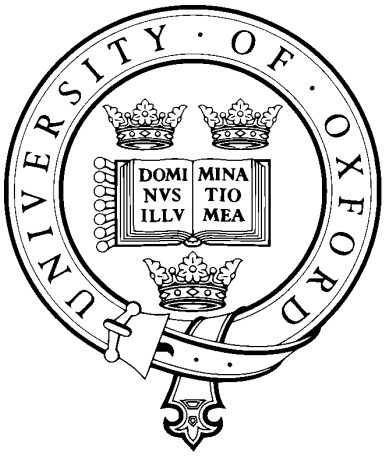
OPEN JUSTICE



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Abstract

This thesis seeks to explain the nature of the open justice principle and elaborates its justification. This thesis argues that the open justice principle's underlying idea is in the concept of “inclusivity” in that members of the public are recognised as “participants” in court adjudication alongside the litigants who are privy to a case before the court. It moves away from the conventional wisdom where court adjudication is framed purely based on the tripartite arrangement of judges and two opposing litigants (plaintiff and defendant; the prosecutor and the accused person). It also challenges the orthodoxy that regards members of the public as bystanders and observers, sitting at the periphery of the judicial process with negligible role and interest. Members of the public are given a space and assumed to be part of the court adjudication by making the adjudicatory process open, accessible and transparent. In this context, publicity is treated as the medium whereby members of the public are brought into the trial process. While acknowledging that open justice may be justified on many grounds, this research concludes that the primary factor that explains the applicability of the open justice principle in the judicial process and the recognition of members of the public as “participants” in court adjudication is because court adjudication is *a process of public enforcement or application of legal norms by the judicial authority*. It becomes the primary justification as (i) it encapsulates the basis of bringing in members of the public into the adjudicatory process; (ii) it integrates other plausible justifications which may additionally explain the need for transparency in court adjudication; (iii) it explains the inapplicability of the open justice principle in the non-judicial dispute settlement process; and (iv) it is relevant and applicable to all types of cases in both civil and criminal trials.

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Introductory Chapter

A. Introduction

English law acknowledges that it is 'of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done'.[1] The open justice principle is said to be a 'sound and very sacred part of the constitution and the administration of justice'.[2] The open justice principle is not a new legal principle, for its judicial recognition can be traced as early as 1829 when Bailey J held in *Daubney v Cooper* that:

> it is one of the essential qualities of a Court of Justice that its proceedings should be in public, and that all parties who may be desirous of hearing what is going on…have the right to be present for the purpose of hearing what is going on.[3]

In *Scott v Scott*, Lord Shaw quoted Hallam's view that ranks the guarantee of public judicial proceedings even higher than the rights of Parliament. Hallam was of the view that:

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[1] *R. v Sussex Justices Ex p. McCarthy* [1924] 1 KB 256, 259; *Re K (Infants)* [1965] AC 201, 237: Lord Devlin held that 'all justice shall be done openly.'

[2] *Scott v Scott* [1913] AC 417 (HL), 473. The constitutional significance of the open justice principle manifests historic validation it attests to the society's long tradition and values. In some countries, the open justice principle has been included in the written constitution. Article 34.1 of the Irish Constitution 1937 provides, 'Justice…save in such special and limited cases as may be prescribed by law, shall be administered in public.' Article 34 of the Constitution of the Republic of South Africa 1996 provides, 'Every person has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing of court or where appropriate, another independent impartial tribunal or forum.' Article 35 (3) (c) of the Constitution of the Republic of South Africa 1996 guarantees the accused person the right to a public trial before an ordinary court. See, *Independent Newspapers v Minister for Intelligence Services* [2008] ZACC 6.

[3] *Daubney v Cooper* (1829) 109 ER 438, 440

> civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise.[4]

Apart from the recognition as a common law principle, the need to hold a public trial is also recognised, governed and enforced through various statutory provisions,[5] rules of court[6] and Practice Directions.[7] The crystallisation of the common law principle of open justice into statutory provisions, in particular, leaves little room for disagreement about its normative force in the administration of justice.[8]

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[4] *Scott v Scott*, 477

[5] For instance, Senior Courts Act 1981, s 67, Magistrates Court Act 1980, s 121; and Armed Forces Act 2006, s 158.

[6] For instance, Tribunal Procedure (Upper Tribunal) Rules 2008, r 37 (1); Tribunal Procedure (First-Tier) (Immigration and Asylum Chamber) Rules 2014, r 27 (1); Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, r 32 (1); Civil Procedure Rules, r 39 (2), and Rule 27 of the Supreme Court Rules 2009, r 27.

[7] For example, Practice Guidance: Transparency in the Family Courts – Publication of Judgments [2014] 1 FLR 733; Practice Guidance (Court of Protection: Transparency) [2014] 1 W.L.R. 235 and Practice Direction (Criminal Proceedings) [2013] EWCA Crim 1631

[8] Many cases recognise the importance of the open justice principle. However, without a clear stipulation of statutory provisions, one may still play down the weight of affirmative judicial authorities by saying that what was positively said about open justice was not the ratio decidendi of the case. In a way, such an attempt can potentially diminish, if not negate, the value of judicial decisions. Despite Lord Shaw's strong enunciation of the open justice principle in the case of *Scott v Scott*,[8] which is one of the most widely cited judicial authorities on the subject, Jaconelli played it down on the basis that it was a mere obiter dictum. He argued that 'the case did not raise in a direct way the central elements of that subject: the right of access to the courtroom on the part of the

The fact that judicial proceedings were invalidated because of the failure to comply with the open justice principle's demand also shows the significance of this principle in our legal system. In those cases, judicial proceedings were invalidated even though there was no evidence that the infringement of the open justice principle had a direct bearing on the court's final decision.

In the case of *R (on the application of O'CONNOR) v Aldershot Magistrates Court*,[9] the first claimant was the founder of a group called "Fathers4Justice". He was charged with a public order offence, and on the day of his trial, his supporters were barred from the court building by court managers for fear of disrupting the judicial hearing. The decision was made without prior consultation with the magistrates. The first claimant then asked the magistrates to allow his supporters to attend the court hearing, but it was to no avail. It was thought that entry to the court building was an administrative issue for court managers to decide and, after all, the trial was still in open court as a journalist was present. The trial was later adjourned pending the judicial review hearing of the decision to exclude the members of the public before the High Court.[10]

There were two issues before the High Court: (i) whether the refusal to allow entry to the court building was lawful and (ii) whether the refusal invalidated the

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members of the public. The dispute did not concern, say, the right of an individual member of the public to remain seated in the gallery--tested…Nor was the issue one in which the losing party in a case, to the hearing of which the public had been denied access, was seeking on that account to impugn the validity of proceedings. Strictly, Scott v Scott was [an] authority only on the lack of power, at common law, even with consents of the parties, to direct the trial in camera of a nullity suit in the interest of public decency.' See, Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002), *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002), 9

[9] *R (on the application of O'CONNOR) v Aldershot Magistrates Court* [2016] EWHC 2792 (Admin)

[10] Ibid, [2]-[13]

trial as it was not a public hearing.[11] The court held that the decision of Her Majesty's Courts & Tribunal Services staff and of the magistrate to refuse entry was unlawful, and therefore, no valid proceedings took place on that day.[12] In the proceeding before the High Court, the Courts and Tribunals Service 'submitted that it had its own free-standing power as [the] occupier of the building to exclude individuals, and it could exercise that power without reference to the judiciary.' The court rejected this argument, and the reason for doing so can be seen in Justice Leggatt's emphasis that:

> It is a necessary incident of the right to attend a criminal trial (or other public court hearing) that a member of the public may enter the court building in which the trial is taking place. We cannot accept the submission made by counsel for [Her Majesty's Courts & Tribunal Services] that, as the occupier of the building in which the Aldershot Magistrates' Court sits, [Her Majesty's Courts & Tribunal Services] has the ordinary power of an occupier to give or withhold permission to enter the building or to impose conditions on an entry in its discretion and subject only to general public law constraints. Access to a court building for the purpose of attending a public hearing is a matter of legal right and does not require any express or implied permission from the occupier. It is analogous to the right of the public to attend meetings of public bodies conferred by the Public Bodies (Admissions to Meetings) Act 1960, which was considered in Laporte v Metropolitan Police Commissioner [2015] EWHC 3574 (QB). But in the case of court proceedings, in contrast to meetings of local authorities, there was no need to enact legislation

[11] Ibid, [16]

[12] Ibid, [53]

> to confer a right of admission on members of the public because the right of the public to be present at court hearings is an ancient common law right.[13]

The court further explained that although a court officer may lawfully exercise statutory power under section 53 of the Courts Act 2003[14] without reference to the judiciary in obvious situations, such as when an individual is violent, the present case, on the contrary, was a 'paradigm example of a situation where reference to the court was essential.'[15] The court held:

> The decision to exclude people who wanted to attend Mr O'Connor's trial was bound to be controversial, and the question of whether their exclusion was reasonably necessary to enable court business to be carried on without interference or delay or to maintain order was, therefore, one on which the court needed to rule.[16]

A similar decision to invalidate the proceeding for failure to comply with the open justice principle can be seen in *Storer v British Gas Plc*.[17] It was held in this case:

> that the door with the push-button lock was an actual physical barrier which prevented all public access; that, accordingly, the tribunal was sitting in private and it did not have jurisdiction to do so; that the mandatory obligation…to sit in public was,

[13] Ibid [2016] EWHC 2792 (Admin), [28]

[14] This provision gives a court security officer the power to restrain, remove and exclude people. Section 53 (3) of the Courts Act 2003 allows a court security officer to exclude or remove from a court building any person for the purpose of '(a) enabling court business to be carried on without interference or delay; (b) maintaining order; (c) securing the safety of any person in the court building.'

[15] *R (on the application of O'CONNOR) v Aldershot Magistrates Court* [2016] EWHC 2792 (Admin), [35]

[16] Ibid, [35]

[17] *Storer v British Gas Plc* [2000] 1 WLR 1237

> on the facts, both fundamental to the function of the tribunal and important in its own right and raised the inference that the failure to do so rendered its decision unlawful; and that, accordingly, the decision would be quashed, and the matter remitted for rehearing before a differently constituted tribunal.[18]

The combined effect of the common law recognition, statutory provisions, and court rules demonstrates that public judicial proceedings have been well embedded in the English legal system. Considering the open justice principle's long-standing recognition, one would naturally expect that the principle could be one of the most developed and extensively researched areas. However, this is not the case. There is a view among several writers that the foundation of open justice has not been adequately developed as opposed to other aspects of the law.[19]

For example, Emma Cunliffe claims that open justice does not have 'a coherent conceptual core' and is best described 'as a set of related principles, not as a single standard.'[20] She suggests that 'the commonly-stated principle, or right, of open justice is not a coherent and unified concept. Rather, it may be best understood as an ensemble of practices and defeasible presumptions.'[21]

While the importance of open justice is widely accepted, the principle can hinder the administration of justice in some instances, for example, by exposing

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[18] Ibid

[19] Sarah J Summers, *Fair Trial The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing 2007) and Antony Duff and others (eds), *The Trial on Trial Volume Three: Towards a Normative Theory of the Criminal Trial* (Hart Publishing 2007),

[20] Emma Cunliffe, 'Open Justice: Concepts and Judicial Approaches' (2012) 40 Federal Law Review 385, 387

[21] Ibid, 388

witnesses and jurors to undue public pressure or influence (and possibly judges) through sensational media reporting. Such risks are particularly significant for both practical and doctrinal reasons. If open justice comes with the risk of causing an unfair trial, then the law should, on this score, treat the requirement for open justice in court adjudication as desirable but not indispensable. If this were the case, it would undermine or remove the structural difference between private and court adjudication because the open justice principle is a key and constitutive element of a public trial.

Some scholars were sceptical about the link between procedural fairness and the need for a public trial.[22] Trechsel, for example, argues that Article 6 of the European Convention on Human Rights (ECHR) on its own does not adequately explain the rationale for the open justice principle. He contends that most of the European Court of Human Rights's judicial remarks on Article 6 of the ECHR 'are unhelpful and somewhat circular', which have not helped to elucidate the value of the principle apart from being connected to the general right of a fair trial.[23] He pointed out that judges would generally recall in their judgment 'that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6.'[24]

In a similar vein, Jaconelli argues that there could be difficulty in explaining the link between public trial and fairness because 'to judge by the contents of many

[22] Jaconelli (Oxford University Press 2002); Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press 2005), *Human Rights in Criminal Proceedings* (Oxford University Press 2005); Summers (Hart Publishing 2007)

[23] Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press 2005), 120

[24] Ibid, 120.

human rights document, [a] public trial is seen as valuable quite independently of the fairness of [the] trial procedure. Both rights to a public trial and a fair trial are guaranteed on an equal and independent footing.'[25] Jaconelli suggests that 'there is no inevitable link between public trial and fairness of [the] trial' because publicity does not necessarily benefit the litigants.[26] The stress and ignominy of a public trial, coupled with the possibility of sensational reporting, might undermine the ability of the litigants to have a trial in an unbiased manner.

Like any other legal doctrine or principle, open justice is an evolving concept, and it evolves to face new challenges and accommodate the realities of the ever-changing society, such as the threat of terrorism and developments of law on privacy. There is a genuine concern that national security and individual privacy issues have constantly challenged the open justice principle. The open justice principle, on many occasions, has been seen as a hurdle that would jeopardise efforts to maintain national security through the preservation of intelligence information. Similarly, open justice often appears to be on a collision course with the protection of privacy.

Accordingly, the debate on the open justice principle should have a fresh perspective on the connection between the judicial process and members of the public and the underlying values that justify the practice. A key question is what role and position members of the public assume in court adjudication, considering that court adjudication is primarily to resolve legal disputes among disputants and is

[25] Joseph Jaconelli, 'Rights Theories and Public Trial' (1997) 14 Journal of Applied Philosophy 169 (1997) 14 Journal of Applied Philosophy 169, 172

[26] Ibid (1997) 14 Journal of Applied Philosophy 169), 172

typically framed based on the tripartite process of judges and two opposing litigants (plaintiff and defendant; the prosecutor and accused person).

The current literature appears to treat members of the public either as a tool to achieve the epistemic aim of a trial, which is to reach correct decisions or as the beneficiary of specific values of the public trial. However, the literature does not explain whether the involvement of members of the public in the judicial process, in these two broad respects, is generated by the trial's central purpose of correctly resolving disputes or by a factor unique to the judicial process.

If one is tempted to assume that the answer is the former, a few scholars were deeply critical about that, and they considered open justice more of a constraint than a facilitator to the pursuit of dispute resolution. Due to the sensationalised publicity that a trial may generate, jurors may be easily influenced beyond the evidence adduced, and potential witnesses may also be reluctant to come forward. Further, if the link between public participation and the success of dispute resolution could be shown to exist, it was unclear what weight, if any, a court would give it when required to balance A's interest in excluding members of the public from participating in his trial (for example, when privacy concerns were present) against B's right to participate in A's trial. It may be argued that the factors justifying B's right to participate would frequently be given negligible weight.

There seems to be no clear answer, at the moment, as to whether members of the public have a negligible role and interest in the administration of justice or otherwise in a polarised debate about the utility and impact of open justice. Despite any shortcomings, proponents of the open justice principle argue that open justice is

necessary for the administration of justice, and its rationale need not necessarily be based on the pursuit of dispute resolution.

B. The Focus of the Thesis

This thesis aims to explain the nature of the open justice principle and elaborate on its justification. It is principally focused on the law in England and Wales but also draws on the laws of other common law jurisdictions, including the United States, India, Singapore, and Malaysia, whenever relevant.

It will be useful to state four caveats about the scope of this thesis. First, it does not purport to be a comprehensive treatise on the open justice principle's law or history. Nor does the thesis provide a detailed treatment of all aspects of the open justice principle. Consequently, I leave out many issues unrelated to the principal aim of my inquiry. For instance, I will not address the methods and means to enhance the quality of open justice in the administration of justice, such as introducing a video camera in the courtroom and a live telecast of the proceedings.[27]

Secondly, this thesis discusses only the judicial adjudicatory process, i.e., court-based law enforcement backed by a compulsory process, which is the state's monopoly. Therefore, it does not cover private arbitration or mediation. Nonetheless, if a party to private arbitration or mediation brought a case to the court, the open justice principle's general requirement would be applicable.

[27] See, for example, Edward Thompson, 'Does the Open Justice Principle Require Cameras to be Permitted in the Courtroom and the Broadcasting of Legal Proceedings?' (2011) 3 Journal of Media Law 211; Stephanie Weiner and Charles Rothwell Nesson, 'Public Trial in the Age of Internet' Social Science Research Network <http://ssrn.com/abstract=1651323> accessed 15 November 2012

Thirdly, in this thesis, the call for open proceedings does not cover private jury deliberations[28] and appellate judges' deliberations. The primary reason is to facilitate a frank and open deliberation about a case among them. Furthermore, although private deliberations of both the jury and a panel of appellate judges may be a source of concern to some critics,[29] such concern can be allayed by the fact that judges must give reasoned judgments. After all, once a trial is held openly, members of the public can observe the proceeding or be informed by the media about how evidence and legal arguments are presented to the jury and the judge. With the information available during an open trial, members of the public can analyse the reasons for the decision.

Fourthly, I rely primarily on two broad ideas within legal philosophy in this thesis: the rule of law (also known as the principle of legality) and the notion of freedom. Given the centrality of the principle of legality and the notion of freedom in this research, it will be necessary sometimes to enter into some controversial questions in legal philosophy.[30] While I endeavour to justify my position on specific issues, this thesis is not intended as a work in legal philosophy. Therefore, the level of discussion may not be as deep and extensive as one would typically find in such

[28] The jury is conceived in theory as representatives of the public. Tatjana Hornle, 'Democratic Accountability and Lay Participation in Criminal Trials' in Antony Duff and others (eds), *The Trial on Trial Volume Two: Judgment and Calling to Account* (Hart Publishing 2006), 140-4. Secret deliberation is a crucial and legitimate feature of English trial law which serves to reinforce the jury's role as the ultimate arbiter of fact and to guarantee open and frank deliberations among jurors on the evidence that they have heard. *Gregory v United Kingdom* (1998) 25 EHRR 577 , [25]

[29] Jaconelli, *Open Justice: A Critique of the Public Trial*, Ch.1

[30] For example, one of the controversial questions engaged is on the scope of judicial law-making process in Chapter 2.

material. The modest aim is to highlight and draw on the plausibility of some arguments in legal and political philosophy in defence of the open justice principle.

C. Principal Argument and Recommendations of the Thesis

The central argument is that a quest to establish a satisfactory theory of the open justice principle should begin with understanding what essentially contributes to the tripartite structure of court adjudication and the reasons for that. In light of this pursuit, a few key issues ought to be discussed. The first broad normative issue concerns the relationship between members of the public and court adjudication.

i) The Relationship between Members of the Public and Court Adjudication

I shall argue that the key idea lies in the fact that members of the public are also participants in the judicial process apart from judges and litigants. Such a notion may be established as soon as we acknowledge the compelling need for members of the public to get involved in court adjudication so that their relevant interests are effectively advanced and protected by their participation in the judicial process.

By virtue of the open justice principle, members of the public are presumptively part of the court adjudication, and this presumption can be actualised by making the adjudicatory process open, accessible and transparent. It is compelling to ensure that members of the public participate in the judicial process to the extent that they cannot be summarily excluded from the judicial process, either by closing the courtroom door or information embargo. The idea of openness makes no sense without a public to which the process is open, so there is a mutual dependency between the adjudicative process and the public.

In this thesis, I shall explain that the nature of the public's involvement and the level of participation required in the administration of justice vary across the spectrum. In most circumstances, members of the public typically play a passive role in the judicial process by being observers. This particular aspect of public participation and its likely impact may be referred to as the Benthamite transparency principle in that officials generally behave better the more closely they are watched.

On the other hand, members of the public may be allowed to play a more active role in the judicial process whose action can directly affect the substantive outcome. This typically can be seen when courts of first instance have made decisions. I must emphasise at the outset, though, that this notion of active participation by members of the public that can directly affect, to an extent, the outcome is limited only to those legally allowed to do so under certain prescribed circumstances, and the practice varies across jurisdictions. For example, certain jurisdictions would allow members of the public who were not privy to a case before the court to draw superior courts' attention to exercise their revisionary power over subordinate courts' decisions. This entitlement is above and beyond the right of the aggrieved parties (litigants), who are unsatisfied with the decision, to appeal.

All four main chapters of this thesis can be read as an extended answer to the questions about the relationship between members of the public and court adjudication, and they ultimately stand as justification for the Inclusivity thesis that I propose. Suffice for me, at this juncture, to briefly state that the notion of recognising members of the public as participants of the judicial process is plausible when we (i) appreciate and synthesise the strong underlying interests of members of

the public that ground the justifications for open justice, and (ii) dissect the issue of whose interest the open justice principle seeks to protect and advance the most. These two components will set the tone of discussion on the status of members of the public in this thesis.

The first component is important because the current orthodoxy of explaining the role of members of the public fails to synthesise various interests of members of the public that are interwoven in the court adjudication process. The lack of such effort has lent credence to the assumption that members of the public are outsiders to the judicial process.

The latter component, which posits the need for providing a hierarchical order of interests between members of the public and the litigants, is important, in my view, because it would reveal how crucial open justice is to members of the public. Without open justice, members of the public are in a precarious position compared to the litigants, whose right to a public trial is explicitly guaranteed in various international human rights documents.[31]

The obscurity as to whose interest open justice seeks to protect the most may, in turn, have a doctrinal and practical implication in the balancing test exercise between a specific interest of the litigants (such as the right to privacy) and the interest of members of the public (such as the right to regulate one's life). The explicit guarantee that the litigants' have the right to a public trial might indicate that they assume a priority claim over members of the public. If unaddressed, the

[31] Apart from Article 6 of the European Convention on Human Rights, the right of litigants to a public trial is also guaranteed by Article 10 (1) of the Universal Declaration of Human Rights 1948 and Article 14 (1) of the International Covenant on Civil and Political Rights.

indication can potentially tilt the balance in favour of the litigants when they waive their right to a public trial. Suppose litigants in a dispute whose right to a public trial is guaranteed under the human rights documents want to have a private hearing, and they categorically inform the court of their decision to waive the right. A judge might be persuaded to summarily allow such a request despite an objection from a journalist because of the interplay between the litigants' decision (the right-holder) and the corresponding duty of the judge (the duty-bearer). According to the Will theory, being the right-holder, litigants may waive their right to a public trial and relieve the judge from the corresponding duty.

Despite some possible overlap between the interests of members of the public and the litigants in certain areas, I shall argue that the open justice principle primarily serves the former's interest. While litigants would always have a recourse to resort to the right to a fair trial and the principle of fairness (apart from the open justice principle) to mount a challenge against any attempt to exclude them from judicial proceedings, members of the public can only maintain their presence and participation in court adjudication by virtue of the open justice principle. As such, judges must ensure that any application to curtail the open justice principle would only be allowed to a certain extent if it is essential and adequately justified.

ii) Justifications for Open Justice

One crucial aspect of the relationship between members of the public and court adjudication is the set of justifications. These justifications are pivotal in establishing and reinforcing the connection between the two. The open justice principle is underpinned by five major rationales, each with its own unique importance:

promotion of accurate fact-finding and correct application of the law; ensuring the fairness of the trial; community catharsis; the educative role of the trial; and maintaining public confidence in the administration of justice. While these justifications are not inherently flawed, they do not, when viewed in isolation, form a unified and coherent justification for open justice.

