to the attention of the public. Together, we ensure that they can have confidence that their rights and interests will be protected from arbitrary interference.

9. Against this background, I think that the principle of "open justice" risks becoming something of a cliché if, as sometimes occurs, it is treated as simply guaranteeing an unbridled right of access to everything that occurs or is filed in a court.[8] A right of this kind is far removed from the motivation or rationale I have identified as underlying the principle, and has never been accepted as an accurate statement of the law in this country. Many of the appeals to "open justice" which are made before the courts often fall into the trap of assuming that the right does extend so far, and there is a real possibility that this could dilute or devalue the force of the principle. Its value is cheapened if it simply becomes seen as a means for the media to attract more viewers, or for commercial parties to gain access to documents of their competitors filed in court.

10. What, then, is the relevance of the principle of "open justice" in a society which has a strong, established system of courts resolving disputes by applying the law? We find the answer to this question in the language of

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6 Cf *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42.

7 See, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *South Australia v Totani* (2010) 242 CLR 1; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1.

8 *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 520–1 [27]–[32] (Spigelman CJ).

the *Court Suppression and Non-publication Orders Act 2010* (NSW). Section 6 requires a court considering making an order under the Act to take "open justice" into account as "*a* primary objective" of the administration of justice. Section 8 requires an order to be "necessary" for the achievement of one or more overlapping purposes, all of which are related, broadly speaking, to the integrity of the justice system. In other words, the Act contemplates that there may be "objectives" of the administration of justice other than the principle of "open justice" and that achieving some of these objectives may mean that it is "necessary" to make a suppression or non-publication order.[9]

11. I think that this assumption is fundamental to the operation of the Act, and relates to the motivation or rationale for the principle of "open justice" which I outlined earlier. It exists to maintain the confidence of the public that their rights and interests under the law will be protected by the courts. This does not require freedom of access to the courts and freedom to publish everything that occurs in them in every conceivable circumstance. Indeed, there will be occasions where freedom of access and publication will directly undermine the confidence of the public, such as, most commonly, when it might prejudice the right of an accused to a fair trial,[10] might expose child victims to unnecessary distress,[11] or might disclose confidential commercial information.[12] To the extent freedom of access and publication will infringe such a right in a way which cannot be avoided by other means, it will become "necessary" to make an order restricting that freedom in order to preserve that right.

12. This much should be familiar and uncontroversial. And yet, it still seems to be treated with, at best, grudging acceptance by media organisations,

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9 *Rinehart v Welker* (2011) 93 NSWLR 311, 320–1 [27]–[31] (Bathurst CJ and McColl JA); *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52, 65–7 [45]–[51] (Basten JA).

10 Cf *R v Glennon* (1992) 173 CLR 592. See also *X7 v Australian Crime Commission* (2013) 248 CLR 92, 142–3 [124] (Hayne and Bell JJ).

11 *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1)(d).

12 See, eg, *Australian Broadcasting Commission v Parish* (1980) 29 ALR 228, 235 (Bowen CJ).

particularly when the material subject to a restriction on publication has a high profile among the public.[13] However, I do not find this reluctant attitude, whether or not truly motivated by a pious concern about "open justice", to be justified. Courts do accept the intrinsic value of "open justice" as a broad principle underlying the administration of justice in our society in the manner I have outlined above. But this comes with a corollary. If "open justice" is important for its *systemic* value, equally applicable whenever judicial power is exercised, it is difficult to say that it should be given more weight in a particular case because its subject matter already has a high public profile.

13. I think that this is well-illustrated by the recent case involving Cardinal George Pell. For some years now, but especially since the McClelland Royal Commission,[14] allegations of child sexual abuse have attracted intense interest from the public. There could be no doubt that the fact that such allegations had been made against Cardinal Pell, who already had a high public profile as the most senior member of the Catholic Church within Australia, would attract almost universal interest and generate widespread discussion. This was certainly the opinion of most media organisations around the country, if the deluge of coverage with which the public was inundated after the non-publication orders were finally lifted is anything to judge by. But does this degree of interest, on an issue which admittedly might be described as one of "public importance", mean that the principle of "open justice" has any greater weight in making a non-publication order?

14. I do not think that it does. The importance of "open justice" does not vary with the desire of the public to know about the details of a particular case, at least for the purposes of the law. If it did, then the principle would pose little obstacle to the closure of the vast majority of trials and

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13 See, eg, Amanda Meade, 'Up to 100 Journalists Accused of Breaking Pell Suppression Order Face Possible Jail Terms', *The Guardian* (online, 26 February 2019) <https://www.theguardian.com/media/2019/feb/26/dozens-of-journalists-accused-of-breaking-pell-trial-suppression-order-face-possible-jail-terms>.

14 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (Web Page) <https://www.childabuseroyalcommission.gov.au/final-report>.

hearings in all courts around the country, which is an outcome clearly contrary to its motivation and rationale. It is for this reason that I think that statements to the effect that derogations from the principle of "open justice" should be "exceptional" or "unlikely" are apt to mislead.[15] They tend to overemphasise the importance of the principle in the circumstances of a particular case, at the expense of any countervailing right or interest said to justify a departure from the principle. It is the latter which, under both the common law and statute, ought to be the proper focus of the inquiry.[16]

15. Again, I think that the case of Cardinal Pell provides a good example of the correct approach to be applied by a court considering whether to make a non-publication order. In his initial judgment,[17] Chief Judge Kidd focused, with respect, entirely properly, only on the question of whether any restraint on publication was "necessary" to prevent a "real and substantial risk to the proper administration of justice" in the form of an infringement of the right of the accused to a fair trial,[18] where two trials were being held substantially "back-to-back".[19] Answering this question involved no need for an encomium on "open justice", or to balance this principle against the right of the accused.[20] The balance had already been struck by the legislature in determining that any restraint on publication must be "necessary".[21] An express consideration of the

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15 Cf *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344, 353 [21], 360 [59] (Spigelman CJ).