Any pursuit of developing a unified and coherent justification for open justice, I argue, should take into account the following three factors: (i) there is no logical correlation between the primary objective of dispute resolution and open justice; (ii) the aims that most of the rationales for open justice seek to achieve are equally relevant and applicable to the non-judicial dispute settlement process; and (iii) the inapplicability of the open justice principle in the non-judicial dispute settlement process.

On the first two points, I will be remiss if I do not explain the inapplicability of the open justice principle in the non-judicial dispute settlement process, even though some of the justifications for open justice are also equally relevant to the non-judicial dispute settlement process. I address this issue by grouping the justifications for open justice into two categories: justificatory aim and justificatory basis. The justificatory aim for open justice resides in its efficacy in serving or achieving a particular end. Promoting accurate fact-finding and correct application of laws is an example of the justificatory aim because it has always been argued that open judicial proceedings would serve this end. On the contrary, the justificatory basis does not pay much attention to what open justice can achieve. However, it focuses more on certain key elements or characteristics of legal adjudication, the

existence of which would, in turn, attract the application of the open justice principle.

The distinction between the justificatory aim and the justificatory basis for open justice is important because if justificatory aims are the rationales for the open justice principle, then the principle should also apply to the non-judicial dispute resolution process. For example, parties to arbitration would certainly want a factually correct decision as much as litigants to a case before the court. In order to explain the paradox that the open justice principle is only applicable in the judicial process, the primary reason for open justice must be beyond the pursuit of achieving specific aims.

Therefore, I argue that the search for its justification should focus on finding and explaining a ground that is peculiar to the judicial process (which I call the primary justification). It does not necessarily follow, however, that there cannot be some other common and overlapping plausible justifications (such as those that come under the category of justificatory aim), which may additionally explain the need for transparency in court adjudication and other methods of settlement (which I call the secondary justification). An identified justificatory basis would rationalise and further strengthen the need to achieve whatever comes under the category of justificatory aim.

A coherent justification for open justice, in my view, should also be able to address the lack of logical and necessary correlation between the objective of successful dispute resolution and open justice because if court adjudication is purely about resolving disputes, then the impact of open justice to the pursuit may be

trivial. The success of the non-judicial dispute settlement process is proof that disputes can be resolved without members of the public. Moreover, the liberty to resolve disputes behind closed doors is one of the reasons why arbitration remains a preferred option for some people in civil matters. Certain critics have also questioned the value of open justice and claimed that open justice, apart from being in a potential conflict with the litigants' right to privacy, is a double-edged sword that can hamper the effectiveness of the judicial process as it may influence jurors and judges, particularly in a highly publicised case.

Despite the convincing criticisms, it is important to tread carefully and not simply accept that open justice, based on those contentions, is of insignificant importance. The necessity of open justice in court adjudication may not solely be determined by or dependent upon whether it will promote the success of resolving disputes. While dispute resolution is a basic object of court adjudication, it is not the paramount factor that outweighs everything else. Other factors, such as the rule of law argument that posits the importance of open courts in a legal system must also be taken into account in our understanding of the open justice principle. This is because the law's identification, clarification, application, and (sometimes) creation may all intertwine in the judicial process.

Members of the public's participation in the judicial process are engendered by the fact that the litigants have invoked the judicial power to resolve a legal dispute.[32] The judicial power that is exercised in the name of the public collectively

[32] Initiating a case so that the judicial power can be exercised is not, in most situations, at the behest of the judges. It was held in *Huddart Parker and Co Proprietary Ltd v Moorehead* (1909) 8 CLR 330, 357 that the judicial process 'does not begin until some tribunal which has the power to give a binding and authoritative decision (whether subject to an appeal or not) is called upon to take action.' Such

to resolve the legal dispute means there will be many ensuing aspects of the judicial process, which are all related to members of the public, such as the imperative of procedural fairness and the norm-guidance aspect of the law, will follow. These aspects would warrant and necessitate the inclusion of members of the public in the judicial process because depriving them of the opportunity to participate will adversely affect, in some ways, their interests as individuals in a legal system.

The aspect of procedural fairness, for example, has always been about attaining the primary aim of trial: accurate determination of the dispute fairly, which is a mutual interest shared by the litigants and members of the public. Suppose the litigants want fair and accurate determinations of legal disputes because their legal rights and obligations are at stake. In that case, members of the public (who are potential litigants in future), in all likelihood, want the same standard of fairness to be put in place so they have confidence in the judicial system.

D. Chapter Outlines

In Chapter 1 (**Understanding Open Justice: A Conceptual Framework)**, I explain my proposal of open justice as the idea of bringing in members of the public - who are not privy to the dispute - into the judicial process and recognising them as "participants". I highlight the bundling approach's flaws (an approach that can typically be found in the literature to explain open justice) on two fronts. Firstly, the bundling approach has not synthesised the interests of members of the public in the judicial process, and secondly, the bundling approach has not determined

practice whereby judges play a passive role is relevant to common law jurisdictions whereas judges in civil law jurisdictions are known to be playing a more active role.

whose interest the open justice principle seeks to protect the most.

The discussion then explains the proposed Integrated approach (as an alternative to the bundling approach). It starts off with defining what "members of the public" means in this thesis and explaining the propriety of giving them the status of participants in the judicial process. I also anticipate and address several possible objections about the plausibility of recognising and treating members of the public as participants in the judicial process, which includes the obscurity of determining the scope and nature of such participation in court adjudication.

While the whole idea of public participation in court adjudication may be broadly conceived and explained in at least two different ways, I argue that all forms of public participation, participation through agency and participation through open justice, can be brought together through a multi-dimensional participatory theory. In so doing, I shall argue that there will be three weaknesses if we rely on and be content with the notion of public participation through agency only in court adjudication.

Chapter 2 (**Reasons for Public Participation in Court Adjudication**) will explain the basis of my claim that members of the public should be allowed to participate in court adjudication through open justice. I argue that court adjudication is an open process and should remain so because it is a process of public enforcement or the *application of legal norms by the judicial authority*.

Throughout this chapter, I shall highlight the need for public participation in the judicial process through open justice in three different conceptions of a trial: (i) a

trial as a law-applying and law-making process, (ii) a trial as a fact-finding process, and (iii) a criminal trial as a moral discourse. The combined factors of the centrality of the court in the legal system and the importance of publicity reflected in the trial process would expound the necessary foundation upon which the open justice principle is based.

Chapter 3 (**The Right to Open Justice)** is written to address three main questions: whether the principle of open justice necessarily entails legal rights such as the right to observe and report judicial proceedings, and if it is, what is the basis and whose right? In so doing, I shall engage primarily with Jaconelli's criticisms that argue the right to a public trial is jurisprudentially unsound.[33] I will demonstrate the Interest theory's ability to survive Jaconelli's criticism and form the basis upon which the litigants' right to a public trial and members of the public's right to open justice stands. This chapter is significant in my defence of the Inclusivity thesis as it shows that judges have a duty to hold a public trial not only for the litigants but also for members of the public.

In so far as members of the public are concerned, the terminology "the right to open justice" is used instead of "the right to a public trial" because the latter sits comfortably with the rights the litigants would have. A more generic terminology is required to circumvent the fact that, unlike litigants, members of the public are not the ones on trial.

[33] Jaconelli, *Open Justice: A Critique of the Public Trial*, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002); Jaconelli, 'Rights Theories and Public Trial'

Chapter 4 (**The Scope of Exceptions to Open Justice**) is allocated to examine the extent to which the open justice principle applies in privacy. Some aspects of judicial proceedings' confidentiality, such as Anonymity Order and Super Injunction, will be discussed. A complete account of the open justice principle has to consider why it does not apply in certain scenarios and why its application is circumscribed in some cases. Analysing the exceptions to the rule seeks to show that the extent to which the exceptions apply cannot completely undermine members of the public's interest in the judicial process.

Chapter 5 serves as a concluding chapter where I summarise this thesis's contributions and possible impact, the central arguments of each chapter, and possible directions of future work.

Chapter 1: Understanding Open Justice: A Conceptual Framework

1.1 Introduction

There is no exact legal definition of the open justice principle. At its basic core, open justice requires the judicial process to be open and accessible to members of the public rather than just to litigants.[34]

1.2 The Bundling Approach

I argue that there are two ways of understanding open justice. One way is to explain open justice as an abbreviated reference to several legal rules that would serve and actualise the often-quoted legal maxim "justice must not only be done but seen to be done." This approach amounts to no more than bundling together several legal rules, which is what one would typically find in the literature.[35] A similar view is expressed by Emma Cunliffe, who states that the open justice principle 'may be best understood as an ensemble of practices and defensible presumptions.'[36] The legal rules include:[37]

[34] Accessibility of the court here refers to the ability of members of the public to gain ingress to observe judicial proceedings and to be informed about what is being litigated before the judge. It does not refer to the ability to go to court to seek legal remedy.

[35] Jaconelli, *Open Justice: A Critique of the Public Trial*, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002), 2-4; Joseph M Jacob, *Civil Justice in the Age of Human Rights* (Ashgate Publishing Limited 2007), *Civil Justice in the Age of Human Rights* (Ashgate Publishing Limited 2007), 52-3

[36] Cunliffe, 'Open Justice: Concepts and Judicial Approaches' (2012) 40 Federal Law Review 385, 388.

[37] Jaconelli, *Open Justice: A Critique of the Public Trial*, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002), 2-4

Firstly, the open justice principle signifies that members of the public have free access to the courts and are entitled to attend and observe any hearing.[38] The entitlement cannot be hindered save for certain valid and legitimate circumstances.[39] The judicial process is open, so members of the public may, among other things, attend the proceeding if they wish to.[40] There should not be unnecessary obstacles that hinder members of the public from attending trials. The obstacles are not only physical barriers; they also include other conditions, such as a decision to arbitrarily hold judicial proceedings at night that might prevent (or discourage) the attendance of members of the public.[41] There must be sufficient provision of adequate facilities for the public's attendance at trial,[42] even if it is held in sensitive areas such as prisons.[43]

Although the court is duty-bound to open the courtroom to members of the public, it does not follow that the court has to make special arrangements to accommodate them, as the duty has to be carried out proportionately.[44] The absence of an obligation to make a special arrangement beyond what is reasonable

[38] *Scott v Scott* [1913] AC 417 (HL); *McPherson v McPherson* [1936] AC 177; *Attorney General v Leveller Magazine Ltd* [1979] AC 440 (HL) [1979] AC 440 (HL); *Barings Plc v Coopers & Lybrand* [2000] 1 WLR 2353

[39] The open justice principle is not absolute. The law allows the principle of open justice to be curtailed under certain limited exceptions. The exceptions are mentioned in various statutory provisions and rules of courts. For example, Rule 39.2 (3) of the Civil Procedure Rules provides a list of some of the exceptions in relation to civil cases.

[40] *McPherson v McPherson* [1936] AC 177, 200

[41] Jaconelli, *Open Justice: A Critique of the Public Trial*, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002)

[42] Ibid, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002), 2;

[43] Read *Kehar Singh & Ors. v The State (Delhi Administration)* [1989] 2 CLJ (Rep) 723; *Md.Shahabuddin v State of Bihar & Ors* [2010] INSC 220

[44] Civil Procedure Rules, r.39.2 (2)

is to 'enable the court to arrange its business efficiently within available facilities.'[45] Practical constraints are sometimes inevitable, but the concessions made due to practical limitations must ensure that the open justice principle's derogation is kept to a minimum.[46]

Secondly, the open justice principle favours public disclosure to ensure transparency of the judicial proceedings. When we speak of disclosure here, it is a disclosure made to non-litigants because the open justice principle does not govern disclosure made to the opponent of the respective parties in a trial. One litigant's disclosure to the opposing party is covered under other legal principles, such as the principle of equality of arms and the imperative of effective adjudication.[47] Court records and documents used or referred to in a trial are made available for public examination to facilitate public disclosure.[48] An interested party who wants to

[45] Adrian Zuckerman, *Zuckerman on Civil Procedure Principles of Practice* (Second edn, Sweet & Maxwell 2006) (Second edn, Sweet & Maxwell 2006), 91

[46] Ibid, 91

[47] It was held that the principle of equality of arms, which is part of the broad principle of fairness, includes the defendant's right to disclose 'all material evidence for or against the accused.' *Edwards v United Kingdom* 15 EHRR 417. There are exceptions to this principle, as provided in the case of *Edwards and Lewis v United Kingdom* (2005) 40 EHRR 593 and *A and others v United Kingdom* (2009) 49 EHRR 625. See, also, Andrew Higgins, 'Open Door Disclosure in Civil Proceedings' (2012) 16 International Journal of Evidence and Proof 298.

[48] *GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection & Indemnity Association Ltd* [1999] 1 WLR 984; *Chan U Seek v Alvis Vehicles Ltd* [2004] EWHC 3092 (Ch); [2005] 1 WLR 2965. In relation to criminal cases, Part 5 of the Criminal Procedure Rules 2011 contains provisions about the supply of information or documents from records or case materials kept by a court. The Crown Prosecution Service has also released its policy in relation to post-trial third-party inspection of the materials used by the prosecution in criminal trials. This is provided in Protocol for Working Together: Chief Police Officers, Chief Crown Prosecutors and the Media. See, The Crown Prosecution Service, 'Protocol for Working Together: Chief Police Officers, Chief Crown Prosecutors and the Media' (*The Crown Prosecution Service*, 2005) <http://www.cps.gov.uk/publications/agencies/mediaprotocol.html#a02> accessed 15 June 2015.

inspect and get a copy of the documents used or referred to in court may do so by applying to the court.[49]

With the court's permission, a video recording of the proceedings may also be obtained in addition to the written documents.[50] Interestingly, the value of legal arguments ventilated in court is not limited to written submissions but includes skeleton arguments. Although skeleton arguments used as a reference during oral submission do not always reflect all the arguments presented before the court, as opposed to written submissions, they are still important to members of the public.[51]

[49] The availability of court documents for inspection is of particular importance, particularly to the media practitioners for journalistic purposes. Journalists who are assigned to report judicial proceedings may not be able to do so every day because of other commitments and logistical limitation. It is normal then for journalists to attend only parts of trials. As such, it was simply impossible to understand the issues and the argument before the court without the access to the key documents referred to the court. This dilemma was brought up for court's consideration in the case of *The Queen (on the Application of Guardian News and Media Limited) v City of Westminster and Magistrates' Court* [2012] EWCA Civ 420 [2012] and it was argued by the respondent that 'the issues raised in the extradition proceedings were ventilated very fully in open court, and there is no need for the press to have access to the documents which they seek for the purpose of reporting the proceedings.', [78]. The court dismissed the contention on the basis the appellant 'put forward credible evidence that it was hampered in its ability to report as fully as it would have wished by not having access to the documents which it was seeking.', [82]. Furthermore, 'the practice of receiving evidence without it being read in open court potentially has the side effect of making the proceedings less intelligible to the press and the public' which makes it is necessary then to allow for public access to documents referred to in open court, [83].

[50] Paragraph 6.3 and paragraph 6.4 of Practice Directions 39A of the Civil Procedure Rules

[51] The value of the skeleton argument was argued in *R (on the application of Davies and another) v HMRC* ex p. Kessler decided July 2011. See, http://www.kessler.co.uk/foi-2/. This is an application for permission to inspect and take copies of the skeleton arguments of the Respondents in the substantive case heard before the Court of Appeal (Civil Division). The Respondent was the Commissioners for Her Majesty's Revenue and Customs. The Court of Appeal considered the case of great public importance beyond the concern of the individual Appellants for it deals with the meaning and effect of the Revenue's longstanding guidance on the meaning of residence of individuals for the purpose of taxation. The application was allowed, and it can be retrieved at http://www.kessler.co.uk/wp-content/uploads/2012/04/Court-of-AppealDecision.pdf

A similar practice is allowed in criminal courts, which would enable non-litigants to request disclosure of skeleton arguments read by the court to understand the case.[52]

Thirdly, members of the public are entitled to know the identity of those involved in court adjudication. Unlike judges, official prosecutors, and lawyers whose identities are disclosed without much qualm, disclosing litigants' identities in civil cases and the accused person in criminal trials may not be straightforward because of the associated risk of negative publicity and breach of privacy.[53] While acknowledging that such risk would always exist, the disclosure of identity would serve a more significant interest because, without names, stories are likely to be

[52] *The Queen (on the Application of Guardian News and Media Limited) v City of Westminster and Magistrates' Court* [2012] EWCA Civ 420, [36], quoted with approval the case of *R v Howell* [2003] EWCA Crim 486. In this case, Judge LJ held that 'subject to questions arising in connection with written submissions on PII applications, or any other express justification for non-disclosure on the basis that the written submissions would not properly have been deployed in open court, we have concluded that the principle of open justice leads inexorably to the conclusion that written skeleton arguments, or those parts of the skeleton arguments adopted by counsel and treated by the court as forming part of his oral submissions, should be disclosed if and when a request to do so is received.', [197].

[53] *In re Trinity Mirror plc and others (A and another intervening)* [2008] EWCA Crim 50, [32]. It was held by the court that the media has the right to disclose the relevant particulars because 'an important aspect of the public interest in the administration of criminal justice is that the identity of those convicted and sentenced for criminal offences should not be concealed.' The importance of disclosing the identity of the accused person has been acknowledged even in serious sexual offences. It was argued by the defendant that his identity must be kept secret in order to ensure that the complainant cannot be identified. This is to give effect to the intention of Section 1 of the Sexual Offences (Amendment) Act 1992. Although the complainant's identity in sexual offence cases can be kept secret permanently by virtue of this provision, the secrecy cannot be extended to restrict the disclosure of a defendant's name. It was held in the case of *In re Press Association* [2013] 1 WLR 1979, 1979 that Section 1 of the Sexual Offences (Amendment) Act 1992 'did not empower the court to make an order restricting publication of a defendant's name in order to protect or enforce a complainant's right to anonymity.' Section 1 (1) of the Sexual Offences (Amendment) Act 1992 reads, 'Where an allegation has been made that an offence to which this Act applies has been committed against a person, neither the name nor address, and no still or moving picture, of that person shall during that person's lifetime—(a) be published in England and Wales in a written publication available to the public; or (b) be included in a relevant programme for reception in England and Wales, if it is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed.'

'devoid of human interest',[54] which, in turn, would frustrate many aims, such as the aim of educating members of the public and maintaining public confidence in the administration of justice. The general rule of name disclosure would apply except in circumstances where statutory provisions require anonymity of certain individuals' identities.[55]

Fourthly, the principle of open justice not only allows members of the public to have access to the trial but also extends to include the right to report the proceedings.[56] Members of the public, especially those who did not attend the hearings or those who could not access the courtroom due to space limitation, are entitled to a contemporaneous reporting of judicial proceedings unless the court has

[54] *Application by Guardian News and Media Ltd and others in Her Majesty's Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants)* [2010] UKSC 1, In this case, the Supreme Court unanimously made an order disclosing the identity of five persons who had their assets frozen by the Treasury for suspicion of supporting terrorist activities. The appellants had argued that the anonymity orders were necessary because their identification as claimants in the substantive proceedings would infringe on their privacy protected under Article 8 of the ECHR. It was contended that they could face social and physical harm if they were identified publically. The anonymity order, too, was crucial for the appellants could not effectively challenge the Treasury orders in court. The court acknowledged the importance of editorial independence and the need to inform the public. Without names, stories are likely to be 'devoid of human interest'. The court pointed out the negative consequences of the anonymity orders upon communities by saying, 'concealing the identities simply casts a shadow over entire communities' and even helps 'to foster an impression that the mere making of the orders justifies sinister conclusions about these individuals'. The court pointed out that the 'public has a legitimate interest in not being kept in the dark about who is challenging' the orders.

[55] Temporary restraint on publication under section 4 of the Contempt of Court Act 1981; Section 1 of the Sexual Offences Amendment Act 1992 requires anonymity for a victim or alleged victim of a sexual offence listed in section 2 of that Act; Section 97 (2) of the Children Act 1989 requires anonymity for a child subject to family law proceedings and includes a prohibition on the disclosure of any information that might identify the address or school of that child; Section 49 of the Children and Young Persons Act 1933 prohibits publication of the name, address, school or any other matter likely to identify a person under 18 who is brought before the Youth Courts either as a victim, witness or defendant.

[56] *Harman v Secretary of State for the Home Department* [1983] 1 AC 280; *Independent Newspapers v Minister for Intelligence Services*, this case was quoted with approval in *The Queen (on the Application of Guardian News and Media Limited) v City of Westminster and Magistrates' Court* [2012] EWCA Civ 420

ordered otherwise in appropriate circumstances.[57] With respect to reporting censorship, the Privy Council held that courts have 'no common law power to make an order postponing the publication of a report of proceedings conducted in open court.'[58] An order purporting to postpone the fair and accurate reporting of court proceedings can only be done if specific legislation confers such power.[59]

Fifthly, the open justice principle entails that reasons for judgment are made public and subject to the scrutiny of the parties, the media, and society.[60] Apart from the litigants, members of the public have the right to understand the rationale and legal basis for making the decisions. For this reason, members of the public may obtain a transcript of any judgment or a copy of any order made in a public hearing.[61] Judgments or orders made in private hearings may also be obtained if there is leave from the court.[62]

Sixthly, transparency of court adjudication requires that the law and the process of administering justice be comprehensible to members of the public.[63] For example, it has become a good practice of the court nowadays to provide a summary of the decision in clear and straightforward language. The initiative of the United

[57] *Harman v Secretary of State for the Home Department* [1983] 1 AC 280

[58] *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago and Another* [2005] 1 AC 190, 190

[59] Ibid

[60] Article 6 (1) of the European Convention on Human Rights provides, '…judgments shall be pronounced publicly…'

[61] Practice Directions 39A of the Civil Procedure Rules, para 1.11

[62] Practice Directions 39A of the Civil Procedure Rules, para 1.12

[63] Duff and others, *The Trial on Trial Volume Three: Towards a Normative Theory of the Criminal Trial* (Hart Publishing 2007)

Kingdom Supreme Court to release a press summary of the judgment, in addition to the written judgment, should be applauded. It helps members of the public understand the gist of the judgment and its reasons.

The need for the law and the process of administering justice to be comprehensible to the broader public has been voiced affirmatively by the judges. Lord Neuberger, for example, acknowledged that:

> it can be a formidable task even for an experienced lawyer to read through and understand a difficult Supreme Court decision running to hundreds of paragraphs, with a number of conflicting or subtly different judgments.[64]

He further emphasised in his speech that 'judges owe it to the public… [the duty]…to ensure that our decision and essential reasoning are as comprehensible as possible to the public.'[65]

A. The Flaws of the Bundling Approach

Despite the widespread usage of this bundling approach, there is a lack of adequate theoretical exposition about the status of members of the public in the administration of justice in light of their entitlement to a laundry list of legal rights. It is legitimate to question the status of members of the public in the administration of justice because it has an inextricable link, both conceptually and practically, with the legal requirement of holding judicial proceedings in public. As we all know, such a

[64] Lord Neuberger, 'The Third and Fourth Estates: Judges, Journalists and Open Justice' Lord Neuberger's Speech at the Hong Kong Foreign Corespondent's Club <https://www.supremecourt.uk/docs/speech-140826.pdf> accessed 25 September 2015, [14]

[65] Ibid, [14]

requirement is quite onerous and must stand on a clear and sound footing.[66] This question (about the status of members of the public in the administration of justice and the basis of their entitlement to certain legal rights) is also apposite as it would shift and set the trajectory of our discussion from *how* the trial looks like (the state of being public as opposed to private proceedings) to *why* the trial is arranged like that.

Some attempts were already made in the literature to explain the status of members of the public and their relationship with court adjudication when they were described and referred to as bystanders, overseers and observers of the judicial process. Hale's commentary on the history of the common law has shown that an open presentation of evidence is a common feature and integral character of trial in England, and he wrote:

> Evidence is given in the open court, and in the presence of parties, their attornies, counsel and all by-standers, and before the judge and jury: where each party has the liberty of excepting, either to the competency of the evidence, or the competency or credit of the witnesses, which exceptions are publicly stated, and by the judges openly allowed or disallowed;- wherein if the judge be partial, his partiality and injustice will be evident to all bystanders.[67]

[66] The requirement of holding judicial proceedings in public is provided in various statutory provisions such as the Senior Courts Act 1981, s 67, Armed Forces Act 2006, s 158, and Rules of Court such as the Civil Procedure Rules and the Supreme Court Rules 2009. It is also a requirement that both the judge and the litigants cannot dispense with at their own wishes and convenience. See, for example, *Ivan William Allan v Glory Anne Clibbery* [2002] EWCA Civ 45 [2002] EWCA Civ 45; *JIH v News Group Newspapers* [2011] 1 WLR 1645

[67] Matthew Hale, *The History of the Common Law of England* (6th edn, 1820)

Sharon Rodrick describes the role of the public 'as overseer of the participants in the administration of justice.'[68] However, these descriptions, in my view, do not satisfactorily depict the actual position assumed by members of the public that can ultimately justify their entitlement to many legal rights. This contention is based on the following arguments.

B. Lack of Synthesization of the Interests of Members of the Public

The bundling approach of explaining open justice as an abbreviated reference to several related legal rules is incapable of providing an adequate answer to my inquiry about the status of members of the public in the administration of justice. In light of their entitlement to a laundry list of legal rights, the bundling approach fails to synthesise the strong underlying interests of members of the public that ground the justifications for open justice. Scholars have argued various justifications to justify the open justice principle, and the following five are the most relied upon and referred to by judges and scholars: promoting a truthful fact-finding and correct application of the law; ensuring procedural fairness of the trial; community catharsis, the educative role of the trial and maintaining public confidence in the administration of justice.[69] All these justifications are oriented towards benefiting members of the public except for the first two justifications, whose values are

[68] Sharon Rodrick, 'Open Justice, the Media and Avenues of Access to Documents on the Court Record' (2006) 29 University of New South Wales Law Journal 90, 94

[69] Some writers have categorised the justifications differently such as in Judith Resnik, 'Due Process: A Public Dimension' (1987) 39 University of Florida Law Review 405. Resnik argued there are six rationales explaining 'why the public has a role to play in some adjudicatory procedures, most typically in criminal trials.' The rationales are history, catharsis, education, control, and accuracy. She believed that all the arguments regarding these rationales rest upon assumptions which are mostly unverifiable. In addition to these five rationales, she proffered a sixth rationale for public participation in the judicial process: interaction to assist in the expression and generation of norms.

mutually shared by members of the public and litigants (who are the immediate parties to the judicial proceeding).[70]

I shall focus on the rationale of maintaining public confidence in the administration of justice as an example to highlight the strong interest of members of the public in the judicial process that should have been used as a basis to uplift their status beyond bystanders, observers and spectators. Firstly, of all the rationales for open justice, the need to maintain public confidence in the administration of justice, apart from being a justification in itself, seems to be the ultimate aim of the first four justifications (promoting an accurate fact-finding and correct application of the law; ensuring procedural fairness of the trial; community catharsis, the educative role of the trial). This can be seen, for example, in the investigatory and disciplinary effects of open justice that could promote accurate fact-finding and correct application of the law.[71] In turn, it may enhance public confidence in protecting innocent citizens by diminishing the risk of wrongful conviction in criminal cases.[72]

Similarly, there will be confidence in the judicial system when the judicial process is not shrouded in suspicions, such as partiality and arbitrary exercise of judicial power against litigants.[73] On the educative aspect of a trial, public confidence

[70] A correct decision that was reached at the end of a fair trial is certainly beneficial to litigants for they are the immediate parties of the judicial process who will bear the direct consequence of the court's order.

[71] Jaconelli, *Open Justice: A Critique of the Public Trial*, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002); *R v Socialist Worker, ex p A-G* [1975] QB 637, 652

[72] Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, Oxford University Press 2010)

[73] Ibid, 122; Hale, *The History of the Common Law of England* (6th edn, 1820, 343-4; Susan Kenny, 'Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium' (1999) 25 Monash University Law Review 209, 217-218

in the administration of justice cannot also thrive when society cannot learn and benefit from the judges' accumulated wisdom in their judicial pronouncements.[74]

Secondly, the need to maintain public confidence in the administration of justice, as the name suggests, is a rationale (apart from the justifications of education and community catharsis) that is not directly orientated towards protecting and advancing the immediate interest of the litigants. Judicial authorities consistently uphold that the need to maintain public confidence in the administration of justice is a significant ground for open justice.[75] It is germane for us to question why it is crucial to maintain the confidence of those who are not immediately involved in a trial. If there was ever a need to maintain one's confidence, logically, it should be the litigants' confidence to be maintained.

C. Lack of a Hierarchical Order of the Stakeholders of Open Justice

Another flaw of the bundling approach is the lack of any explanation about whose interest the open justice principle seeks to protect and advance the most. I argue that even though the values of promoting accurate fact-finding, correct application of laws, and procedural fairness of the judicial process are mutually shared between members of the public and litigants, the open justice principle, in totality, seeks to protect and advance the interests of the former more than the latter.

I shall elaborate on this point in Chapter 3 but suffice for me to say at this juncture that this hierarchical order is important so that we may not lose the forest

[74] Adrian Zuckerman, 'Super Injunctions-Curiosity -Suppressant Order Undermine the Rule of Law' (2010) 29 Civil Justice Quarterly 131 (2010) 29 Civil Justice Quarterly 131, 134

[75] *Scott v Scott* [1913] AC 417 (HL); *Attorney General v Leveller Magazine Ltd* [1979] AC 440 (HL)

for the trees, especially in the context of resolving a competing claim between members of the public (such as journalists) and the litigants. The fact that open justice may simultaneously benefit the litigants and the absence of an explicit legal provision in human rights documents that grants members of the public the right to open justice does not mean that litigants assume a higher degree of protection than members of the public.

Litigants cannot become the primary beneficiary of open justice because of an inherent internal conflict with their interest in privacy. On many occasions, litigants have insisted on having private proceedings[76] to vindicate their right to privacy as guaranteed by Article 8 of the European Convention on Human Rights.[77] It appears then the assumption that the open justice principle is to serve the well-being of litigants may not necessarily be correct. Similarly, it has become a subject of criticism by some quarters that the association of the open justice principle with the notion of procedural fairness is quite blurry and weak after taking into account some of the applications to derogate from the open justice principle were made for fear of having to deal with the prejudicial effect of a trial by media.[78]

[76] *Terry v Person Unknown* [2010] EWHC 119 (QB) [2010] 1 FCR 659

[77] Ibid; Article 8 of the European Convention on Human Rights provides that: (1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[78] Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002); Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press 2005); Summers (Hart Publishing 2007)

Therefore, there has to be an alternative way of understanding the open justice principle that can articulate the status of members of the public in the administration of justice and address the above two flaws. With this proposal in mind, I turn to the following section.

1.3 The Integrated Approach

In an alternative to “the bundling approach” of defining the open justice principle as an abbreviated reference to several legal rules, I suggest that the open justice principle can be understood and explained as a principle that would require the inclusion of members of the public into the judicial process by treating them as participants in court adjudication. As such, the requirement moves away from the conventional wisdom where court adjudication is typically framed purely based on the tripartite arrangements of judges and litigants (plaintiff and defendant; the prosecutor and accused person).

As opposed to an amicable resolution of disputes among the disputants, a triadic structure of consensual dispute resolutions posits a situation where a third party is invited at the disputant’s invitation to play a role as mediator, arbitrator or adjudicator. In court adjudication, litigants do not choose the third party, but the State appointed him on the community's behalf. This description of having a tripartite arrangement between judges and litigants is also in line with what Shapiro calls the "prototype" of courts. The prototype, in Shapiro's words, involves ‘(1) an independent judge applying (2) pre-existing legal norms after (3) adversary

proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned the legal right, and the other found wrong'. [79]

In a slight variation from the typical triadic arrangement between judges and litigants, the basic template of the triadic structure of judicial dispute resolution is fundamentally changed by virtue of the open justice principle, when members of the public are then presumptively assumed to be part of the judicial process. The actualisation of public participation is made possible by making the judicial process open, visible, accessible and transparent. In this context, open justice is the medium by which members of the public are brought into the judicial process.

Such a proposition also aligns with a judicial pronouncement that explains what an open court means. In the case of R v Lewes Prison (Governor), ex p Doyle, the court held that a trial is not 'an open court' by the accused and his legal representatives' presence. The term 'in open court' means 'a Court to which [members of] the public have the right to be admitted.' [80]

While the practice of a public trial in the early days of English legal history was more of a historical coincidence when it started as the standard form of justice that was carried out by the community with a simple procedure, where the laymen were judges of both law and facts,[81] the practice of admitting members of the public to the court has been accepted as a distinct characteristic of courts over time. Sir

[79] Martin Shapiro, *Courts: A Comparative and Political Analysis* (University Chicago Press 1981)

[80] *R v Lewes Prison (Governor), ex p Doyle* [1917] 2 KB 254, 271

[81] Editorial, 'Legal History: Origins of the Public Trial' (1960) 35 Indiana Law Journal 251, 251

Edward Coke, for example, explained that the very word "court" implied public access. He said:

> All Causes ought to be heard, ordered, and determined before the judges of the king's courts openly in the king's courts, wither all persons may resort*;* and in no chambers, or other private places: for the judges are not judges of chambers, but of courts, and therefore in open court.[82]

It should be noted, though, that the inclusion of members of the public does not mean that individuals must always be physically present in the public gallery of a courtroom.[83] The inclusion is obligatory to the extent that judicial proceedings must be held openly, save for certain limited exceptions allowed by law.

A. The Composition of a Trial

Jaconelli argues that any discussion about the open justice principle should take into account the existence of two categories of people who can attend the courtroom: (i) the *dramatis personae* of a trial and (ii) members of the public.[84] In his analysis of open justice, he has used the example of a theatre as an analogy to illustrate the

[82] Edward Coke, *The Second Part of the Institutes of the laws of England. Containing the Exposition of Many Ancient and Other Statutes* (London : printed for E. and R. Brooke 1797), 103

[83] *McPherson v McPherson* [1936] AC 177, 200

[84] The issue of whether someone is to be classified as *dramatis personae* of a trial or as a member of the public is to be determined by reference to his role in the proceeding. *Dramatis personae* of a trial are those who are admitted to the courtroom by virtue of their immediate role in the disposal of the case, such as litigants, lawyers, interpreters, jurors and witnesses. The determination of one's access to a trial based on the role he plays is important. This is because a different role and capacity would require a different underlying principle that justifies and governs one's right to participate. Lawyers get access to a trial as representatives of the litigants whereas interpreters (and other courts' officials) get similar access to a trial to assist the judge in the performance of his duty. Jurors are admitted because they are the fact-finder whereas witnesses are crucial to unfold the factual narratives of the case before the court. It follows that the general public and even friends or relatives of the litigants who do not have an official and immediate role to play may be excluded from the proceedings in the absence of the open justice principle.

varying capacity of those who can attend the court's proceedings.[85] One may be present in a theatre either because one is part of the production team or the audience.[86] Similarly, one may attend the court, according to Jaconelli, in his capacity as *dramatis personae* of the trial or as a spectator who sits in the public gallery observing the proceedings.[87]

Jaconelli's explanation about the composition of a trial based on the theatre performance analogy is helpful because it demonstrates the existence of two separate groups of people who are allowed access to the theatre hall in two different capacities. However, it does not explain why members of the public should be allowed to gain access to the theatre hall and the courtroom apart from indicating that they are the audience. Jaconelli should have gone further to discuss whether the presence of members of the public is crucial to both the theatre performance and the judicial proceedings.

I would argue that such a query could be addressed by considering that staging a theatre is a purposive act in that it is a form of entertainment. Using a theatre performance as an analogy is interesting because both groups are considered essential to constitute a meaningful theatre performance because of an interrelated aim between them. The purpose of staging a theatre, as far as the *dramatis personae* of a theatre are concerned, is to entertain the audience, whereas the purpose of getting access to the theatre hall, as far as the audience is concerned,

[85]Jaconelli, *Open Justice: A Critique of the Public Trial*, 16

[86] Ibid, 16

[87] Ibid, 16

is because they want to be entertained by the actors (including the whole crew members of the production team). In this context, we can say that the audience is a constitutive element of a meaningful act of performing a play because there is no point in performing a theatre when there is nobody in the theatre hall to be entertained. Similarly, there is no point in sitting in a theatre hall without a performance. In other words, the value and usefulness of staging a theatre are symbiotically contingent upon the audience's presence in the gallery.

In a public trial, members of the public enjoy a position similar to that of the audience of a public theatre in that they are a constitutive component of the process. From a dispute resolution standpoint, I argue that court adjudication is a collaborative enterprise between the *dramatis personae* and members of the public because of a shared aspiration to have a judicial process that would resolve legal disputes correctly and fairly. Along the process, the *dramatis personae* and members of the public have a distinct role to play in their respective capacities, and the interaction between them essentially constitutes a public trial.

From a norm-guiding viewpoint, the value and usefulness of court adjudication as a norm-guiding source lie partly in the inevitable communication between the addresser (the judge) and the addressee (members of the public). We can say that members of the public are a constitutive element of a meaningful process of explaining legal norms in their capacity as the addressee, as it would be ridiculous for the addresser (the judge) to address himself.

I have said earlier that the audience (members of the public) is a constitutive element of a meaningful act of performing a play. While a theatre performance is

meaningless without an audience in the theatre hall, can the same thing be said about a public trial? If there is nobody interested in attending a trial, should the judge allow for a private proceeding? Similarly, if both litigants mutually agree and apply for a private proceeding, should the judge pay heed to such a request? The answer is no to these three questions because members of the public at a public trial are far more important than the audience in a theatre due to the importance of court adjudication in a legal system.

While a theatre performance without an audience is an exercise in futility, as there is no one to entertain, the same cannot be said for court adjudication. The absence of the public in the courtroom does not automatically render the judicial proceedings meaningless. The argument for a public trial is more intricate, and its justification is more significant than that for a public theatre performance. This is because court adjudication is not about entertainment, but about upholding the rule of law. A trial, unlike a public theatre, serves a multitude of purposes in the legal process, from resolving disputes to setting norms.[88] Apart from the primary function of resolving disputes, court adjudication may be viewed as a norm-guiding source in a modern legal system. I shall discuss this topic further in the next chapter, but I wish to briefly indicate, for our present discussion, how the norm-guiding source aspect explains the connection between members of the public and court adjudication.

[88] A number of different justifications for the open justice principle may be identified. There are at least five major rationales underpinning the foundation of the open justice principle, which are as follows: promotion of truthful fact-finding and correct application of the law; ensuring the fairness of the trial; community catharsis, the educative role of the trial and maintaining public confidence in the administration of justice.

Unlike other sources, the process of adjudicating disputes has the advantage of becoming an authoritative source of explained norms in that it demonstrates the practical application of legal norms on facts and the legal ramifications that follow suit. The unique value of court adjudication as an authoritative source of explained norms can be contrasted with an intellectual disagreement among legal scholars. There is no doubt that scholars' intellectual discussion on certain legal issues may, to an extent, help clarify and explain legal norms. However, the contestation of philosophical ideas and legal arguments among scholars does not settle what the law is for members of the public to follow. The debate between Hart and Fuller on the concept of law and the debate between Hart and Lord Devlin on law and morality are, perhaps, two good examples. While intellectual disagreement over matters may be of public interest and concern, such debate could happen in private without violating the open justice principle.

B. The Nature of Public Participation

Thus far, I have pointed out that two categories of people share and claim interests in court adjudication: the *dramatis personae* and members of the public. As opposed to the typical view that treats members of the public as the audience, I go beyond that by treating them as participants of the judicial process because of shared commonalities between the *dramatis personae* and members of the public in the process.

However, the main difference between them is their nature and degree of involvement in the judicial process. There is a varying degree of participation across the spectrum, which includes a reference to the Benthamite transparency principle

in that people generally behave better the more closely they are watched to a more active and positive role.

i) A Benthamite Kind of Participation

Open trial conduct enables society to participate in the administration of justice, where contemporaneous review in the public domain effectively restrains possible abuse of judicial power.[89] Drawing from Jeremy Bentham's famous principle of the Panopticon, 'judges are less likely to act arbitrarily and partially in an open environment for while judging, the public simultaneously judges them.'[90] The House of Lords judicially recognised this idea in Scott v Scott, in which Lord Loreburn said, 'a court may not be so jealous to do right when its proceedings are not subject to full public criticisms.'[91]

Unlike the *dramatis personae*, which enjoy direct and active participation, the nature of participation by members of the public may not be so apparent and of the same category. In the current literature, the discussion about the nature of their involvement in a public trial can be seen, for example, in the justificatory aim of publicity, which is to promote accurate fact-finding and correct application of the law by discouraging witnesses from lying and encouraging them to tell the truth.

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[89] Gerald J. Postema, 'The Soul of Justice: Bentham on Publicity, Law, and the Rule of Law' in Xiaobo Zhai and Michael Quinn (eds), *Bentham's Theory of Law and Public Opinion* (Cambridge University Press 2014), 'The Soul of Justice: Bentham on Publicity, Law, and the Rule of Law' in Xiaobo Zhai and Michael Quinn (eds), *Bentham's Theory of Law and Public Opinion* (Cambridge University Press 2014)

[90] Jeremy Bentham, *Rationale of Judicial Evidence* (John Stuart Mill ed, Hunt and Clarke 1827), 523. Bentham said, 'upon his moral faculties it acts as a check, restraining him from active partiality and improbity in every shape: upon his intellectual activities it acts as spur, urging him to that habit of unremitting exertion.'

[91] *Scott v Scott* [1913] AC 417 (HL), 449

The centrality of discouraging witnesses from lying and encouraging them to tell the truth by having a public trial is not only popular among legal scholars in Anglo-American jurisdictions such as Jeremy Bentham[92] and Wigmore,[93] but writers of European jurisdictions such as Mittermair, Voltaire, Zacharia and Beccaria also echo it.[94] They emphasised the positive effect that publicity will have on the quality of evidence adduced in courts. According to them, the quality of evidence can be enhanced in two ways: firstly, by discouraging lies, and secondly, by encouraging potential evidence to surface. On the first account, the quality of evidence may be enhanced on the assumption that publicity can pressure the witnesses to tell the truth.[95]

A public trial arguably puts witnesses in a difficult position to lie, and if they were to lie, then it would be discovered by members of the public who would later turn up to contradict it.[96] Witnesses who are also caught lying while giving testimony

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[92] Jaconelli, *Open Justice: A Critique of the Public Trial*, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002), 36. Jaconelli quoted what Bentham said: 'Environed as such a witness sees himself by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to it from a thousand mouths. Many a known face, and every unknown countenance, presents to him a possible source of detection, from whence the truth he is struggling to suppress may through some unsuspected connexion burst forth to his confusion.'

[93] John Henry Wigmore, *Evidence in Trial at Common Law*, vol 6 (Chadbourn Revision 1976), Ch.62. Wigmore said: '…first, by stimulating the instinctive responsibility to public opinion, symbolized in the audience, and ready to scorn a demonstrated liar; and next, by inducing the fear of exposure of subsequent falsities through disclosure by informed persons who may chance to be present or to hear of the testimony from others present.'

[94] Summers, *Fair Trial The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing 2007

[95] On a broader analysis, the utility of the public as an imbued mechanism of the enhancement of the quality of evidence can also be seen as a tacit acknowledgement that the public is a participant in a judicial proceeding.

[96] Jaconelli, *Open Justice: A Critique of the Public Trial*, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002)

may be charged in court for perjury,[97] and at the same time, they have to bear the brunt of the public's reaction condemning them for not telling the truth. One's social standing in the eyes of the community can no longer be the same if found to be lying in court, especially if the incident is widely known due to media coverage. Publicity is, therefore, an additional procedural mechanism to discourage witnesses from lying apart from cross-examination.[98]

On the second account, the open justice principle is founded upon what can be described as an 'investigatory rationale'.[99] This rationale assumes that a trial's publicity may lead to the emergence of new evidence and witnesses. A public presentation of evidence would enable members of the public to come forward to assist the court if they have relevant testimony to offer. Lord Widgery CJ explained, in the case of *R v Socialist Worker, ex p A-G*, that:

> very often the only value of the witness's name being given as opposed to it being withheld is that if it is published up and down the country, other witnesses may discover that they can help in regard to the case and come forward. That, of course, is not unusual, and if the witnesses' names are not given, it may tend to prevent other witnesses from coming forward in that way.[100]

[97] Perjury is an offence by virtue of the Perjury Act 1911, s1.

[98] It has been suggested that there is already an in-built mechanism in our adversarial procedure to elicit truth from witnesses and reveal lies and dishonesty, which is through effective and thorough cross-examination by the opposing party. Wigmore in John Henry Wigmore, *Evidence in Trial at Common Law*, vol 5 (Chadbourn Revision 1976), 1367, for instance, hailed cross-examination as the 'greatest legal engine ever intended for the discovery of truth.'

[99] Jaconelli, *Open Justice: A Critique of the Public Trial*, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002); *Richmond Newspapers Inc v Virginia* 448 US 555 (1980), 596-97

[100] *R v Socialist Worker, ex p A-G* [1975] QB 637, 652

The evidence made available as a result of publicity does not necessarily have to refute the untruthful testimony of an earlier witness in the trial.[101] The probative value of new evidence may also be corroboration that would substantiate a particular claim before the court.[102]

The plausibility that a piece of fresh evidence may emerge due to publicity and potentially be useful to the disposal of a case remains real. It was reported that new evidence in the case of the Chinese dissident Wang Yam, an MI6 informant convicted of murder after a secret trial, would have had a "dramatic impact" on the jury in his trial, the court of appeal has heard.[103] A neighbour of Allan Chappelow, the murdered man, who came forward after reading a Guardian article on the case,[104] told the court that he and his family had been threatened with death by an intruder after Yam was taken into custody.