16 See *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 476–7 (McHugh JA); *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1).

17 *Director of Public Prosecutions (Vic) v Pell* [2018] VCC 905.

18 Ibid [36].

19 *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344, 360 [63] (Spigelman CJ); *Nationwide News Pty Ltd v Qaumi* (2016) 93 NSWLR 384, 392–3 [35]–[36] (Bathurst CJ, Beazley P, Hoeben CJ at CL).

20 *Director of Public Prosecutions (Vic) v Pell* [2018] VCC 905, [38]–[44].

21 *Open Courts Act 2013* (Vic) s 18(1); cf *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8(1). See also *Rinehart v Welker* (2011) 93 NSWLR 311, 321 [31] (Bathurst CJ and McColl JA), quoting *Hogan v Australian Crime Commission* (2010) 240 CLR 651, 664 [31] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).

relative importance of the principle and the right in the circumstances of the particular case would have been irrelevant.[22]

16. The real issue which arose for determination at this initial stage was not even whether an order should be made, but what *scope* of order was "necessary".[23] A group of media interests contended that a non-publication order should be limited to Victoria, while the Crown and defence counsel supported an order applying throughout the Commonwealth.[24] The limitation on the scope of the order was supported by a submission that an order applying only in Victoria would be sufficient to quarantine the "vast majority" of potential jurors for the second trial from any information arising out of the first trial, and that any additional risk to the proper administration of justice arising from interstate contamination was not so significant that it could not be managed by appropriate directions.[25]

17. This submission was ultimately unsuccessful, but what is important to note is that it was both put and rejected, not on the basis of any abstract appeal to "open justice", but upon a close consideration of the relevant facts about the Australian media environment and how this might affect the right of the accused to a fair trial.[26] Indeed, the intense interest from the public in the case was a factor which was relevant only insofar as it tended *against* not making a non-publication order, rather than in favour of "open justice", by reason of the additional notoriety, and thus, likelihood of contamination, which this lent to the proceedings.[27] Thus, looking at the judgment as a whole, I do not think that there could be a clearer affirmation that, while the principle of "open justice" is the background against which it must be "necessary" for a restraint on

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22 *Director of Public Prosecutions (Vic) v Pell* [2018] VCC 905, [52].

23 Ibid [55].

24 Ibid [56]–[57].

25 Ibid [58].

26 Ibid [58]–[59].

27 Ibid [59](a).

publication to be imposed, it is not the place of the court to assess its importance in the circumstances of the particular case.

18. I find it difficult to disagree with either the approach adopted by the Chief Judge or, subject to one caveat, with the result itself. The circumstances were, as he put it, a "perfect storm",[28] involving a defendant who was a prominent public figure accused of a very topical offence, and hence, a very great risk to the proper administration of justice if one trial was allowed to contaminate the other. I was a member of a Court of Criminal Appeal which affirmed the making of non-publication orders in similar, but not identical, circumstances involving "back-to-back" trials in *Nationwide News Pty Ltd v Qaumi*,[29] and, I would submit, the results in these two cases are consistent. Ultimately, there is nothing in the principle of "open justice" which requires the public to have real-time updates on the progress of a trial, or knowledge of its outcome, where doing so would result in unavoidable prejudice to a trial scheduled to commence shortly after.[30]

19. The caveat to which I have referred is the possible futility of the non-publication orders made by Chief Judge Kidd.[31] I was able to read all about Cardinal Pell's trial simply by going to *The Washington Post* website.[32] *The Washington Post* did not consider itself bound by the order, and could have had a good constitutional defence if its publication of the trial had been challenged in the United States.[33] Courts will

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28 Ibid [47].

29 *Nationwide News Pty Ltd v Qaumi* (2016) 93 NSWLR 384.

30 Cf *Chaarani v Director of Public Prosecutions (Cth)* [2018] VSCA 299, [41], [46] (Maxwell P, Beach JA, Hargave JA).

31 See *Director of Public Prosecutions (Vic) v Pell* [2018] VCC 2125, [35] ff.

32 See, eg, Chico Harlan, 'Australian Court Convicts Once-powerful Vatican Official on Sex-abuse-related Charges', *The Washington Post* (online, 13 December 2018) <https://www.washingtonpost.com/world/australian-court-convicts-once-powerful-vatican-official-on-sex-abuse-related-charges/2018/12/12/da0d909c-fe20-11e8-a17e-162b712e8fc2_story.html>.

33 *United States Constitution* amend I. See *Sheppard v Maxwell*, 384 US 333 (1966); *Nebraska Press Association v Stuart*, 427 US 539 (1976).

increasingly have to grapple with this problem. All I will say at the moment is that one thing that courts should not do is to overreact and seek even more stringent restrictions on transparency such as the complete closure of a court where there is international interest.

20. The central purpose of my remarks this evening has been to discuss the possibility that "open justice" perhaps means both something more and something less than we commonly appreciate today. The concept means something more in that it goes beyond the mere "transparency" or "accountability" of the courts, and extends to the confidence of the public that their rights and interests will be protected by courts according to law. It means something less in that it does not itself provide the operative criterion for determining whether a restriction on publication is justified. To be sure, it is part of the background against which we apply the touchstone of "necessity", but we should be careful to ensure that we do not confuse it with a more general voyeuristic desire on the part of the public when other, more pressing rights might be at stake. As a systemic value of our legal system, "open justice" is something more certain, more fixed, and more important than that.