Here, in the case of *Yam v Regina,*[105] the Court of Appeal was invited to reverse the conviction for murder upon a Reference by the Criminal Cases Review Commission ("CCRC") under Section 9 of the Criminal Appeals Act 1995, on the basis that the Police's failure to reveal to the Crown Prosecution Service an incident

[101] See Wigmore, *Evidence in Trial at Common Law*, vol 5 (Chadbourn Revision 1976)

[102] On corroboration, read Roberts and Zuckerman, *Criminal Evidence* (2nd edn, Oxford University Press 2010), 662-93

[103] Duncan Campbell and Richard Norton-Taylor, 'Wang Yam trial: court of appeal hears from new witnesses over murder' *The Guardian* (18 July 2017) <https://www.theguardian.com/law/2017/jul/18/wang-yam-murder-trial-court-of-appeal-hears-new-evidence> accessed 10 February 2020

[104] Here is the article which was read by Allan Chappelow's neighbour. Duncan Campbell and Richard Norton-Taylor, 'Murder in Hampstead: the author, the dissident and a trial held in secret' *The Guardian* (23 January 2014) <https://www.theguardian.com/law/2014/jan/23/murder-hampstead-alan-chappelow-echr-wang-yam> accessed 10 February 2020

[105] [2017] EWCA Crim 1414

reported by Mr Jonathan Bean, led to material non-disclosure and denied the Defence the opportunity to present an alternative suspect for the jury's consideration. Therefore, there was a real possibility that the conviction would be considered unsafe, considering the lack of any direct evidence connecting the Appellant with the murder of the deceased.[106]

It is interesting to note that here, in this case too, the Court of Appeal allowed the Appellant's request to rely 'not only on the fresh evidence of Mr Bean but also on the fresh evidence of two further witnesses, Peter Hall and Michael Dunne…who had come forward in response to continued media coverage about the case.'[107]

The Court of Appeal was satisfied that the conditions of Section 23 (2) of the Criminal Appeals Act 1968 had been met with, in that the evidence of all three witnesses was capable of belief, it would have been admissible at the trial, and there was a reasonable explanation for the failure to call it.[108] However, in the final analysis, the Court of Appeal held that they 'can see no basis for a conclusion that the new evidence would or might reasonably have affected the jury's decision in this case' and they 'are satisfied that the Appellant's conviction is safe'.[109]

The role of members of the public, too, can be seen in the justificatory aim of publicity to ensure procedural fairness in the judicial process. Jeremy Bentham

[106] [2017] EWCA Crim 1414, [5]

[107] [2017] EWCA Crim 1414, [6]

[108] [2017] EWCA Crim 1414, [134]

[109] [2017] EWCA Crim 1414, [135]

strongly advocated this view, believing publicity was more effective than other available mechanisms to guard against the court's arbitrary decision. He was of the view that:

> without publicity, all other checks are insufficient: in comparison to publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.

The considerable emphasis on guarding litigants against judges' partiality and arbitrary exercise of judicial power is because these two factors ultimately lead to wrong decisions.

The primary aim of resolving disputes must not be carried out at the expense of procedural fairness because it is a crucial element in court adjudication. Zuckerman asserts that:

> principles of procedural fairness, such as impartiality, publicity, the right to be heard, or treating litigants on an equal footing must be observed regardless of consideration of economy, of efficiency, or, indeed, of whether they help or hinder the ascertainment of truth. [110]

The normative basis of guaranteeing a fair trial is closely linked to the rule of law as an ethical-political ideal that denounces the arbitrary exercise of state power on the subjects. For example, Trevor Allan believed that the rule of law 'encompass[es] traditional ideas about individual liberty and natural justice, and more generally,

[110] Zuckerman, *Zuckerman on Civil Procedure Principles of Practice* (Second edn, Sweet & Maxwell 2006), 4:

about the requirements of justice and fairness in the relations between governors and governed'.[111] The relations between the governors and those governed are structured, constrained, and determined by the legal rules, which certainly include procedural rules in the context of court adjudication. Procedures are laid down partly as safeguards to protect the subjects' fundamental right to due process as they mitigate the prospect of arbitrary exercise of judicial power and authority.[112]

Ashworth and Redmayne emphasise that a trial is not just a 'diagnostic procedure of which the sole purpose is to establish as accurately as possible (subject to the standard of proof) what happened.'[113] Apart from the epistemic aim of arriving at correct decisions,[114] the trial's legitimacy by observing and maintaining procedural fairness is another crucial aspect that is of equal importance.[115] Ashworth, Redmayne, Zuckerman, and Roberts have given considerable attention to the question of legitimacy, for it is considered to be among the primary underlying values of a trial.[116]

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[111] T R S Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1994), 21

[112] For insights on three traditions of procedural fairness, read, Denis J Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford University Press 1996), 165-226

[113] Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, Oxford University Press 2010), *The Criminal Process* (4th edn, Oxford University Press 2010), 25

[114] Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge University Press 2006), 2: 'whatever else it is, a criminal trial is first and foremost an *epistemic* engine, a tool for ferreting out the truth from what will often initially be a confusing array of clues and indicators. To say that we are committed to error reductions in trials is just another way of saying that we are earnest about seeking the truth.'

[115] Antony Duff and others, 'Introduction: Towards a Normative Theory of the Criminal Trial' in Antony Duff and others (eds), *The Trial on Trial Volume One: Truth and Due Process* (Hart Publishing 2004)

[116] Ashworth and Redmayne, *The Criminal Process* (4th edn, Oxford University Press 2010), Ch. 2; Read Ian Dennis, *The Law of Evidence* (4th edn, Sweet & Maxwell 2010), Ch. 2, Roberts and

Judicial proceedings have a moral dimension that sets them apart from other means of dispute settlement for upholding and enforcing standards of conduct. This moral dimension, in the form of moral integrity, is the basis for judicial legitimacy. Judges are responsible for maintaining high standards of moral integrity because 'a system of law that purports to teach moral lessons to others must itself at least aspire to be beyond moral criticism.'[117]

In the context of our discussion, open justice is a factor that keeps the moral integrity of judicial proceedings high apart from other contributing factors, such as enhancing the reliability of evidence, independent and impartial judiciary, and respect for rights.[118] It was held that:

> The public nature of the proceedings helps to ensure a fair trial by protecting the litigants against arbitrary decisions and enabling society to control the administration justice. This possibility of supervision by the public, even if frequently theoretical or potential, is a guarantee to the parties to a dispute that a real endeavour will be made to establish the truth through hearings conducted by a judge whose independence and impartiality can be verified by the way in which he conducts the hearing, summons and question witnesses and experts, considers the relevance of proposed evidence, and respects the right to be heard.[119]

Zuckerman, *Criminal Evidence* (2nd edn, Oxford University Press 2010); Paul Roberts, 'Theorising Procedural Tradition: Subjects, Objects and Values in Criminal Adjudication' in Antony Duff and others (eds), *The Trial on Trial Volume Two: Judgment and Calling to Account* (Hart Publishing 2006)

[117] Roberts and Zuckerman, *Criminal Evidence*, *Criminal Evidence* (2nd edn, Oxford University Press 2010), 188

[118] Ibid

[119] Axen v Germany B/57 December 14, 1981 Com Rep (European Commission Report) (EComHR), para 76-77

In essence, this justification rests on the disciplinary value of publicity, which ensures fairness by guarding litigants against the partial and arbitrary exercise of judicial power. It assumes that open justice can put the necessary pressure on the judge to remain firm and steadfast in discharging his duties according to the law.[120]

ii) Limited Active Participation in a Prescribed Circumstance

Unlike the *dramatis personae*, one may find it difficult to accept the notion that members of the public are participants in court adjudication, considering that they do not have active and direct involvement in the judicial process. This contention is not necessarily true because other than exerting the necessary pressure on the *dramatis personae* by making the judicial process open and transparent, members of the public may play a positive role, to an extent, in certain limited situations. This notion of limited active participation by members of the public (including an organisation, a body corporate or a public body) can directly affect, to an extent, the outcome is limited by law, and the practice varies across jurisdictions. For example, members of the public may draw the relevant authorities' attention to initiate a revision process over decisions made by the court in criminal trials.

The object of revision is to confer on criminal courts a kind of supervisory jurisdiction over decisions made by the subordinate courts in criminal cases to correct a miscarriage of justice arising from a misconception of law, irregularity of

[120] *R v Socialist Worker, ex p A-G* [1975] QB 637; *In re S* [2005] 1 AC 593, per Lord Steyn: 'A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all 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 or criminal trials in progress promotes public confidence in the administration of justice. It promotes the values of the rule of law.'

procedure, neglect of precautions or apparent harshness of treatment.[121] The power to revise a decision differs from the power to overturn a decision through appeal, which is the right of the aggrieved party who disagreed with the court's judgment. Revisionary power of the superior courts is a special power given by law to be exercised in certain appropriate circumstances only. The law permits revising the inferior courts' decisions in certain jurisdictions, such as Singapore and Malaysia.[122]

In Malaysia, a High Court judge may exercise the power of revision to examine the 'record of the proceedings of which has been called for by himself, or which otherwise comes to his knowledge'.[123] What is interesting about calling and examining the record of proceedings by the High Court for the revision is that non-litigants who are not privy to the dispute can initiate it. There are many ways in which the court's attention may be drawn to cases that may have to be revised, such as through newspaper reports,[124] letters from members of the public, the aggrieved parties or their relatives, and formal applications.[125]

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[121] K Muralidharan Pillai and Luo Qinghui, 'Revisiting the High Court's Revisionary Jurisdiction to Enhance Sentences in Criminal Cases' (2009) 21 Singapore Academy of Law Journal 135

[122] In Malaysia, for instance, Malaysian Criminal Procedure Code, s 323 (1) provides: 'A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court.' In Singapore, similar provision is provided in Singapore Criminal Procedure Code, s 400.

[123] Malaysian Criminal Procedure Code, s 325 (1)

[124] *Public Prosecutor v Burhanuddin* [2006] 6 MLJ 465; Herein this case, the High Court judge exercised his revisionary power upon reading the news about a convict of armed robbery who was sentenced to 30 months of imprisonment and one stroke by the Magistrate in the newspaper.

[125] *Public Prosecutor v Muhari Mohd Jani & Anor* [1999] 8 CLJ 430

In Malaysian jurisdiction, judges may revise the decision of subordinate courts based on letters sent by members of the public or news coverage.[126] In the case of *Public Prosecutor v Muhari Mohd Jani*, the subordinate court's decision was revised by the High Court judge, who acted upon a complaint from members of the public. In *Public Prosecutor v Burhanudin*, the High Court judge exercised his revisionary power after reading in the newspaper about a convict of armed robbery sentenced to 30 months of imprisonment and one stroke by the Magistrate.

A similar arrangement may be seen in the ability of the Criminal Cases Review Commission (CCRC) to refer the conviction or any sentence of an offence on indictment in England, Wales and Northern Ireland to the Court of Appeal if there is a real possibility that the conviction or sentence will not be upheld.[127] The Commission can make such reference at its own volition or after an application of the convict or his representative.[128] In deciding whether to make a reference of a conviction, verdict, finding or sentence or not, the Commission is not restricted and confined to consider the representation of the convict only. Section 14 (2) of the Criminal Appeal Act 1995 provides that:

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[126] In the case of ibid, the decision of the subordinate court was revised by the High Court judge acting upon a complaint from members of the public. In *Public Prosecutor v Burhanuddin*; the High Court judge exercised his revisionary power upon reading the news about a convict of armed robbery who was sentenced to 30 months of imprisonment and one stroke by the Magistrate in the newspaper.

[127] Criminal Appeal Act 1995, s 13. There has been criticism levelled against the Commission, claiming that it is not fit for the job due to systemic failures. Read, https://www.theguardian.com/law/2018/may/30/criminal-cases-review-commission-not-fit-for-purpose-lawyers-say . Be that as it may, for our present purpose, the Commission, which has the power to refer a case to the Court of Appeal based on a representation, remains a relevant example indicating the possibility of members of the public playing an active role in the administration of justice.

[128] Criminal Appeal Act 1995, s 14(1) provides 'a reference of a conviction, verdict, finding or sentence may be made under any of sections 9 either after an application has been made by or on behalf of the person to whom it relates or without an application having been so made.'

In considering whether to make a reference of a conviction, verdict, finding or sentence under any of sections 9

> the Commission shall have regard to—
>
> (a) any application or representations made to the Commission by or on behalf of the person to whom it relates,
>
> (b) any other representations made to the Commission in relation to it, and
>
> (c) any other matters which appear to the Commission to be relevant.

The importance of the Criminal Cases Review Commission can be seen in its role in the landmark case of *R. v. Mahmoud Mattan (Hanged)*.[129] In this case, the conviction was ultimately quashed after the Criminal Cases Review Commission referred it to the Court of Appeal. Subsequently, the family received £1.4 million in compensation from the government for a murder the deceased did not commit.[130]

In Canada, a similar arrangement may be seen in the availability of applications for ministerial review on the grounds of miscarriage of justice. Section 696 (1) of the Canada Criminal Code provides:

> An application for ministerial review on the grounds of miscarriage of justice may be made to the Minister of Justice by or on behalf of a person who has been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament or has been found to be a dangerous offender or a long-term offender under Part XXIV and whose rights of judicial review or appeal with respect to the conviction or finding have been exhausted.

[129] *R. v. Mahmoud Mattan (Hanged)* [1998] EWCA Crim 676. The accused was convicted for murder and sentenced to death in July 1952.

[130] https://www.theguardian.com/uk/2001/may/14/jamiewilson

Section 696 (3) of the Criminal Code stipulates powers of the Minister of Justice:

> On an application under this Part, the Minister of Justice may
>
> (a) if the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred,
>
> (i) direct, by order in writing, a new trial before any court that the Minister thinks proper or, in the case of a person found to be a dangerous offender or a long-term offender under Part XXIV, a new hearing under that Part, or
>
> (ii) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person found to be a dangerous offender or a long-term offender under Part XXIV, as the case may be; or
>
> (b) dismiss the application.

All the instances mentioned above of the Criminal Cases Review Commission in the United Kingdom, the Minister of Justice of Canada and a Malaysian High Court judge exercising the revisionary power over subordinate courts' decisions in criminal cases are well within the contemplation of being members of the public envisaged in this thesis as they were not part of the *dramatis personae* in the original case.

C. Members of the Public as Participants: Clarifying the Terminology

While the proposition that the basic underlying idea of the open justice principle is in the idea of recognising members of the public as participants in court adjudication may provide a fresh perspective, this admittedly attempts a new set of questions. Who are members of the public? What does public participation mean in court adjudication? What is the basis for claiming that members of the public are a party to the judicial process? I shall first deal with the first two questions in the remaining part of this chapter and address the third question in Chapter 2.

The word “members of the public”, used extensively in this thesis, has two different yet interrelated connotations depending on the context. Firstly, “members of the public” is an abstract construct that collectively refers to society as a political community. The reference is evident when I speak of the general idea of court adjudication as an institutional process of dispute settlements in society in contrast to a private settlement. Court adjudication is an institutional process of dispute settlement of the society because it is established in the name of the society whose authority and power are derived from the people's will.[131]

Moreover, the legal norms applied in legal proceedings are public norms. Therefore, it means the judicial process and the judgments should be exposed and susceptible to public evaluation and assessment.[132] Another factor upon which members of the public may claim ‘ownership’ in the trial process is that public funding funds the judicial system.[133] As such, members of the public are deemed ‘to

[131] Jeremy Waldron, ‘The Concept and the Rule of Law’ (2008) 43 Georgia Law Review 1, 24; See, *Presley v Georgia* 558 US__ (2010)

[132] *Harman v Home Office* [1983] 1 AC 280, 316. See, Waldron (2008) 43 Georgia Law Review 1 and Jeremy Waldron, ‘The Rule of Law and the Importance of Procedure’ New York University Public Law and Legal Theory Working Papers, Paper 234 <http://lsr.nellco.org/nyu_plltwp/234> accessed 25 June 2013

[133] See, Chris Hastings, ‘High Court Judges' Accommodation Costs Taxpayer More than £5 Million a Year ’ *The Telegraph* (04 Apr 2009) <http://www.telegraph.co.uk/news/uknews/law-and-order/5105210/High-Court-judges-accommodation-costs-taxpayer-more-than-5-million-a-year.html> accessed 05 August 2014; Matthew Davis, ‘Judges' Mega-pensions Could Cost Taxpayer Billions’ *Express* (17 August 2014) <http://www.express.co.uk/news/uk/500215/Judges-pensions-could-cost-billions> accessed 1 September 2014; Marc Meneaud, ‘Taxpayers’ £20m Bill So Judges Can Live in Luxury’ (23 March 2014) <http://www.sundaypost.com/news-views/uk/taxpayers-20m-bill-so-judges-can-live-in-luxury-1.282119>

have a right to control the state process, which encompasses the right to check the administration of public law.'[134]

With the terminology, I suggest that members of the public collectively would then be recognised as (i) a group of people whom the court must continuously engage with during and after the conclusion of a trial and (ii) an integral part and component of the trial process. In the context of open justice, the institutionalisation of open proceedings as a general norm of the judicial process may arguably be perceived as a concrete step to give effect to the collective participation of "members of the public".[135] This presumption of openness can be defeated if a proven countervailing interest can only be served by a certain degree of derogation from the open justice principle acceptable in a democratic society.[136]

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[134] Morag McDowell, 'The Principle of Open Justice in a Civil Context' [1995] New Zealand Law Review 214, 'The Principle of Open Justice in a Civil Context' [1995] New Zealand Law Review 214, 222.

[135] The requirement of holding judicial proceedings in public is provided in various statutory provisions. For example, Section 67 of the Senior Courts Act 1981 reads, 'business in the High Court shall be heard and disposed of in court except in so far as it may, under this or any other Act, under rules of court or in accordance with the practice of the court, be dealt with in chambers.' See, also, Section 121 of the Magistrates Court Act 1980; Section 158 of the Armed Forces Act 2006; Rule 37 (1) of the Tribunal Procedure (Upper Tribunal) Rules 2008; Rule 27 (1) of the Tribunal Procedure (First-Tier) (Immigration and Asylum Chamber) Rules 2014; Rule of 32 (1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009; Rule 39.2 of the Civil Procedure Rules and Rule 27 of the Supreme Court Rules 2009.

[136] Article 29 (2) of the Universal Declaration of Human Rights 1948 provides that 'limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in *a democratic society*.' Similarly, Article 11 of the European Convention of Human Rights provides that derogation from the general requirement of publicity of trial be made 'in the interests of morals, public order or national security in *a democratic society*.' When human rights instruments use the expression 'democratic society', it does so in a broader and more inclusive sense rather than referring to a majoritarian conception. The notion of democratic society, as stipulated in the human rights document, is not only referring to majoritarian government but rather envisioning a society that respects and upholds the democratic values and ideals of participation, deliberation and self-determination. See, Trechsel

The recognition of members of the public as a collective agent would also mean that the absence of members of the public in the public gallery would not violate the open justice principle if there is no restriction imposed on members of the public. The position is in line with a judicial pronouncement in the case of *McPherson v McPherson* where it was held that:

> the actual presence of the public is never, of course, necessary…the Court must be open to any who may present themselves for admission. The remoteness of the possibility of any public attendance must never by judicial action be reduced to the certainty that there will be none.[137]

Understanding "members of the public" as a collective agent[138] is vital because there has been criticism against open justice based on the frequent absence of members of the public in the courtroom, particularly in lower courts that deal with minor offences and simple civil cases.[139] I argue that this criticism is weak because its primary concern is only with the ongoing hearing. It does not account for other aspects of open justice that require continuous judicial engagement with members of the public, such as after the conclusion of a trial. The requirement of giving reasoned decisions, for example, is a distinct aspect of open justice that is not dependent on the presence or absence of individual members of the public in the courtroom.

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[137] *McPherson v McPherson* [1936] AC 177, 200

[138] Richard Ekins, 'Joint Intention and Group Agency' in *The Nature of Legislative Intent* (Oxford University Press 2012); Richard Ekins, 'Facts, Reasons and Joint Action: Thoughts on the Social Ontology of Law' Oxford Legal Studies Research Paper No 26/2014 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2430247> accessed 10 February 2015

[139] Jaconelli, *Open Justice: A Critique of the Public Trial*, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002),37; Martin Beckford, '3,000 Trials are Held in 'Secret' as Part of Scheme to Speed Up Justice' *The Mail on Sunday* (12 July 2015) 46 '3,000 Trials are Held in 'Secret' as Part of Scheme to Speed Up Justice' *The Mail on Sunday* (12 July 2015) 46

Secondly, the term "members of the public" may also refer to members of the public as particular individuals in a specific context, for example, when we talk about the application of the open justice principle at a personal level. The open justice principle would be less meaningful if it remains an abstract idea and ideal without implying clear and concrete practical implications. The actualisation of the need for members of the public to participate in the judicial process can be seen, for instance, in the fact that the law grants various rights to members of the public individually, such as the right to attend and observe judicial proceedings, the right to know about the facts and issues litigated in courts and the right to criticise judicial decisions.[140] These legal rights are given to members of the public even though they are not immediately involved in the judicial process.

As I have indicated earlier, there is interconnectedness between the first definition (members of the public as a political community collectively) and the present one. We (as individuals) are partly entitled to those rights provided by the open justice principle by virtue of our membership in society. It is essential to highlight the interrelation between these two points because it underlies a basis for claiming participation in court adjudication.

As we shall see later in this thesis, it is insufficient for members of the public to claim participation in the judicial process by just relying on a claim that they have an interest in the judicial process. This is because, as a matter of analogy, someone may have an interest in who is going to become the leader of a particular political party, of which he is not a member. Does it mean he is also a participant in the

[140] *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, [38]-[40]

election process? So, this kind of query may be overcome by emphasising that the notion of public participation at the individual level is somehow dependent on his membership/ties to the whole political community and the degree of the state's commitment to the principle of the rule of law.

There is also a need to clarify the terminology, particularly in a legal rights discourse, because identifying the right holder is vital. Although the general practice is to attribute legal rights to individuals as the right-holders, some scholars have argued, such as Will Kymlicka and Joseph Raz, that rights may be given to groups collectively because groups can be right-holders.[141] The right to affirmative action is such an example. In the modern context, 'group rights' are used as an instrument to facilitate the realisation of equality. This could happen when a particular group needs special protective rights if its members are to enjoy living conditions on terms equal to the majority of the population.[142] Therefore, any suggestion here in this thesis to give members of the public the right to open justice, which includes the

[141] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press 1995); Joseph Raz, *The Morality of Freedom* (2nd edn, Oxford University Press 1986), 208

[142] Examples of such groups may include indigenous peoples and ethnic minorities. India has an extensive system of affirmative action quotas or reservations intended to address historical inequalities of opportunity, especially the legacy of the caste system. Similarly, Article 153 of the Malaysian Federal Constitution grants special positions to certain ethnic groups to address some socio-economic problems due to the historical legacy of the colonials. Article 153 (2) of the Malaysian Federal Constitution reads: 'Notwithstanding anything in this Constitution, but subject to the provisions of Article 40 and of this Article, the Yang di-Pertuan Agong shall exercise his functions under this Constitution and federal law in such manner as may be necessary to safeguard the special provision of the Malays and natives of any of the States of Sabah and Sarawak and to ensure the reservation for Malays and natives of any of the States of Sabah and Sarawak of such proportion as he may deem reasonable of positions in the public service (other than the public service of a State) and of scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and, when any permit or licence for the operation of any trade or business is required by federal law, then, subject to the provisions of that law and this Article, of such permits and licences.'

right to attend a public trial, could be mistakenly understood as if it is given to the community at large collectively.

While it is true that one may not discount the fact that a legal right could be given to a group collectively, as argued by certain scholars,[143] it may not be the case for the right to open justice. Luis Rodriguez-Abascal has argued that to qualify as a group right, it 'must be indivisible into individual rights'[144] and 'rights that can be understood as arrays of individual rights are not group rights.'[145] He further explained that if this requirement of indivisibility were not in place:

> then all individual rights would also qualify as group rights and the difference between individual and group rights would vanish - individual and group right would be just two possible ways of referring to the same thing.[146]

Michael Hartney has also argued along the same line and concluded that there will be redundancy if individual and group rights have the same conceptual and normative meaning.[147]

Hence, the right to open justice given to members of the public, as I shall discuss in Chapter 3, in gist retains its characteristic of being an individual right held

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[143] Leslie Green, 'Two Views of Collective Rights' (1991) 4 Canadian Journal of Law and Jurisprudence 315

[144] Luis Rodriguez-Abascal, 'On the Admissibility of Group Rights' (2003) 9 Annual Survey of International and Comparative Law 101

[145] Ibid, 'On the Admissibility of Group Rights' (2003) 9 Annual Survey of International and Comparative Law 101, 104

[146] Ibid

[147] Michael Hartney, 'Some Confusions Concerning Collective Rights' (1991) 4 Canadian Journal of Law and Jurisprudence 293

severally. So, when I say, for example, that members of the public, including a body corporate,[148] have the right to open justice, it does not mean that I am referring to society's rights collectively. Instead, it is the right given to individuals who are neither privy nor immediately involved in the case litigated before the court, which is in line with the Inclusivity thesis that I defend in this thesis.

D. The Propriety of the Term "Participants".

I have suggested that an alternative way of explaining the open justice principle is in the idea of inclusivity, whereby members of the public are recognised as participants in court adjudication. As participants, members of the public are entitled to many legal rights, such as the right to attend a trial, observe the proceedings and be informed about what took place in the courtroom. Members of the public also remain involved throughout the judicial process, and they cannot be summarily excluded from the trial, either by closing the courtroom door or information embargo.

[148] The right to a public trial is confined to a natural person and extends to a corporate legal personality. There have been many cases where a body corporate has raised the issue of open justice. See, for example, *A v BBC* [2014] UKSC 25, [26]. Here, in this case, the BBC brought the appeal to challenge an order made by the Court of Session regarding a decision of the Upper Tribunal. The Court of Session allows the applicant to delete his name and address and substitute the letters of the alphabet. Although the court dismissed the appeal brought by the BBC, an important dictum was laid down by the court. The court held, 'the connection between the principle of open justice and the reporting of court proceedings is not…merely functional. Since the rationale of the principle is that justice should be open to public scrutiny, and the media are the conduit through which most members of the public receive information about court proceedings, it follows that the principle of open justice is inextricably linked to the freedom of the media to report on court proceedings.' In principle, there is no distinction between a corporate legal personality that is registered overseas and a local body corporate. However, the application of the principle is subjected to the issue of jurisdiction for the purpose of enforcement.

However, describing members of the public as participants may be seen as obfuscatory and misleading because the description of being participants in court adjudication is typically suitable for litigants. The crux of the criticism, in my view, has two parts: firstly, it is a misnomer to describe members of the public as participants because they are not privy to the dispute before the court, and secondly, they are unable to participate in court adjudication directly.

E. Must Members of the Public be Privy to the Subject Matter of Disputes?

The issue of privity to the dispute is not a strong point that could be relied on to say that members of the public are not, or should not be deemed, participants of court adjudication outright because there is a varying degree, nature of and the reason for participation in the judicial process between *dramatis personae* and members of the public.

A distinction can be made between participation in the judicial process due to privity to the subject matter of a dispute (the cause of action) and privity to the dispute resolution process. With regard to the former, being involved in a legal dispute is relevant to the extent that it determines one's ability to seek legal redress from courts. The law regulates the court's accessibility through various means, such as the doctrine of locus standi and the doctrine of misjoinder, to ensure that only those with genuine grievances can become litigants.

On the other hand, other people, such as judges, lawyers, and jurors, participate in court adjudication without being involved in and connected to the subject matter of a dispute. They participate in the judicial process because they are

crucial in resolving the dispute. If privity to the dispute were to be used as an argument to preclude public participation, then the same argument could be used against judges, lawyers, and jurors because none of them would be privy to the dispute.

Furthermore, the issue of privity to the subject matter of a dispute may be grounds for a judge to recuse himself from adjudicating the case because of the principle of natural justice.[149] The issue of privity to the dispute, too, may make lawyers and prosecutors unfit to represent their client and conduct the case, for they may be called witnesses. Thus, a more sensible approach to determining whether someone participates in the judicial process is to ask what role he plays in the process and the nature of his involvement.

F. Is the Lack of Direct Participation Fatal to the Notion of Public Participation?

The second part of the first criticism posits that judges, lawyers, litigants and witnesses (the *dramatis personae*) are participants because there is direct and active involvement in their respective capacities. This direct and active involvement would practically confirm their participation in the trial process. Unlike the *dramatis personae,* who are actively and directly involved in the trial process, members of the public are merely there in the courtroom to watch the proceedings. In other words, they are just bystanders who sit at the periphery of the whole process without any right to address the judge. Furthermore, a trial will proceed notwithstanding the

[149] The natural justice principle provides that no one should be judged in his own cause. A judge who has some connection with the case, which may create a reasonable apprehension of bias in the mind of fair-minded members of the public, has to recuse himself. See, Zuckerman, *Zuckerman on Civil Procedure Principles of Practice* (Second edn, Sweet & Maxwell 2006), 72-88

absence of members of the public in the courtroom, indicating how trivial members of the public are to court adjudication.

My refutation of the argument about the lack of direct and active involvement of members of the public in the judicial process has two parts. Firstly, while members of the public who chose to come to court may rightly be described as bystanders in that specific context, I suggest that, in the final analysis, the generic term "participant" is more accurate and potentially better to depict members of the public's actual status and the role they play in court adjudication. This is because the reductive description of members of the public as bystanders has a spatial and temporal limitation.

Reducing members of the public as observers and bystanders means limiting the scope and nature of the public's involvement. It may be appropriate to call those who come to court and sit at the public gallery as bystanders, but what about those not physically present in the courtroom? Those who read an online newspaper at home, tweet about an on-going case and watch a live broadcast of the Supreme Court's proceedings are not bystanders. This is because a bystander, by definition, is a 'person who is present at an event or incident but does not take part.'[150] In this context, my choice of terminology, which is that members of the public are participants in the judicial process, has its strength and advantage because it is more expansive and inclusive in scope.

[150]'Oxford Dictionaries' (*Oxford University Press*, 2016) <http://www.oxforddictionaries.com/definition/english/bystander?q=by-stander> accessed 10 January 2016

Secondly, although members of the public cannot be as active as the trial's *dramatis personae*, it does not mean that they do not participate at all. The nature of the public's involvement varies across the spectrum, and the level of participation required of them in the administration of justice depends on the situation. Observing judicial proceedings from the public gallery is a form of participation that is sufficient and suitable for members of the public who come to court. They cannot be given the same active role as the trial's *dramatis personae* because there is no need to do so.

To say that members of the public who came to court to observe the proceedings do not participate in the judicial process is not entirely correct. Members of the public who sit at the public gallery, including those who watch a live proceeding at home, to an extent, participate in the judicial process by putting the necessary pressure on the trial's *dramatis personae* to act according to law. Judges, for instance, are restrained from exercising their judicial power arbitrarily because of this, knowing that they are under constant watch by the public. Similarly, witnesses are encouraged to be truthful, knowing they will be subjected to public rebuke and criminal prosecution for perjury if caught lying while giving testimony.[151]

Although members of the public do not have the right to address the judge, as such right is limited to lawyers (who represent the clients before the court) or litigants themselves, if unrepresented, it is not the sole determining factor that defines public participation in the judicial process. If we were to confine participation

[151] Perjury Act 1911, s1. It reads, 'If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury, and shall, on conviction thereof on indictment, be liable to penal servitude for a term not exceeding seven years, or to imprisonment for a term not exceeding two years, or to a fine or to both such penal servitude or imprisonment and fine.'

merely to verbal involvement, what about an accused person who chooses to remain silent throughout the trial? The fact remains that the accused person participates in the judicial process despite his silence.

Similarly, if the issue was all about having the right to speak, then the jurors also do not have the right to address the judge and ask witnesses questions in the trial. Allowing anybody other than the *dramatis personae* to address the court freely is unnecessary and cost-inefficient. The right to address the court has been given to litigants to ensure that justice can be served in a timely and proportionate manner.[152]

In my view, the nature and extent to which participants of court adjudication (such as judges, lawyers, litigants, witnesses, and members of the public) participate are determined according to their role, nature and degree of interest in the judicial process. For example, even though judges participate in the judicial process, their participation is not of the same degree and breadth as litigants. For procedural fairness, judges who determine legal disputes and command, to an extent, the power to manage the judicial process are required to dispose of the case before them judiciously and shall not behave as if they are one of the litigants.

[152] Zuckerman, *Zuckerman on Civil Procedure Principles of Practice* (Second edn, Sweet & Maxwell 2006), 13-5. Zuckerman has advanced a powerful argument of a 'three dimensional concept of justice'. Justice, according to him, is a delicate balance between the imperative of substantive justice, the imperative of timely resolution and the imperative of proportionality. Indeed, the introduction of the new Civil Procedure Rules (CPR) in 1998 was to address some of the fundamental problems with how justice was previously administered where litigants were deliberately delaying the case with impunity. Prior to the CPR, the court had limited powers of control over the conduct proceedings or to monitor the progress of litigation. Judges now have more control over the management of cases in the light of the recommendations of the Jackson Report that propose coherent reforms designed to control costs and promote access to justice.

In the context of a criminal prosecution, the accused's ability to present his case and effectively defend against the charge may be impaired if the judge, for example, behaves as if he were the prosecutor. This was reflected in the judgment of *Zainur bin Zakaria v Public Prosecutor*, a Malaysian case. The appellate court held that:

> The manner [the judge] conducted the proceedings, in particular the interrogation of the appellant and the speedy finding of guilt without even allowing the appellant to call any witness, gave the picture that he was behaving as though he was acting as counsel for the two prosecutors in the motion. [153]

G. The Need for a Formal Application to Exclude Members of the Public

As envisaged in this chapter, the idea of public participation is not abstract without evidence. I have adumbrated above that the open justice principle entails various legal rights and generates different legal obligations, such as the right of members of the public to know the identities of the litigants[154] and the duty of the judge to apply the necessary test before any order for physical exclusion and information embargo can be granted.[155] These rights and obligations practically mean that members of the

[153] *Zainur bin Zakaria v Public Prosecutor* [2001] 3 CLJ 673, 636. This remark was made on appeal from the judgment made in *Re Zainur Zakaria* [1999] 3 CLJ 696.

[154] Steph Cockroft, 'Divorcee, 53, embroiled in a legal battle with her banker ex-husband over his alleged £1million family fortune loses her anonymity bid' *Mail Online* (19 January 2017) <http://www.dailymail.co.uk/news/article-4136850/Tina-Norman-loses-anonymity-bid-divorce-case.html> accessed 25 January 2017

[155] *Ntuli v Donald* [2010] EWCA Civ 1276 [2010] EWCA Civ 1276; *JIH v News Group Newspapers* [2011] EWCA Civ 42.

public would remain involved in the trial process unless and until they are excluded by the order of the court.

It was held in the case of *R (on the application of O'CONNOR) v Aldershot Magistrates Court* that 'it is a necessary incident of the right to attend a criminal trial (or other public court hearing) that a member of the public may enter the court building in which the trial is taking place.'[156] The court emphatically pronounced that the 'access to a court building for the purpose of attending a public hearing is a matter of legal right and does not require any express or implied permission from the occupier' and a decision to exclude members of the public from the judicial proceedings cannot be made administratively, but it must primarily be decided, in most of the situations, by judges.[157]

Derogation from the open justice principle is an exception to the general norm of open and transparent judicial proceedings. Thus, the applicant who seeks derogation from the general principle must establish, based on cogent evidence, that it is strictly necessary.[158] We may infer from the need to apply for physical exclusion from the courtroom or information embargo that there is a tacit acknowledgement that members of the public are participants in the trial. Logically, there is no need to make such formal applications to the court if members of the public are mere bystanders with no legitimate interest and any legal standing in the judicial process.

1.4 The Need for Public Participation through the Open Justice Principle

[156] [2016] EWHC 2792 (Admin), [28]

[157] [2016] EWHC 2792 (Admin), [28]

[158] *Ntuli v Donald* [2010] EWCA Civ 1276

I argue that a broad idea of public participation in court adjudication may be conceived and explained in at least two different ways: first, participation through agency, and second, participation through publicity of the open justice principle. Although these types of participation are different, they are equally required to exist in court adjudication. However, there are two things to be noted about public participation through an agency for our discussion.

Firstly, members of the public get involved when their interests are advanced and served by at least four different agencies directly and actively involved in a case before the court: judges, jurors, the Public Prosecutor/Attorney General, and amicus curiae. These four agencies have their respective functions, roles, and powers within the comprehensive system of administration of justice. Although these agents have different roles in their respective capacities, they share a general and common aim of representing the public interest.

Secondly, public participation through an agency is independent of the open justice principle. I distinguish between participation through agency and participation through open justice because of the basic underlying difference between two categories of people claiming and sharing interests in court adjudication. Participation through an agency is carried out by those who are immediately involved in the proceedings. In contrast, participation through the open justice principle is a form of involvement by members of the public. This dichotomy of separating these two groups of people (the *dramatis personae* of trial and members of the public) is crucial because it forms, as I have explained before, the basic ingredient of the open justice principle.

A. Public Participation through Agency

Many public interests are interwoven in court adjudication. What amounts to a public interest is issue-specific and context-dependent. Given the multiple aspects of public interest in court adjudication, different mechanisms, including agency representation, will be used to serve those interests.[159] Agency representation is a possible way of arguing that members of the public get involved in the judicial process, wherein their interests are served or defended through representatives. I have chosen four examples to illustrate members of the public's involvement through the agency.

i. Judges

In a non-judicial dispute resolution process, the disputants remain autonomous, which is, to say, entirely able to regulate and determine how a dispute is resolved. The disputants may choose to resolve the dispute amicably among themselves through the dynamics of compromise. Alternatively, they can also refer the dispute to a third party of their choice for determination. In arbitration, a third party is chosen and invited to become the trier of facts and the decision-maker. Parties

[159] Agency representation that I am talking about here is different from group litigation and representative parties. This is because these two devices are meant for handling multi-party actions as provided in CPR 19. Representative proceedings are conducted on behalf of claimants or defendants when there is an identity of interest within the group. Class litigation refers to a procedure for multiparty claims with a view to facilitating access to justice where large numbers of persons have been affected by the defendant's conduct. Unlike in representative proceedings, actions brought together under group action remain separate proceedings. Zuckerman, *Zuckerman on Civil Procedure Principles of Practice* (Second edn, Sweet & Maxwell 2006), 508-27

remain mostly autonomous, in my sense, even when arbitration is underway because the rules and parameters are predetermined by themselves and are most likely tailored to suit their best interests and convenience.

However, there are situations in civil matters when the dynamics of negotiation and compromise fail to resolve legal disputes. Parties may also fail to reach a consensus on the rules and parameters for arbitration. In such a scenario, the disputants can seek the community's assistance to resolve the dispute.

In practical terms, the community cannot resolve the dispute unless it is done through their representatives. These representatives are the judges who adjudicate matters by the rules and standards applicable and acceptable to the community. John Finnis succinctly explains the role played by the court in the following passage. He said:

> the judicial responsibility is to adjudicate between parties who are in dispute about their legal rights and obligations by applying -- to facts agreed between them or found by the court after trial – the law that defined those rights and obligations at that time past when the matter of their dispute (the cause of action) arose. *The court's judgment identifies and applies the legal commitments the community should be judged to have made to each of the parties now before the court*, by the time they came into conflict with each other about the content or applicability of those commitments: past. (Emphasis added) [160]

[160] John Finnis, 'Judicial Power: Past, Present and Future' Oxford Legal Studies Research Paper No 2/2016 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710880##> accessed 14 January 2016, 4. See also, John Finnis, *Philosophy of Law* (Oxford University Press 2011)

Judges are also deemed to become the representatives of members of the public, partly by their appointment to the office. Magistrate courts especially have a strong public representation element because a magistrate is 'a member of the local community whose appeal is in judging the accused as a peer.'[161] Although there are variations regarding the mode of selection and appointments between judges of the inferior and superior courts, the fact remains that the litigants do not select and appoint judges.[162] Litigants submit to the court's jurisdiction without having the privilege of choosing whom they think preferably suitable to adjudicate the matters. They must accept whoever is assigned to them, save in exceptional circumstances that may warrant an application for recusal due to conflict of interest and bias avoidance.[163]

Judges represent members of the public in court adjudication in many ways. First, they represent the public interest by providing a fair, impartial, and effective judicial system to avoid self-help and vigilantism and maintain public order, which is intrinsically a public interest. As representatives, judges are tasked with

[161] Jacqueline Hodgson, 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' in Antony Duff and others (eds), *The Trial on Trial Volume Two: Judgment and Calling to Account* (Hart Publishing 2006), 227

[162] The appointment of a Justice of the Supreme Court of the United Kingdom is governed by Sections 25 to 31 and Schedule 8, of the Constitutional Reform Act 2005. High Court judges are appointed by the Queen on the recommendation of the Lord Chancellor, after a fair and open competition administered by the Judicial Appointments Commission. High Court judges must have had a right of audience for all proceedings in the High Court for at least seven years, or have been a circuit judge for at least two years. Prior to October 2013, the Lord Chancellor appointed magistrates. Under the Crime and Courts Act 2013, and from 1 October 2013, the statutory power to appoint magistrates transferred to the Lord Chief Justice, who delegates the function to the Senior Presiding Judge for England and Wales. Magistrates are not paid, apart from an allowance for loss of earnings, mileage and subsistence.

[163] An application for recusal of judges should be entertained if there is an issue of judicial bias. Zuckerman, *Zuckerman on Civil Procedure Principles of Practice* (Second edn, Sweet & Maxwell 2006), 72-88

administering society's legal rules and standards, and they cannot substitute them with their personal moral or political inclinations.

Secondly, the representation of public interest in court adjudication can be seen in the division of roles played by judges and legislators who share a responsibility to promote public interest in their respective capacities.[164] Legislators play their role at the legislative assembly to enact laws of general application, whereas judges' responsibility to promote public interest arises when litigants invoke judicial power.

Unlike legislators with the capacity and privilege of promoting public interests through legislation, judges have the narrower task of deciding a specific case by identifying and applying 'the legal commitments the community should be judged to have made to each of the parties…before the court'.[165] The process of identifying and applying the legal commitments as envisaged by Finnis is not a straightforward task, as it would sometimes require judges to tread into the realm of interpretation. However, the interpretative exercise by judges is not left untied to any legal framework. Judges would interpret legislation that they believe is correct at

[164] All three branches of government share the same duty of promoting public interest in their respective capacities. There is no cut-and-dried drawn line between them particularly between the judiciary and legislature. I tend to agree with Kavanagh's rejection of the term separation of power because 'it underestimates both the legitimate interaction between the three branches of government and the considerable overlap in the constitutional role of each branch.' Instead, she prefers to use the term 'constitutional division of labour between the three branches of government.': Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009), 8-9

[165] Finnis, 'Judicial Power: Past, Present and Future' Oxford Legal Studies Research Paper No 2/2016 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710880##> accessed 14 January 2016

law and one that would promote a public good.[166] It is sometimes done under the disguise of giving an interpretation that suits Parliament's intention the best.

This aspect of interpretative exercise by judges may also be taken as the notion of accountability to law. Tushnet explains that accountability to the law refers to 'an appropriate orientation or mindset. A judge is accountable to the law if and to the extent that she orients her thinking to legal materials and thinks of herself as a judge rather than, for example, a bureaucrat or politician.'[167] Contrary to a politician who may decide according to the popular view, a judge has to strike a balance between the specific need to deliver justice to litigants while respecting the intention of lawmakers who legislate statutory laws and the expectation and sentiment of members of the public in general.

Raz argues that the function of the rule of law in judicial decisions is 'to facilitate the integration of particular pieces of legislation with the underlying doctrines in [the] legal system'.[168] Courts must carry out their interpretive functions in a way that is 'both faithful to the legislative purpose and principled in integrating it with traditional doctrines of the liberties of the citizens'.[169]

ii. Jurors

[166] This aspect of promoting public good is one the good aspects of court adjudication as opposed to alternative disputes resolutions. Read, Craig Loveless, 'The Dangers of Privatising Civil Justice through Mandatory ADR ' (2003) 10 UCL Jurisprudence Review 368 and Owen M Fiss, 'Against Settlement' (1984) 93 The Yale Law Journal 1073

[167] Mark Tushnet, 'Judicial Accountability in Comparative Perspective' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press 2013), 71

[168] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1995), 375

[169] Ibid

Jurors are tasked with finding the accused's guilt in criminal trials of certain offences.[170] Jury deliberation is the process of reasoning and discussion by a representative group of citizens in search of a collective judgment on a fellow citizen. There may be a good reason to think that juries have the attributes that make them good fact-finders because a jury is a group of people of various backgrounds who are 'likely to contain a broader range of experience and expertise than the single judge.'[171] It was argued that the difference in social class and variety of background between the jurors and a judge 'may give them better insight into the sort of situation which [is] the subject of [the] trial.'[172] The jury system's value also lies in jurors' capacity to inject a sense of common justice and popular morality'.[173]

Although the lay magistracy and the jury system are defended on many accounts as forms of democratisation where certain selected members of the public are allowed to get involved in the trial directly on behalf of the community, I argue that such democratisation is still essentially within the realm of public participation through agency representation. Even though magistrates and jurors are selected and appointed among lay members of the society, they assume the role of *dramatis personae* of the trial who are formally involved in the case. Their presence and participation in a trial do not make the trial public in the context of the open justice

[170] For a critical assessment of the role of jury in criminal justice system, see, Roberts and Zuckerman, *Criminal Evidence* (2nd edn, Oxford University Press 2010), 65

[171] Mike Redmayne, 'Theorising Jury Reform' in Antony Duff and others (eds), *The Trial on Trial Volume Two: Judgment and Calling to Account* (Hart Publishing 2006), 101

[172] Ibid

[173] Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford University Press 1996), 11. This is perhaps true in the context of jury nullification. See, Thom Brooks, 'A Defence of Jury Nullification' (2004) 10 Res Publica 401; Thom Brooks, 'The Right to Trial by Jury' (2004) 21 Journal of Applied Philosophy 197

principle. This category of people does not amount to “members of the public” within the context of the open justice principle because those individuals who assume official roles will physically be there throughout the adjudicatory process.

The main concern of open justice should always be about those who may be excluded from a trial process for lack of an official capacity, such as judges who decide the case and witnesses who unfold the evidence. There is also the danger that if the conception of a public trial can be satisfied with the lay magistrates and jurors' mere presence and participation in a trial, the possibility of a private trial is no longer problematic.

iii. The Attorney-General/Public Prosecutor

The public is also represented in court adjudication through the Attorney General or the Public Prosecutor's office when there is a public interest in the subject matter. What amounts to a public interest in the adjudicatory process is context-specific and issue-dependent. It may be because the government is a litigant or the issue brought to court, in a case where the government is not named as a party, would have an overreaching impact on society in general. In civil matters, the Attorney General's office must protect and advance the public's interest when the government sues or is sued. In certain circumstances where the government is neither the plaintiff nor the defendant, society may be represented in public interest cases through an Attorney General's intervener application.

In the case of *C plc and another v P (Attorney General intervening)*, the issue for determination was whether P could invoke the privilege to prevent disclosure of

the material to the police. P submitted that it was not permissible for the court to use the 1998 Act when no human rights were engaged to justify departing from the law laid down by precedent. The Attorney General, intervening, submitted that, while the judge had ultimately made the right decision, there was never any difference between civil law and criminal law, and the rationale for the privilege had no application to independent evidence.[174]

In criminal trials, the Office of Public Prosecutor is always portrayed as the 'guardian of the public interest'.[175] The prosecutor is assumed to represent society's interest (and the victim's) in having the accused person punished for the offence committed. This is particularly true considering that criminal justice has been primarily taken out of private individuals' hands by the modern state. However, the law retains and recognises some degree of private control of criminal justice, such as the possibility of initiating and conducting private prosecution. [176] The assumption of a prosecutor as the guardian of society is partly justified by considering criminal law as the embodiment of public wrong. According to Duff, 'a public wrong is a wrong which [members of] the public have an interest in prosecuting and if, if a conviction is warranted, condemning.'[177]

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[174] *C plc and another v P (Attorney General intervening)* [2007] EWCA Civ 493.

[175] *Government of Malaysia v Lim Kit Siang* [1988] 1 CLJ Rep 63; *Public Prosecutor v Pasupathy Kanagasaby* [2001] 2 CLJ 753; *Niedbala v Poland (27915/95)* (2001) 33 EHRR 48

[176] Private prosecution is defined by the Crown Prosecution Service as 'a prosecution started by a private individual, or entity who/which is not acting on behalf of the police or other prosecuting authority. A prosecuting authority includes, but is not limited to, an entity which has a statutory power to prosecute.' Crown Prosecution Service, 'Private Prosecution' (*Crown Prosecution Service*, 2015) <http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/#an01> accessed 14 January 2015

[177] Duff and others, *The Trial on Trial Volume Three: Towards a Normative Theory of the Criminal Trial*, (Hart Publishing 2007), 268

iv. Amicus Curiae

Society may be represented in cases of public interest through an intervener application by the Attorney General. However, the capacity to intervene on public interest issues is not exclusive to the Attorney General. This is most obviously apparent when the government is one of the parties to the proceeding. Amicus curiae are different from intervener in that '…the role of an *amicus curiae* was to help the court by expounding the law impartially, or if one of the parties were unrepresented, by advancing the legal arguments on his behalf.'[178]

Allowing amicus curiae is desirable, especially in cases before our superior courts. The doctrine of binding precedent means that the superior courts' decisions do more than merely decide disputes between private individuals or determine individuals' guilt or innocence because they decide the law of the land. When courts decide cases of public importance, it is correct that the hearing should not be restricted to only the parties before them.[179] In *Re E (a child) (AP) (Appellant) (Northern Ireland)*, Lord Hoffman explained that:

> Leave is given…to intervene and make submissions…in the expectation that their fund of knowledge or a particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain.[180]

[178] *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, 266 F-G

[179] The practice of third-party interventions in the higher courts has grown considerably since 1996 when the House of Lords, in the case of R v Khan, allowed the first intervention. Read Henry Brooke, 'Interventions in the Court of Appeal' [2007] Public Law 401. See also Sarah Hannett, 'Third Party Intervention: in the Public Interest?' [2003] Public Law 128; Mona Arshi and Colm O'Cinneide, 'Third-party Interventions: the Public Interest Reaffirmed' [2004] Public Law 69

[180] *Re E (a child) (AP) (Appellant) (Northern Ireland)* [2008] UKHL 66 [2]

However, Lord Hoffman was quick to remind that 'it is not the role of an intervener to be an additional counsel for one of the parties.'[181]

B. Public Participation through the Open Justice Principle

In the preceding paragraphs, I have explained a few aspects of a trial that may be considered forms of public participation. One may question why it is still necessary to have open judicial proceedings since there is already public participation through agency representation. What does the rule of open justice add to what already exists?

I argue that all forms of public participation, participation through agency and participation through publicity of proceedings, can be brought together through a multi-dimensional participatory theory. Court adjudication fulfils a public function, which, in a democratic society, calls for the widest possible participation. As an institution tasked to adjudicate legal disputes and enforce legal rights, courts must show that they can deliver justice effectively. In this regard, 'the effectiveness of the judicial system as the final guarantor of rights crucially depends on the extent to which it can command respect and confidence.'[182] The respect and confidence of members of the public can only be maintained 'where the administration of justice is transparent, comprehensible and accountable.'[183]

[181] Ibid [3]

[182] Zuckerman, 'Super Injunctions-Curiosity -Suppressant Order Undermine the Rule of Law' (2010) 29 Civil Justice Quarterly 131, 132

[183] Ibid

There are degrees of participation, starting from participation by the immediate parties through their representatives (who represent the parties and uphold the professional standard of justice) through judges, interveners, and participation by members of the public themselves. However, all these forms of participation (other than by members of the public themselves) are possible without having judicial proceedings in public. Although the agency representation may, to some extent, account for public participation, they are still, in my view, insufficient to address and deal with many issues, such as the need for judicial accountability and the likelihood of judicial arbitrariness. Without publicity, members of the public cannot expect to be taken seriously by those we think are representing us. Only through transparency can we ensure that public concerns are addressed. In this way, publicity is what ensures public input.

There would be three weaknesses if we were to rely on and be content with public participation through agency only. The agency representation's first weakness is the limitation of the "representatives" involved. The agency participation is limited because the available opportunities to assume official roles in the administration of justice are finite. Efforts to enhance the lay participation of the jurors or magistrates by increasing the number, for instance, may not be feasible. We cannot afford to have a large number of jurors or magistrates for the sake of efficiency, as such a measure will exponentially increase the cost of the administration of justice. Even if we could afford, for argument's sake, to bear the expensive cost of having a large number of jurors or magistrates, the numbers are still limited.[184] On the contrary,

[184] There is also no necessary correlation that there will be a higher chance of reaching a more accurate and justified decision by having a large number of judges or jurors.

public participation through open justice, especially with the help of modern technology, can address this particular problem of limited participation. It rightly serves as an additional complementary mechanism towards "democratisation" of the judicial process that goes beyond the *dramatis personae* of a trial.

Lay participation through the jury system has been considered a symbol of participatory democracy.[185] Redmayne believes that the jury system has a 'citizen-centred perspective' as it permits 'citizens to influence the way in which they are governed, and does increase the feeling of citizenship among those who serve on juries.'[186] Unlike the jury system, which is limited in scope, the democratisation of the judicial process through publicity would have a wider reach on a larger segment of society. It has the advantages of being more inclusive, egalitarian, and extensive. It is egalitarian to the extent that it provides an equal opportunity for all members of the public to attend the courtroom and follow the trial proceedings.

Public participation through open justice is also more encompassing, as it covers all areas of litigation at all levels of the judicial hierarchy. As we know, the jury

[185] Valerie P Hans, 'Introduction: Lay Participation in Legal Decision Making' (2003) 25 Law & Policy 83, 'Introduction: Lay Participation in Legal Decision Making' (2003) 25 Law & Policy 83; John Gastil and others, *The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation* (Oxford University Press 2010); Albert W Dzur, *Punishment, Participatory Democracy and the Jury* (Oxford University Press 2012). There has not been a consensus, though, on the value of lay participation in criminal trials. In Hornle, 'Democratic Accountability and Lay Participation in Criminal Trials' in Antony Duff and others (eds), *The Trial on Trial Volume Two: Judgment and Calling to Account* (Hart Publishing 2006), 152: Hornle rejects the strong claim that the legitimacy of a criminal trial's outcome requires democratic underpinning in the form of lay participation as it does not 'introduce plebiscitarian elements into the trial, nor do they convince as a feature of representative democracy.' She also doubts the weaker claims defending the desirability of lay participation for she believes that 'there are also important counter-arguments.'

[186] Redmayne, 104

system only applies to selected cases.[187] It lacks the generality that could inject the democratic element it seeks to achieve on a broader scale. It also lacks universal application across legal systems, as the jury system has been abolished in some Commonwealth jurisdictions, such as Malaysia and Singapore.

Paul Roberts observes that there are many alternative ways for public participation in the administration of justice apart from being a jury or a magistrate, such as through 'various forms of community action, trade union activity, membership of pressure groups or involvement in local or national politics'.[188] According to him, such alternatives to lay participation in criminal adjudication would serve the objective of popular self-government more efficiently and effectively than the jury service.[189]

Secondly, the agency representation, I would say, is potentially defective in the absence of open justice. Agents (judges, jurors, the Attorney-General and *amicus curiae*) who represent members of the public in court adjudication cannot be wholly trusted and relied upon unless the judicial process is transparent. The comparison between public participation through agency representation and public participation through the actualisation of the open justice principle is akin to comparing the notions of representative democracy to direct participatory democracy. While representative democracy is better than direct participatory democracy in many

[187] The vast majority of civil cases tried in court do not have a jury (libel and slander trials are the main exceptions). The cases are heard by a judge who listens to the argument and makes the decision thereafter.

[188] Roberts, 'Theorising Procedural Tradition: Subjects, Objects and Values in Criminal Adjudication' in Antony Duff and others (eds), *The Trial on Trial Volume Two: Judgment and Calling to Account* (Hart Publishing 2006), 61

[189] Ibid

aspects, the former is still imperfect because representatives' actions may ironically weaken democratic institutions. The representatives may weaken democratic institutions if they are allowed to perform their duty without an accountability mechanism.

In this regard, Gilead Cooper has made a similar argument, criticising the open justice principle. He contended that if there was a genuine risk of the court misbehaving, other measures could address the risk instead of open justice. The following paragraphs are the relevant excerpts from his article that reflect his objections to open justice:

> 15. First, the fact that the court hears a case in private does not prevent either party from making the result, and the details, public. That was, indeed, part of the ratio of Scott v Scott, which held that it was not a contempt of court by the petitioner in the divorce to obtain and distribute a transcript of the proceedings that had been held in camera.[190]
>
> 16.More recently, in Hodgson v Imperial Tobacco Ltd, Lord Woolf drew a distinction between hearings' 'in chambers'' and hearings ''in camera'', and explained that although hearings ''in chambers' 'were in private, this did not prevent the parties from making them public. Section 12 of the Administration of Justice Act 1960 confirms that ''the publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court'' except in a limited number of specified situations.
>
> Furthermore, the court has power under Section12 (2) to make an order expressly prohibiting publication. In contrast, hearings in camera were properly described as ''secret'', as the court had

[190] Gilead Cooper, 'Open (in)justice: privacy, open justice and human rights' (2019) 25 Trust & Trustees 712, 715

> decided that the administration of justice would be rendered impracticable if the public were aware of what had taken place.[191]
>
> 17. Thus, if either party, having initially agreed to have the case heard in private, considers that justice was not done, he or she is at liberty to go to the press, or to protest online. There is ample scope for the court's conduct to be subjected to scrutiny. The objection that by then it is too late applies equally if the court fails to deliver justice at a public hearing. The availability of an appeal does not depend on the proceedings being public.[192]

The main problem with Gilead Cooper's argument is that the responsibility of ensuring that the court and public officials behave properly seems to be given solely to the litigants. While it could be true that a private hearing may not necessarily prevent either party from making the details of a trial public, it will not bring about the same result and effect with instantaneous and contemporaneous scrutiny by members of the public. As a matter of principle, public confidence in the administration of justice cannot hinge on the litigants' individual decisions because the judicial system is a collective good shared by all members of the public. They must, therefore, be equally responsible for ensuring that it works properly.

Open justice makes the judicial process accountable. It enables society to participate in the administration of justice, where an instantaneous and contemporaneous review in the public domain acts as an effective restraint against potential misrule by public officials.[193] Drawing from Jeremy Bentham's famous

[191] Ibid

[192] Ibid, 715-16

[193] Postema, 'The Soul of Justice: Bentham on Publicity, Law, and the Rule of Law' in Xiaobo Zhai and Michael Quinn (eds), *Bentham's Theory of Law and Public Opinion* (Cambridge University Press 2014)

Panopticon principle, judges are less likely to act arbitrarily and partially in an open environment, for while judging, the public simultaneously judges them.[194] This notion is supported by the judicial recognition expressed by Lord Loreburn, who said, 'a court may not be so jealous to do right when its proceedings are not subject to full public criticisms.'[195]

However, it is not the purpose of this thesis to claim that those "representatives" do not and cannot represent members of the public in the judicial process and serve a particular public interest. Members of the public certainly want to see an effective and efficient administration of justice in place. The administration of justice works effectively and efficiently when judges, jurors, prosecutors and magistrates play their roles effectively and efficiently in their respective capacities on behalf of the community. What I am suggesting, however, is that the public interest can be served better, in addition to the agency representation, when members of the public are also capable of getting involved in the trial process.

Thirdly, public participation through the open justice principle is a key and constitutive element of a public trial that cannot be wholly replaced with agency representation. The distinct status of members of the public in the context of open justice may be seen in *Daubney*.[196] In this case, a summary proceeding was taken against Preston. Instead of appearing before the court, he sent Daubney on his behalf. Daubney represented himself as Preston's representative. Cooper, who was

[194] Bentham, 523. Bentham said, 'upon his moral faculties it acts as a check, restraining him from active partiality and improbity in every shape: upon his intellectual activities it acts as spur, urging him to that habit of unremitting exertion.'

[195] *Scott v Scott* [1913] AC 417 (HL), 449

[196] *Daubney v Cooper* (1829) 109 ER 438.

one of the magistrates, made an order to remove Daubney from the court forcibly. Daubney sued Cooper for illegal removal from the courtroom. He won the case because the court held that he was entitled to be in the courtroom as a member of the public. The irony of this case is that there was no deliberation whatsoever about the right of an audience despite Daubney's claim that he was representing Preston in the proceeding. Perhaps, there was none because Daubney was not officially a barrister.

If we merely relied on agency representation without public participation through the open justice principle, there would be real and practical implications in many aspects. In extreme cases, if public participation through agency representation is considered a sufficient component of open justice, a private trial may be held as a general norm without offending the open justice principle. This means that there will no longer be a significant structural difference between private and court adjudication when the presence and participation of members of the public are optional extras.

For present purposes, the Supreme Court's decision in *Al-Rawi v Security Services* implicitly indicates that public participation through the open justice principle is a key element of a public trial that cannot be wholly replaced with agency representation.[197] The government invited the Supreme Court to exercise its inherent jurisdiction to allow Closed Material Procedure (CMP). The government has argued that the element of unfairness caused to the appellant by depriving him of having direct access to the material to prepare his case may be mitigated using the

[197] *Al-Rawi v Security Service* [2011] UKSC 34 (SC)

Closed Material Procedure (CMP).[198] With CMP, the appellant can access the materials through the Special Advocate. The Supreme Court judges were unanimous that the court had no common law jurisdiction to replace the Public Interest Immunity procedure with CMP because it would have infringed, among others, the principle that trials are held in public.[199] Lord Dyson believed that the issues of principle raised by the closed material procedure were 'so fundamental that a closed material procedure should only be introduced in ordinary civil litigation (including judicial review) if Parliament sees fit to do so.'[200]

Another moderate example can be seen in the application of a balancing test between conflicting interests. The balancing exercise of a judge between the need for open justice and other competing interests, such as the right of litigants to privacy and the need to protect national security, will be made easier if we are content with the agency representation. In both scenarios (extreme and moderate), a judge, for instance, can easily give in to a request for anonymity order on the pretext that members of the public adequately participate in the judicial process through the role played by the judge, the Public Prosecutor, the Attorney-General, the magistrates, or the jurors (all of them are the *dramatis personae*).

If I may explain further that the presence of *dramatis personae* of the trial does not form the core element of the open justice principle, they will always be part

[198] Ibid

[199] Ibid

[200] Ibid [69], A similar view was expressed by Lord Brown when he said that: 'in so far as the real issue before us is whether Parliament alone could provide for so fundamental an inroad into the principle of open justice as is proposed here -- whether, in other words, such a step is beyond the permissible development of the common law -- I am in Lord Dyson's camp.' [68]

of the trial process. As such, if the conception of a public trial may be satisfied by the mere presence and participation of the *dramatis personae* of the trial, it practically means there will be no instances where the principle of open justice could have been violated.

Furthermore, litigants, lawyers, and judges have official capacities whose presence and participation in the trial can be independently explained and justified without the open justice principle. Let us take the lawyers, for instance. Their court attendance has always been guaranteed by the right of the audience and not the open justice principle. If challenged, lawyers can always invoke the right of the audience in the case they are engaged with and when the case is called for hearing. It follows that a lawyer waiting for his case to be called in the courtroom is just a member of the public who may be excluded from the courtroom.[201]

1.5 Conclusion

Without really delving into the rationales of why we need open justice yet in detail, I have sought, thus far, to sketch the plausibility and propriety of describing members of the public as participants in court adjudication in three areas. I have explained my arguments that there is a structural difference between private adjudication and court adjudication. Members of the public are deemed as participants in court adjudication; I have clarified the terminology of members of the public as participants and the propriety of using such term. These three points are dealt with

[201] Jaconelli, *Open Justice: A Critique of the Public Trial*, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002), 18. *McKenzie v McKenzie* [1971] P 33

first because open justice, as the idea of public participation, is a recurring theme throughout the discussion in this thesis.

The next chapter will consider a detailed treatment of the rationales for the open justice principle wherein it shall specifically elaborate on why the notion of members of the public as participants in the judicial process is plausible and not only desirable but necessary. I am interested in finding out whether the often quoted rationales for the open justice principle provide adequate explanation and grounding behind the long-standing recognition of the open justice principle. I am also keen to examine whether the rationales may reinforce my hypothesis of the notion of public participation in court adjudication through open justice.

Chapter 2 - Reasons for Public Participation in the Judicial Process

2.1 Introduction

The uninterrupted practice and the continued recognition of the open justice principle showed that it is well embedded in the English legal system and has become a distinct hallmark of the judicial process. Such a long-standing practice of holding open judicial proceedings has been justified on at least five justifications: promoting a truthful fact-finding and correct application of the law, ensuring procedural fairness of the trial, community catharsis, the educative role of the trial and maintaining public confidence in the administration of justice. These justifications, gleaned from the literature, are not in themselves flawed. However, these justifications do not provide a unified and coherent explanation for open justice if viewed separately.

Any pursuit of developing a coherent and adequate account of justification for open justice should take into account the following three factors: (i) there is no logical correlation between the primary objective of dispute resolution and open justice; (ii) the inapplicability of the open justice principle in the non-judicial dispute settlement process; and (iii) the aims that most of the rationales for open justice seek to achieve are equally relevant and applicable to the non-judicial dispute settlement process.

A. The Lack of Logical Correlation between Publicity and Disputes Resolution

The need for publicity in court adjudication is not logically implied by the primary object of dispute resolutions (to resolve disputes), as the success of resolving

disputes does not necessarily depend on whether there is publicity. It is pretty evident in a non-judicial process that disputes can be resolved through an amicable settlement among the disputants themselves or through a third party who plays a role as a decision-maker or mediator at the disputants' invitation before the hearing. In this regard, the impact of the presence or absence of members of the public in the process of resolving disputes is, therefore, very minimal and negligible.

Going by the same logic, it may be intuitively attractive to say that members of the public may not get involved in court adjudication because a dispute before the court is paradigmatically a matter between the plaintiff and defendant and the Crown and the accused person. Suppose the primary aim of court adjudication is to resolve disputes. In that case, the emphasis should be on finding ways to ensure that the judicial process is less intimidating to the litigants and witnesses. The privacy of Alternative Dispute Resolution and its success at providing a convenient and conducive space for litigants and witnesses far from the ignominy and stigma of open proceedings is apt for comparative purposes.

However, this may not be the case as a dispute that ends up in court is no longer in the absolute realm of private autonomy, and there is a public interest in having a public process. The desirability and necessity of having publicity in the process are not determined by or dependent upon whether it will promote the success of resolving disputes. Other factors and considerations, such as the rule of law argument that posits the importance of courts and the judicial process in a legal system, shall also be grounds that justify the open justice principle.

B. The Inapplicability of the Open Justice Principle in the Non-Judicial Process of Disputes Settlement

The commitment to open justice in the administration of justice is unique, for it is not strictly observed in the non-judicial dispute settlement process.[202] Unlike the judicial process,[203] disputes that are resolved through other means may be held secretly, far from the knowledge and presence of members of the public, because ordinary dispute resolutions are primarily within the realm of private autonomy.[204] Based on their autonomy, the disputants in non-judicial proceedings are pretty much entitled and in control of deciding about the mechanism, procedures, and terms of the resolution.[205] The disputants determine who gets to see and be informed of the dispute resolution process that takes place and who does not. They may thus keep the process privately to themselves, or they may do it in public.

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[202] *Union Oil Company of California v Dan Leavell* 220 F3d 562 (7th Cir 2000) 220 F3d 562 (7th Cir 2000), 568: 'People who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. Judicial proceedings are public rather than private property.' Arbitration is typically confidential and private because of an implied obligation based on the nature of the arbitration unless there is a court order or an agreement among the parties involved to the contrary. See, *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184, [81]

[203] It is trite law that the open justice principle applies to all hearing of anybody exercising the state's judicial power. It follows that a tribunal, which may not be part of the ordinary judicial system, is therefore still subjected to such a requirement of openness if it exercises the judicial power of the state. The position has always been that the open justice principle is applicable to hearings of any body or tribunal exercising the judicial power of the State. This is in line with Section 19 of the Contempt of Court Act 1981, which defines the term 'court' to include 'any tribunal or body exercising the judicial power of the State'.

[204] Laurie Kratky Dore, 'Public Courts versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution' (2006) 81 Chicago-Kent Law Review 463

[205] In arbitration, Section 1 (b) of the Arbitration Act 1996 provides that 'the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest'. Arbitration Act 1996, s 46 (1) further provides that 'the arbitral tribunal shall decide the dispute—(a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.'

Although the legal system provides court adjudication as an avenue to resolve legal disputes among disputants, court adjudication is not purposely arranged to suit the disputants' convenience. The judicial process is carried out at the public's expense, and the court will resolve the dispute that administers the law in the public's name. Zedner argues that the two opposing parties, at trial, 'agree not only to the involvement of a third party to resolve [the] dispute but also to the norms and laws according to which the resolution is sought.'[206] Thus, litigants do not have the luxury and privilege of picking and choosing what norm they are comfortable with by dispensing with, for example, the need to hold judicial proceedings openly.

Considering that court adjudication is an institutional settlement backed up by a compulsory process, which is the State's monopoly, the so-called "agreement" does not have to be mutual and voluntary. The agreement, therefore, may be foisted upon one party against his will.[207] The invocation of the judicial power would essentially turn a private matter that can be resolved privately into a matter of public concern and interest that has to be resolved publicly. Once a dispute is brought before the court, it is sufficient to attract the public's attention as Lord

[206] Lucia Zedner, *Criminal Justice* (Oxford University Press 2004), 75. In the context of the mode in which disputes are to be resolved, English law currently requires judicial proceedings to be held in public except for certain limited circumstances.

[207] Does this mean that there is no room for dispute over the law? Certainly, there are times even when the norms themselves are in dispute. The two opposing parties may bring up any legal issues that they disagree with provided that it is done within the broad legal framework itself for courts' determination. What litigants cannot do is to be picky and choosy, trying to resolve a disagreement over a particular pre-existing legal norm at their own convenience. For example, if litigants request for a departure from the normal application of the open justice principle, it has to be done in an open court first for determination. A mere disagreement of a litigant on the applicability of open justice without a valid and cogent reason does not and cannot alter the basic procedural arrangement of holding a trial in public.

Neuberger MR held that 'what goes on in the courts…is inherently of legitimate interest, indeed of real importance, to the public.'[208]

C. The Extendibility of Most Justifications for Open Justice to the Non-Judicial Process of Disputes Settlement

Despite some of the aims that specific justifications for open justice seek to achieve may be extended to the arbitral process, such as promoting truthful fact-finding and correct application of laws, ensuring procedural fairness and education, the open justice principle is not applicable in the non-judicial dispute settlement process. As an example, let us take the justification of promoting accurate fact-finding and correct application of the law through the disciplinary and investigatory value of open justice.

The emphasis is on guarding litigants against the partiality of the adjudicator (judges in the context of court adjudication) because it may lead to wrong decisions. If that is the case, is it not appropriate for members of the public (non-disputants) to claim the right to attend arbitration proceedings on the same ground? Can a party to the arbitration, with the objection of the opposing party, insist on having a public arbitral proceeding, considering arbitration, as the court also shares the same aim to find the "truth" so that the dispute can be put to an end? Similarly, suppose open justice can enhance procedural fairness in court adjudication. In that case, members of the public could arguably enjoy the same right and privilege of getting access to arbitral proceedings for the same reason.

[208] *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, 176

The same questions mentioned above can be extended to the justification of education. Given that an ever-larger proportion of disputes are handled by Alternative Dispute Resolution (ADR), members of the public must be informed of what the process involves, how it is conducted, and the results it produces. There have been intermittent calls for arbitration to be more open and transparent.[209] There are some positive developments towards a more open and transparent scheme, such as the initiative to publicise the arbitral award so that arbitration proceedings in the future may benefit from previous arbitrators' accumulated wisdom on similar issues. Public availability of awards would develop the law, especially if excellent arbitrators write them. Lord Neuberger calls for greater transparency in the arbitration process because unnecessary privacy is a genuine concern. He has emphasised that

> there is a real risk that, if there is no transparency, many arbitrators will feel relatively free to do what they want rather than to give effect to the law. This is a temptation which is particularly great now that it is so difficult to appeal an arbitration award. [210]

[209] Perhaps it is worth highlighting that there is now a general rule of publicity for Investor-State arbitration. UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, r 6 (1) reads, 'subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument ("hearings") shall be public.' Rule 6 (3) further provides, 'the arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate)…' The rule of publicity for Investor-State arbitration is indeed a positive development that recognises the importance of transparency in arbitral process.

[210] See, Lord Neuberger, 'Arbitration and the Rule of Law' Lord Neuberger's Speech at the Chartered Institute of Arbitrators Centenary Celebration, Hong Kong <https://www.supremecourt.uk/docs/speech-150320.pdf> accessed 10 September 2015, [23] [24].

Despite the increasing need to educate members of the public about the subject matter of arbitration and the arguments ventilated in the process, arbitration remains mostly private today.

2.2 The Primary Justification

The problems mentioned above can be addressed by dividing the justifications for open justice into two categories: justificatory aim and justificatory basis. The justificatory aim for open justice resides in its efficacy in serving or achieving a particular end. Promoting accurate fact-finding and correct application of laws is an example of the justificatory aim because it has always been argued that open judicial proceedings would be able to serve this end.

On the contrary, the justificatory basis does not pay much attention to what open justice can achieve. However, it focuses more on certain key elements or characteristics of legal adjudication, the existence of which would, in turn, attract the application of the open justice principle.

Considering the insufficiency of justificatory aims to coherently and adequately explain the inapplicability of the open justice principle in the non-judicial dispute settlement process, a justification for the principle must be peculiar to the judicial process (the primary justification). I believe court adjudication is presumptively open because it is *a process of public enforcement or application of legal norms by the judicial authority*. As such, it should be recognised as the primary justification for the open justice principle. As opposed to secondary justifications (such as the promotion of accurate fact-finding and correct application of the law,

procedural fairness, community catharsis, and education), which are justificatory aims, the primary justification is more aptly described as a justificatory basis.

I argue that a justification is primary when (i) it encapsulates the basis of bringing in members of the public into the judicial process; (ii) it integrates other plausible justifications (such as the promotion of an accurate fact-finding and correct application of the law; procedural fairness, community catharsis, and education) which may explain the need for transparency in court adjudication; (iii) it explains the inapplicability of the open justice principle in the non-judicial dispute settlement process; and (iv) it is relevant and applicable to all types of cases in both civil and criminal trials (inclusive of the trial and appellate stages).

It follows that the justificatory aims fall under the category of secondary justification because they do not fulfil the four criteria above to qualify as the primary justification. Let me use the justificatory aim of community catharsis and the justificatory aim of promoting accurate fact-finding as examples to illustrate the relevance of dividing the rationales for open justice into two types: the primary justification and the secondary justification.

Regarding community catharsis, some scholars and judges justify the open justice principle based on the cathartic impact that a trial can bring to society because it was assumed that court adjudication has a powerful communicative impact.[211] A criminal trial, in particular, can potentially provide a cathartic effect on

[211] Community catharsis as a justification for open justice is not free from criticism. Some criticisms towards community catharsis can be read in Resnik, (1987) 39 University of Florida Law Review 405, 412. Resnik is of the opinion that trials may not really fit the idea of providing avenues to vent emotions. She argued that even assuming that 'some members of the public need to vent their emotions when they learn about the commission of a crime,' it is doubtful 'whether attending trials,

the community because it has a 'prophylactic purpose of providing an outlet for community concern, hostility, and emotion.'[212] When a 'shocking crime occurs', the community needs the means to express 'natural human reactions of outrage and protest'.[213] Without public trials, members of the public run the risk of 'self-help...of vigilante "committees".'[214]

Community catharsis happens when the public yearns to see justice done and retribution is satisfied.[215] Members of the public learn that criminals cannot get away from the long arm of the law. They are bound to be caught and brought to justice. This instils a sense of security in people's minds and makes society feel safe. On a similar account of satisfying the public's yearning to see justice done, it is also therapeutic for members of the public to learn that perpetrators of mass torts, for instance, are held to account in civil proceedings.

I have mentioned above that to qualify as a primary justification for open justice, the justification must be relevant and applicable to all types of cases in civil

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reading newspaper reports, or seeing televised portions of trials provides a suitable vehicle.' Litigants have the right to have a trial in a judicial serene environment. 'In contrast to other rituals, such as some religious services or rock concerts, much of the style, pace, and manner of a trial seems designed to rein in and to control emotions.' Hence, when emotions run high, courtrooms are cleared and public admonished.

[212] *Richmond Newspapers Inc v Virginia* 448 US 555 (1980), 572

[213] Ibid, 571

[214] Ibid

[215] Community catharsis is in line with the idea of retributive justice. Retributive justice is a theory of justice that considers punishment to be the best response to crime. Contrast this idea with the theory of restorative justice. See, *Retributivism: Essays on Theory and Policy* (Mark D. White ed, Oxford University Press 2011); *Retributivism Has a Past: Has It a Future?* (Michael Tonry ed, Oxford University Press 2011); Linda Radzik, *Making Amends: Atonement in Morality, Law, and Politics* (Oxford University Press 2009)

and criminal trials.[216] Community catharsis remains a secondary justification, in my view, because it is unclear whether the envisaged impact of therapeutic justice to give 'the reassurance of safety and the satisfaction of revenge'[217] desired by members of the public, which is typically expected in serious and shocking crimes, could happen in less severe and trivial criminal cases such as shoplifting and littering.

The justification of community catharsis seems more suitable with a criminal trial process than a civil trial because it is primarily built upon certain normative elements of criminal law.[218] Criminal justice theorists argue that criminal law and trials have unique factors that make open justice essential. These include the state's use of authority to implicate ordinary citizens for public wrongdoing. This underscores the importance of transparency in criminal cases.[219]

Similar to the justification of community catharsis, the justificatory aim of promoting a truthful fact-finding through the disciplinary and investigatory value of publicity falls under the category of secondary justification because it cannot explain the applicability of the open justice principle in judicial proceedings at the appellate

[216] In civil cases, Rule 39.2(1) of the Civil Procedure Rule provides that 'the general rule is that a hearing is to be in public.' A similar rule is provided in Criminal Procedure Rules 2013, r 37.2 (1) for criminal cases hearings.

[217] Barbara Allen Babcock, 'Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel' (1982) 34 Stanford Law Review 1133, 1140

[218] Secondary justifications are sometimes built on certain normative conceptions of trial. The justification of community catharsis is such an example whereby openness is linked to the peculiar normative qualities of the criminal law and criminal process. The criminal trial could potentially provide a cathartic impact on the community because the trial is said to have a 'prophylactic purpose of providing an outlet for community concern, hostility, and emotion.' *Richmond Newspapers Inc v Virginia* 448 US 555 (1980), 572

[219] Duff and others, *The Trial on Trial Volume Three: Towards a Normative Theory of the Criminal Trial* (*The Trial on Trial Volume Three: Towards a Normative Theory of the Criminal Trial* (Hart Publishing 2007

stage and sentencing phase where there is no witness to be called upon to testify.[220] On the contrary, the primary justification has no difficulty asserting the open justice principle's undiminished force in all types of judicial proceedings (including proceedings at the appellate stage and sentencing phase) because they are essentially the law-applying process.

2.3 Trial as a Law-applying and Law-making Process

Court adjudication is, by default, open, first and foremost, because of its role and significance in a legal system as a law-applying and law-making process.[221] I am guided by the discussion within the tradition of modern positivism that has developed Hart's conception of law as the union of primary rules of conduct and secondary rules that govern how the primary rules are made, applied and changed. Hart regarded that court as essential in a legal system when he introduced the concept of secondary rules such as 'secondary rule empowering [the] individual to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken.'[222] Hart argued that a legal system contains official bodies that make authoritative rulings on whether the standards have been complied with in some situations.

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[220] Jaconelli, *Open Justice: A Critique of the Public Trial*, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002), 38. This criticism is misplaced because the prominent advocates of the disciplinary value of publicity, such as Bentham and Wigmore, do not claim that such value is the sole ground for the open justice principle.[220] They articulated a justification that may account for the need for publicity in parts of the trial. The evidence oriented-justification is, therefore, relevant and plausible in so far as oral testimony is concerned. Other parts of the trial, depending on the nature of the process, may have and require different grounds to justify the open justice principle.

[221] The understanding of trial as a law-applying and law-making process is not limited to hearings of the first instance but it includes proceedings at the appellate stage.

[222] H.L.A Hart, *The Concept of Law* (Paul Craig ed, 3rd edn, Oxford University Press 2012), 96

Raz believes the court's adjudicative function is also central to a legal system. His argument is tied to the court's very nature as a 'norm-applying institution' in society.[223] Raz explains the importance of courts to the idea of a legal system by arguing that 'law-applying institutions are...a constant feature of law in every type of society and their existence should be regarded as a defining characteristic of law.'[224] Raz distinguished between 'norm-applying' institutions and 'norm-enforcing' institutions. Unlike 'norm-applying' institutions such as the court, whose judgment is a norm, 'norm-enforcing' institutions such as the prison service 'apply norms not by making other norms but by physically implementing them'. Raz explained further that 'there is no doubt that norm-enforcing institutions play an important role in all modern legal systems. Yet they cannot be regarded as the key to the identification of legal systems.'[225]

One finds a similar position outlined by Gardner, who maintains that courts' existence is 'more crucial to the existence of a legal system than the presence of any other legal institutions.'[226] Gardner observes that 'one has no legal system at all until one has courts; i.e., adjudicative institutions charged with administering a system of rules by which they themselves are bound (and indeed, as Hart said, constituted).'[227]

[223] Joseph Raz, 'The Institutional Nature of Law' (1975) 38 The Modern Law Review 489, 493

[224] Joseph Raz, 'The Identity of Legal Systems' (1971) 59 California Law Review 795, 80.

[225] Raz, 'The Institutional Nature of Law', 493

[226] John Gardner, *Law as a Leap of Faith* (Oxford University Press 2012), *Law as a Leap of Faith* (Oxford University Press 2012), 257

[227] Ibid

It should be noted that the function of applying legal norms and evaluating and judging behaviour against a set of applicable rules and standards[228] is not a peculiar feature of the court only because other norm-applying institutions may play a similar role.[229] The peculiar task of evaluating and judging behaviour by the court as opposed to other norm-applying institutions lies in the nature of the judicial power itself.[230] Judicial power was once defined as 'the power which every sovereign must of necessity have to decide controversies between its subjects or between itself and its subjects whether the rights relate to life, liberty or property.'[231] In this context, the courts assume a unique character as the ultimate arbiter of legal disputes.

As the ultimate arbiter of legal disputes, this constitutional duty and function have a risk that would naturally come with it. In some jurisdictions, such as in Malaysia and the United States of America, the superior courts are in a position to

[228] Raz, 'The Institutional Nature of Law' (1975) 38 The Modern Law Review 489; In Zedner, *Criminal Justice* (Oxford University Press 2004), 126-7, Zedner similarly argues that: 'the activity of judging furnishes the occasion for making authoritative statements of legal norms and for restating the rules in order to make clear the entitlements and more importantly the obligations of the citizen.'

[229] Civic enforcement officers, for instance, who issue summonses for violation of traffic and parking offences, also play the same role. Civic enforcement officers would issue traffic summons to offenders if they were satisfied that there had been a violation of traffic rules committed. Similarly, officers of the United Kingdom Border Agency also evaluate behaviour of the subjects. They will decide whether foreigners who come here to the United Kingdom have complied with the immigration laws.

[230] Unlike other norm-applying institutions such as the police department and municipal council, the courts evaluate the behaviour of the subject in the course of resolving a legal dispute that is brought before them. In other words, the courts do not take action to apply and enforce legal norms unless and until litigants seek such action. However, this view cannot be true because in some civilian systems prosecutors have the status of judges, and they initiate proceedings, especially criminal. So not initiating cannot be regarded as a feature of a court, any court.

[231] *Huddart Parker and Co Proprietary Ltd v Moorehead*, 357. This passage was quoted with approval by the Privy Council in *Shell Company of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275, 295-96.

evaluate and judge the behaviour of not only the ordinary subjects, other norm-applying institutions (the executive) but also the principal norm-creating institution of the State, i.e., the legislative assembly.[232] While acts of the public authority, both the executive and, to some extent, the legislature, may be challenged in a court of law, the same opportunity may not be available to judicial decisions (except by way of an appeal or revision). Therefore, since courts are the ultimate and highest form of institutional settlement one may have, it is appropriate to ponder the following question: what mechanisms do we have to keep courts in check?

Public scrutiny is a reliable and effective method of judicial oversight, apart from the following mechanisms such as judicial scrutiny of judgments through the appeal process,[233] the revision process[234] and the administrative scrutiny[235] by the Judicial Conduct Investigation Office,[236] which is an independent statutory body to

[232] The possibility of the courts to judge the acts of the legislative assembly may not be a constitutional anomaly in this scenario because of the supremacy of the written constitution. *Yang Dipertua, Dewan Rakyat & Ors v. Gobind Singh Deo* [2014] 9 CLJ 577: Here, in this case, the respondent was found guilty of an act of contempt purportedly committed during a debate in the Parliament. The respondent was suspended as a Member of Parliament for a period of 12 months. During this period, the respondent was not paid the prescribed allowances and benefits of a Member of Parliament. The Federal Court held that the respondent was entitled to be paid the remuneration because there was no constitutional nor legal basis to empower the Parliament to withhold the remuneration of a Member of Parliament.

[233] The option of doing judicial scrutiny through the appeal process is limited to litigants.

[234] Unlike the appeal process, the revision process is done by superior courts over decisions of the subordinate courts

[235] Administrative scrutiny may be done by the Judicial Conduct Investigation Office and judges may be subject to a disciplinary sanction in accordance with the relevant statutory provisions. Reports are also released by individual courts on their own performance annually. The Lord Chief Justice himself would publish a regular review of the areas which appeared to him to be of importance to the judiciary and the administration of justice in England and Wales. The report officially named the Chief Justice's Review of the Administration of Justice in the Courts.

[236] https://judicialconduct.judiciary.gov.uk/about-us/

support the Lord Chancellor and Lord Chief Justice to deal with complaints of misconduct.

With regard to the second aspect of court adjudication as a law-making process, members of the public cannot afford to be left uninvolved in this process of significant importance in light of Hart's rule of change.[237] The rule of change 'advances the dexterity of the law' because 'the law has the ability to adapt nimbly to changed circumstances.'[238] Those designated by the rule of change 'need not wait for custom to evolve, but rather they have the power to deliberately alter the rules and thus enable the society to meet the challenges they face.'[239] The rule of change captures the fact that legal systems contain methods for deliberately altering the standards.

Apart from legislative initiatives, legal standards can be altered through judicial actions because court decisions may, to an extent, have the effect of making law.[240] Although judges' primary duty is to apply the law and administer justice, they may "change" the law in some instances through the interpretative exercise of

[237] Hart, *The Concept of Law* (Paul Craig ed, 3rd edn, Oxford University Press 2012)

[238] Scott J. Shapiro, 'What is the Rule of Recognition (and Does it Exist)?' Yale Law School, Public Law Working Paper No 184 < http://ssrn.com/abstract=1304645> accessed 16 July 2013

[239] Ibid

[240] For further discussion on the nature of case law, read Gardner, *Law as a Leap of Faith* (Oxford University Press 2012), 74-82. This 'law-making' role is context-dependent as it does not receive universal recognition in all legal systems. It is only popular and generally accepted as a peculiar feature of the courts in common law jurisdictions. The courts in both the civil jurisdictions and the Islamic legal tradition are known to be less favourable to the idea of judicial binding precedence. See, Shapiro, *Courts: A Comparative and Political Analysis*(University Chicago Press 1981). While the proponent of stare decisis may argue that it ensures consistency and predictability of judicial decisions, the sceptics may find the doctrine of binding precedents an impediment to judicial wisdom. The 'law-making' function, too, is hierarchically specific in the sense that such function is only exercised by the superior courts.

parliamentary legislation.[241] The process of applying and interpreting laws by judges has, in a way, the impact of "legislating" laws, especially within the context of common law tradition, due to courts' authority as the ultimate arbiter of legal disputes whose pronouncements carry the force of law.

However, it is not part of my claim that the judiciary enacts a law in the same way Parliament does it. Judicial law-making is a limited notion of law-making[242] as it is limited by occasion and legal issues framed.[243] While Parliament can enact laws in any matter of its own volition at all times, the judiciary may only do so when litigants bring a legal dispute to them.[244] It should be noted that the court's law-making function is quite controversial among legal scholars.[245] Some scholars, such as Richard Ekin and Jeremy Waldron, are not comfortable with the idea of judicial law-making because the judicial law-making role would obscure the line drawn between the function of the legislature and the judiciary.[246]

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[241] Gardner, *Law as a Leap of Faith* (Oxford University Press 2012), Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009)

[242] Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009), 29

[243] The possibility of trial as a law-making event may not be overplayed in the light of the increasing legislative activity of Parliament. Many scholars, such as Jeremy Bentham, have articulated the advantages of legislation. Bentham is a well-known advocate for the codification of legal rules to address the complexity and inefficiency of common law. Therefore, it is probably correct to say that the value of stare decisis diminishes whenever the answers are clearly provided by legislation. Thus, in those areas already covered by the legislation, we may say the court gives the answer to a problem not because there is a ruling previously made by the superior court, but it is because there is already a given answer by Parliament.

[244] The judicial process is unique for the exercise of the judicial power is not at the behest of the judges. It 'does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.' *Huddart Parker and Co Proprietary Ltd v Moorehead* (1909) 8 CLR 330, 357

[245] Shapiro, *Courts: A Comparative and Political Analysis* (University Chicago Press 1981)

[246] The suitability of the legislators to create laws on behalf of the society has been articulated by Richard Ekins in Chapter 5 of Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press

The court is not in a suitable position to make laws because of its lack of democratic legitimacy, as members of the public do not democratically elect judges.[247] Moreover, unlike politicians, judges are disadvantaged in enacting laws as they primarily have the privilege of considering the arguments advanced by litigants only, which are most likely tailored to suit their best interest to win the case. The central judicial task is adjudicating and answering the legal question framed explicitly before them by referring to the existing law. It would be unfair to litigants and the community if a trial were used as an occasion for deliberate law-making. If we were to accept, which I do, the limited notion of judicial law-making as practised in the common law jurisdictions, it can never be the court's primary function. Despite the differences of opinions on the nature and scope of judicial lawmaking, the fact remains that the court's decisions settle what the law is, which the citizens need to know to plan their affairs.

A. The Scope of the Judicial Power

The significant element in the law-applying and law-making process of court adjudication lies in the exercise of judicial power. The exercise of such power determines the applicability of open justice in the proceeding. Although I accept that

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2012). Read, also, Jeremy Waldron, 'Representative Lawmaking' (2009) 89 Boston University Law Review 335. Herein this article, Waldron highlights five salient values that explain the propriety of legislature to make laws. He argued, among others, that law-making process which deals with issues of general policies is better left with the politicians.

[247] K.D. Ewing, 'A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary' (2000) 38 Alberta Law Review 708, 711: Ewing was of the view that the common law tradition of judicial rule-making role 'remains completely untouched by the era of democracy, in the sense that the rules are made by a process from which the people are excluded, save only as litigants. For the most part, we are spectators with no right of participation in the development of the common law and consequently of the rules by which we are governed. Participation is instead confined to the advocates who appear before the court, a small cadre of self-appointed lawyers whose function it is to represent the self-interest of their client rather than the public interest of the community as a whole.'

the classification of judicial power and judicial proceedings can be used as a parameter and yardstick to determine whether the open justice principle is applicable or not in a particular proceeding,[248] I am critical of the term "judicial power" is usually understood.

The dominant understanding of "judicial power" has always been tied to the court's basic and primary function to resolve legal disputes authoritatively.[249] There is no doubt that resolving legal disputes is the primary function of the court. However, apart from the court's primary function to authoritatively resolve legal disputes, courts may have other functions and powers assigned by law. Some of these functions are administrative,[250] advisory,[251] and investigatory,[252] which are uncontentious in nature. In exercising these functions, courts would sometimes hear the matter as the court of the first instance, and the judges, on some occasions, may

[248] The practice of open justice has been accepted as a character that defines what amounts to a judicial process because it is 'the authentic hallmark of judicial as distinct from administrative procedure.' *Daubney v Cooper*) (1829) 109 ER 438, 440.

[249] *Huddart Parker and Co Proprietary Ltd v Moorehead* (1909) 8 CLR 330

[250] The Court may play an administrative role in the administration of trust in non-contentious matters. CPR r. 39.2 (f) provides 'a hearing, or any part of it, may be in private if it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate.'

[251] In Malaysia, for instance, Article 130 of the Federal Constitution provides that the Federal Court has an advisory jurisdiction to advise the Yang di-Pertuan Agong (the Head of State). It reads, 'the yang di-Pertuan Agong may refer to the Federal Court for its opinion any question as to the effect of any provision of this Constitution which has arisen or appears to him likely to arise, and the Federal Court shall pronounce in open court its opinion on any question so referred to it.' Even though the judicial pronouncement of the Federal Court is a form of advice in that it does not substantively determine one's legal rights or obligation, the whole proceeding and the advice are of practical importance to the public. The advice of the Federal Court on the effect of any constitutional provision is of public interest according to the rule of law.

[252] One example of a pure investigatory role of the court is the coroner's inquest. An inquest held by the coroner aims to find facts in relation to the name of the deceased, the place and time of death, and the reason for his death. Unlike in an ordinary process of court adjudication, there is no criminal or civil liability established out of the facts in an inquest. See, Coroners Rules 1984.

act on their own volition.[253] Therefore, the definition of "judicial power" should not be confined to the court's power to resolve disputes.

A more liberal interpretation of the term "judicial power" is needed to refer to whatever power the court exercises based on the constitution, statutes, common law and the doctrine of inherent power.[254] This liberal interpretation of the term "judicial power" is important so that the open justice principle applies with equal force in all types of judicial proceedings, as seen in the following examples.

Although courts are typically defined by reference to their judicial function of resolving legal disputes, there were times when judges took the contrary view. It was judicially held that public proceedings might not be necessary for certain circumstances where some aspects of the court's role have been seen as 'less judicial'.[255] As such, it may be justified to derogate from the normative force of the open justice principle. Viscount Haldane, in *Scott v Scott,* explained two situations where members of the public may be excluded from the proceedings:

> In the two cases of wards of Court and of lunatics, the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and

[253] Judges may, under certain circumstances, exercise the judicial power in *suo motu*.

[254] The word "inherent" suggests that the powers arise from the status and role of the court itself rather than from an external vesting source such as statutory law. This conclusion can be justified on the basis that the court must have a general or residuary source of powers beyond the confines of procedural rules to ensure that it has the appropriate authority to deal effectively with the abuse of its process and that justice is never compromised by the inadequacy of written law. For further discussion on the doctrine of inherent power, see, Jacob, 'The Inherent Jurisdiction of the Court' (1973) 23 Current Legal Problems 1; Daniel J. Meador, 'Inherent Judicial Authority in the Conduct of Civil Litigation' (1995) 73 Texas Law Review 1805; and M S Dockray, 'The Inherent Jurisdiction to Regulate Civil Proceedings' [1997] Law Quarterly Review 120

[255] *Scott v Scott* [1913] AC 417 (HL)

> the disposal of controverted questions is an incident only in the jurisdiction.[256]

The examples mentioned in the above-quoted passage should be treated as exceptions to the general rule of publicity.[257] Family courts and the Court of Protection are not entirely spared from the open justice principle.[258] I do not think that it is correct to exclude members of the public because the proceedings are not judicial or less judicial[259] because the court still assumes the role of a norm-applying institution in those circumstances where the proceedings are less adversarial and the jurisdiction is parental and administrative.[260]

Being a norm-applying institution in a legal system is crucial because it does not differentiate among the court's varying roles. The issue as to whether the court plays a judicial, parental, or administrative role is immaterial because it does not

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[256] Ibid, 437

[257] Jaconelli, *Open Justice: A Critique of the Public Trial*, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002), 15

[258] Rule 27.10 of the Family Procedure Rules 2010 provides that family court proceedings are to be held in private. However, Rule 27.11 (2) (f) allows for duly accredited representatives of news gathering and reporting organizations to attend the hearing. There has been call for greater transparency in Family Court judgments. See, for example, Owen Bowcott, 'Senior Judge Orders Greater Transparency in Family Court Judgments' *The Guardian* (16 January 2014) <http://www.theguardian.com/law/2014/jan/16/judge-transparency-family-court-judgments> accessed 15 May 2014. With respect to the Court of Protection, although the general rule is that a hearing is to be in private, Rule 92 of the Court of Protection Rules 2007 allows the court to order that a hearing be held in public. There is an approval from the top judge of the Court of Protection to allow for more transparency. A piece of legislation is perhaps necessary to change the current practice, see, Amelia Hill, 'Court of Protection Should be Open to Public Scrutiny, says Leading Judge' *The Guardian* (6 November 2011) <http://www.theguardian.com/law/2011/nov/06/court-of-protection-public-scrutiny> accessed 11 June 2014. Sir was reportedly said that, 'it seems to me a matter of public interest. The public is, after all, entitled to know what's going on. Locking up a mentally disabled person is a very serious thing to do and we don't want people quietly locked up in private.'

[259] Judicial power briefly is 'the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to the legal rights and liabilities of one or more parties. *Public Prosecutor v. Dato' Yap Peng* [1987] CLJ (Rep) 284, 287

[260] Raz, 'The Institutional Nature of Law' (1975) 38 The Modern Law Review 489, 493

change the fact that legal norms are applied in all these circumstances. As such, the open justice principle would always remain applicable, and any departure from the principle should only be allowed in case of exceptions supported by cogent evidence.[261]

Let me refer to the case of *V v T, A*,[262] as an example of how the court has been persistently insistent on upholding the open justice principle even though the subject matter of the application was uncontentious. This case was about a variation of a trust under the Variation of Trusts Act 1958. The parties requested for the application to be heard in private because, among others, the application is not contested.[263] They rely on Rule 39.2 (3) (f) of the Civil Procedure Rule that provides, 'a hearing, or any part of it, maybe in private if it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate.'

The variation order was ultimately granted, but the application for a private hearing was refused. The court held that it is not a sufficient justification to have a private hearing about an application under the 1958 Act if it was merely based on the argument that the subject matter is purely a matter of the family's private financial affairs.[264] There were a few reasons argued before the court in support of the application to derogate from the open justice principle, and one of them is the

[261] *Ntuli v Donald* [2010] EWCA Civ 1276

[262] *V v T, A* [2014] EWHC 3432 (Ch)

[263] The application was also made based on Rule 39.2 (3) (c) and (d) of Civil Procedure Rule pertaining to confidentiality and the need to protect the interest of any child or patient respectively.

[264] *V v T, A* [2014] EWHC 3432 (Ch) [20]

possible adverse impact on the business. It was pointed out that the trust owns shares in a private company. The applicants were worried that an open hearing might damage the trust assets' value because the customers may squeeze the company's profit margin (owned by the trust) if they know the profit levels.

Apart from the lack of evidence supporting the application, the court also appeared reluctant to accept such an argument because it would practically mean that there would be very few cases in the Companies Court that would be suitable to be heard in open court.[265]

B. The Rule of Law Argument: Open Justice and the Norm-guidance Aspect of Law

The importance of educating members of the public is strongly tied to the doctrine of the rule of law,[266] particularly the formal conception of the rule of law.[267] Legal

[265] Ibid, [21]

[266] Postema; Vanessa Yeo, 'Access to Court Records: The Secret to Open Justice' [2011] Singapore Journal of Legal Studies 510; Jonathan Klaaren, 'Open Justice and Beyond: Independent Newspapers v Minister for Intelligence Services: In Re Masetlha' (2009) 124 The South African Law Journal 24; Claire Baylis, 'Justice Done and Justice Seen to be Done-Public Administration of Justice' (1991) 21 Victoria University Wellington Law Review 177; Beverly McLachlin, 'Courts, Transparency and Public Confidence-To the Better Administration of Justice' (2003) 8 Deakin Law Review 1

[267] Gardner revisits this common usage in Gardner, *Law as a Leap of Faith* (Oxford University Press 2012), 195-220. He argues that it is inaccurate to say that the formal conception of the rule of law does not pass judgment on the content of the law because Fuller and Raz's desiderata actually deal with the content of the law. Formal conception of the rule of law, according to them, deals with how the law was promulgated, the clarity and the temporal dimension of the norms. The desiderata of generality and clarity, for instance, are about the content of the law. Gardner rejects this 'form vs. content' distinction. Gardner is also not convinced with the 'form vs. substance' distinction as argued by Craig in Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] Public Law 467 where Craig talks about procedural and form as opposed to substance. This is quite difficult to defend considering the overlap between the procedural law and substantive law that makes the difference between the two obscure. The right to a fair trial is a good example of the fine line between procedural law and substantive law. I agree with Gardner's argument about the 'supposed formality' of law which, in actual fact, is not just about the form. Rather, it does evaluate the content of the law although it is not done to the extent of Dworkin's

philosophers (who subscribe to the formal conception of law) argue that the rule of law embodies certain basic ideals: that laws must be open, clear, accessible, intelligible, predictable, coherent, prospective, and stable; laws with those characteristics should govern legislation and executive action.[268] The underlying value of these crucial features is that citizens can regulate their conduct.[269] Legal norms that do not conform to formal qualities are believed to be less capable of guiding society.

For instance, Fuller, a well-known proponent of the formal conception of the rule of law, explained that the function of law is to guide human conduct. He said, 'the purpose I have attributed to the institution of law is a modest and sober one, that of subjecting human conducts to the guidance and control of general rules'.[270] Fuller stated that 'there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted or changed every minute.'[271]

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substantive theory of rule of law. Luban observes in David Luban, 'The Rule of Law and Human Dignity: Re-examining Fuller's Canons' (2010) 2 Hague Journal on the Rule of Law 29, 38, that 'Fuller's eight canons should not be thought of as 'procedural' rules, because in fact, they are almost entirely substantive.'

[268] Tom Bingham, *The Rule of Law* (Penguin Books 2010), *The Rule of Law* (Penguin Books 2010); Lon Luvois Fuller, *The Morality of Law* (Revised edn, Yale University Press 1969), *The Morality of Law* (Revised edn, Yale University Press 1969) Ch. 2; Joseph Raz, *The Authority of Law* (2nd edn, Oxford University Press 2009) (2nd edn, Oxford University Press 2009), 214-18; John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) (2nd edn, Oxford University Press 2011), 270-71; John Rawls, *A Theory of Justice* (Oxford University Press 1971), 236-9; Robert S. Summers, 'The Principles of the Rule of Law' (1999) 74 Notre Dame Law Review 1691

[269] Bingham, *The Rule of Law* (Penguin Books 2010)

[270] Fuller, *The Morality of Law* (Revised edn, Yale University Press 1969), 146

[271] Ibid, 39

According to Raz and Hayek, providing a degree of certainty for citizens is a central concern of the rule of law.[272] In a liberal democracy, 'the idea of the rule of law is bound up with the individual autonomy-the freedom to make choices.'[273] The centrality and sanctity of self-autonomy in our liberal society further enhance the moral worth of having public adjudication in place. The interconnectedness between the rule of law and the freedom to make choices has implications for the substantive aspect of law and the administration of justice. In addition, the norm-guidance element of the rule of law is also crucial because of its connection to the notion of human dignity.

I am following in the footsteps of Raz, who argues that individuals are autonomous moral agents that deserve respect.[274] Raz claims that the observance of the rule of law is 'necessary if the law is to respect human dignity'. Humans are not treated dignifiedly if they cannot organise their lives rationally. To enable humans to organise their lives rationally, 'the law must be capable of guiding the behaviour of its subjects'.[275]

In this regard, Lord Diplock's opinion in the case of *Black-Clawson International Ltd* that 'the acceptance of the rule of law as a constitutional principle

[272] Hayek defines the rule of law in this way: 'Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.' F. A. Hayek, *The Road to Serfdom* (Routledge Classics 1944), 54

[273] Murray Gleeson, 'A Core Value' (Judicial Conference of Australia, Annual Colloquium, Canberra, 6 October 2006), 3

[274] Raz, *The Authority of Law* (2nd edn, Oxford University Press 2009), 221. Raz suggests that 'deliberate disregard for the Rule of Law violates human dignity.'

[275] Ibid, 214

requires that citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it'[276] affirms the need for clear guidance in our legal system.

It should be noted that the list of desiderata of the formalistic conception of the rule of law contains two strands of qualities. In the first category, the rule of law posits certain characteristics or features that norms should have, such as clarity, predictability, generality, prospectiveness, and openness.[277]

In the second category, the rule of law posits some structural or institutional qualities that should exist in a legal system (in addition to the first category). For instance, Raz adumbrates a few points dealing with the institutional characteristics of a legal system. Raz spells out that 'the independence of the judiciary must be guaranteed' and 'the courts should be easily accessible'.[278] He also believes that 'the courts should have review powers over the implementation of the other principles'.[279] Raz insists that these elements and requirements of 'open hearing, [the] absence of bias and the like are obviously essential for the correct application of the law thus…to its ability to guide action.'[280]

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[276] *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg* [1975] AC 591, 638 (HL)

[277] Bingham, *The Rule of Law* (Penguin Books 2010); Fuller, *The Morality of Law* (Revised edn, Yale University Press 1969), Ch. 2; Raz, *The Authority of Law* (2nd edn, Oxford University Press 2009), 214-18; Finnis, *Natural Law and Natural Rights*(2nd edn, Oxford University Press 2011), 270-71; Rawls, 236-9; Summers, 'The Principles of the Rule of Law' (1999) 74 Notre Dame Law Review 1691

[278] Raz, *The Authority of Law* (2nd edn, Oxford University Press 2009), 214

[279] Ibid

[280] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979), 217,

On both accounts (the rule of law that posits characteristics that norms should have and the rule of law that sets some structural or institutional qualities that should exist in a legal system), publicity is essential so that members of the public can regulate their affairs.

Can open norms be administered, created, applied, and identified by the secretly operating court? I do not think that when scholars speak of the need for legal norms to be open, such norms are only limited to the norms created by legislators. This may not be the case because the law is what is recognised by the officials, says Hart.[281] According to Hart, 'of all officials who may identify and recognise what law is; judges are those in [a] special category with paramount importance.'[282] Therefore, open justice is implied in discussing the rule of law because the law's identification, clarification, application, and (sometimes) creation may all intertwine in the judicial process.

Lord Bingham, for example, acknowledges the importance of a transparent judicial process in his definition of the rule of law, which highlights the critical feature of how justice is dispensed with. Lord Bingham has defined the rule of law by incorporating two elements. He believed that 'all persons and authorities within the state…should be bound by and entitled to the benefit of *laws publicly made*…and *publicly administered in the courts.*'[283]

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[281] Hart, *The Concept of Law* (Paul Craig ed, 3rd edn, Oxford University Press 2012)

[282] Ibid

[283] Bingham, *The Rule of Law* (Penguin Books 2010) (Emphasis added); Lord Bingham of Cornhill, Speech on the Rule of Law at the Sixth Sir David Williams Lecture, 16 November 2006, p 5: https://www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/Media/THE%20RULE%20OF%20LAW%202006.pdf

The need for the public administration of law is intuitively crucial, for there is not much benefit of having laws that are open, stable, predictable, and prospectiveness if their application is kept secret[284] because guiding behaviour through legal norms is not as easy as it sounds. To guide behaviour, members of the public need not only legal norms but explained legal norms. Judges' transparent application of legal rules tends to serve the law's very purpose as a source of guidance as the 'judicial process shapes and publicises legal standards.'[285] Therefore, keeping members of the public away from having access to judicial proceedings may affront the rule of law.[286]

The inextricable link between the judicial process and the norm-guidance aspect of law can also be seen in the light of Fuller's argument that the rule of law rests on a kind of social contract between lawgivers and those they govern.[287] In explaining his position, Fuller relied on analogy in that 'just like in the law of contract, the substantive content of the contract must be comprehensible to both

[284] Ibid; Fuller, *The Morality of Law* (Revised edn, Yale University Press 1969), Ch. 2; Raz, *The Authority of Law* (2nd edn, Oxford University Press 2009), 214-18; Finnis, *Natural Law and Natural Rights*(2nd edn, Oxford University Press 2011), 270-71; Rawls, 236-9; Summers, 'The Principles of the Rule of Law' (1999) 74 Notre Dame Law Review 1691

[285] Adrian Zuckerman, 'Common Law Repelling Super Injunctions, Limiting Anonymity and Banning Trial by Stealth' [2011] Civil Justice Quarterly 233 [2011] Civil Justice Quarterly 233

[286] Ibid

[287] Fuller's basic argument for the publicity of law derived from the requirements that a contract be understandable and capable of being performed, which include clarity, non-retroactivity, consistency, constancy and feasibility, is not free from revisit. Due to the complexities of modern society, which is highly regulated, law can fail the publicity condition if citizens have no idea that their behaviour is unlawful because of the vast volume of law, and law too is incredibly arcane and counterintuitive. For further insights on the necessity of a regulatory state and the publicity requirement on laws read David Luban, 'The Publicity of Law and the Regulatory State' (2002) 10 The Journal of Political Philosophy 296

parties so that they understand what performances it requires of them.'[288] While Fuller's analogy is correct, it is useful to ponder: does the comprehensibility of the contract's substantive content also include its application or enforcement? Comprehensibility of legal norms requires more than just a stipulation of the contents because the contents sometimes are the source of disputes.

In the context of court adjudication, it is a site where legal norms are affirmed, clarified and explained by the court. While a public pronouncement of judgments officially marks the end of a trial, the process of judicial engagement with members of the public, however, continues beyond the trial. This process of clarification and explanation by the court (the addresser) reflected in the judgment will be followed by a continuous constructive and meaningful engagement of the addressee (members of the public) because to be comprehensible, norms which are applied (and not applied) in the adjudicatory process must withstand the rigorous process of questioning within the society. We can see that rigorously questioning and reviewing judicial decisions, for example, are actively done by academics in universities and journalists in the media.

i) A Symbiosis of Legal Rules and the Judicial Rulings

Acting upon the fact that court adjudication is a law-applying and law-making process, it is perfectly sensible to justify open justice based on the imperative of public education. Bentham was one of the advocates of open justice, who believed that a trial has an educative role in society. He said

[288] Fuller, *The Morality of Law* (Revised edn, Yale University Press 1969)

> by publicity, the temple of justice adds to its other functions that of a school: a school of the highest order, where the most important branches of morality are enforced by the most impressive means.[289]

The rationale of educating members of the public through an open judicial process is interesting because the benefit of a public trial is not built upon protecting and advancing litigants' interests. Members of the public who have no immediate interest in a dispute before the court are invited to follow the judicial proceedings to learn about the law and how the judiciary administers it.[290]

The open-door policy of courts is also an initial step towards a long and continuous process of engaging and educating members of the public by giving them 'an opportunity both for understanding the [legal] system in general and its workings in a particular case'.[291] This educative role argument is significant and has an important practical dimension to it. Instead of getting glimpses of the court's business through drama series such as the *Silk* and *Law and Order*, the public trial allows the public to learn the actual practices that occur in the courtroom directly. This kind of education one possibly gets first-hand, and the "syllabus" is not picked, chosen and tailored by the drama producer to suit an hour-time slot. Lest we forget that however meticulous and thorough a production team can be, the

[289] Bentham, *Rationale of Judicial Evidence* (John Stuart Mill ed, Hunt and Clarke 1827), 525. See also, Lawrence Douglas, 'Perpetrator Proceedings and Didactic Trials' in Antony Duff and others (eds), *The Trial on Trial Volume Two: Judgment and Calling to Account* (Hart Publishing 2006)

[290] Unlike the litigants, members of the public would have no direct impact from the rulings of the courts. When a case goes to court, the court is tasked to determine the normative situation of the litigants. They have immediate interests in the result of the trial because judicial power has been explained as 'the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to rights and liabilities of one or more parties.' *Public Prosecutor v. Dato' Yap Peng* [1987] CLJ (Rep) 284, 287

[291] *Richmond Newspapers Inc v Virginia* 448 US 555 (1980), 572

staging of a trial on drama cannot completely replicate the reality of how a trial is conducted.

I argue that the most important aspect of education lies in the symbiotic connection between the court's rulings and the legal rules upon which the rulings are based. The symbiosis between legal rules and judicial rulings makes up the law, for the law is 'the enterprise of subjecting human conduct to the governance of rules and rulings'.[292]

Scholars such as Hart, Raz and Gardner have consistently emphasised the critical aspect of rules and rulings in a legal system.[293] For instance, Gardner asserts that 'rules and rulings are part and parcel of a legal system. There is no legal system without rules, but there is also no legal system without rulings.'[294] Such emphasis proceeds from the basic premise that legal rules that bind and govern society are meaningless if they are not enforceable due to the lack of an institution that can give authoritative rulings when there is a dispute about the rules.[295]

Although judicial rulings are enforceable and applicable strictly to litigants, they are still relevant to the public because we must know the law to guide our

[292] Gardner, *Law as a Leap of Faith* (Oxford University Press 2012), 209

[293] Hart, *The Concept of Law* (Paul Craig ed, 3rd edn, Oxford University Press 2012); Raz, 'The Institutional Nature of Law' (1975) 38 The Modern Law Review 489; Gardner, *Law as a Leap of Faith* (Oxford University Press 2012)

[294] Gardner, *Law as a Leap of Faith* (Oxford University Press 2012), 208

[295] Hart, *The Concept of Law* (Paul Craig ed, 3rd edn, Oxford University Press 2012), 94-5

future conduct.[296] Judicial rulings help us know how legal rules are applied in a given set of facts with reasonable certainty. They become a source of practical guidance that affirms and sometimes clarifies legal rules. For example, when the court held in *Currie v Misa* that there was no contract between the promisor and promisee without consideration, we know that consideration is one of the conditions for having a valid and enforceable contract.[297]

Moreover, court rulings, particularly by the superior courts, are important in common law jurisdictions because of the doctrine of stare decisis.[298] Stare decisis means 'cases are decided by analogy, by comparison of their facts to the facts of previously decided cases and conformity of their results to results of past cases.'[299] Therefore, the precedential value of judicial decisions will somehow mould, determine and clarify the course of law that will affect future cases with the same facts. Such clarification is highly relevant, for example, when a dispute before the court involves uncharted territory of new laws passed by the legislative assembly.

In this regard, the Supreme Court, in the *Agricultural Sector (Wales) Bill - Reference by the Attorney General for England and Wales*, delivered its unanimous ruling that the Agricultural Sector (Wales) Bill was within the legislative competence of the National Assembly for Wales. The Bill had been referred to the Supreme Court in August 2013 by the Attorney General for England and Wales. Section 112(1) of the

[296] Bingham; Fuller, Ch. 2; Raz, *The Authority of Law*, 214-18; Finnis, *Natural Law and Natural Rights*, 270-71;

[297] *Currie v Misa* [1932] AC 562

[298] Michael Zander, *The Law-Making Process* (Cambridge University Press 2004)

[299] Christopher J. Peters, 'Adjudication as Representation' (1997) 97 Columbia Law Review 312, 360-1

Government of Wales Act 2006 allows for the referral of a Bill passed by the National Assembly for Wales if the Attorney General or the Counsel General, the Welsh Government's law officer, considers that it goes beyond the Assembly's legislative competence.[300]

ii) Private Law and Public Law

In the context of the norm-guidance aspect of the law, it should be noted that there is no sharp and straightforward distinction between public and private law in the administration of justice to guide our behaviour. Both public and private law are part of the whole corpus of the law. The differences between these two are essentially matters of taxonomy. Waldron argues that some jurists might even resist the distinction between public and private law because 'the polity must take responsibility for the whole of the law that it administers and be ready to subject any of it to critical evaluation at the hands of the people through the medium of the political process.'[301] By using the law of contract as an example, Waldron emphasises that

> although this branch of private law respects private settlements, nevertheless it represents what is to be done *in the name of the public* in regard to settlements between private parties. Thus, even in this area, the law must be informed-perhaps constrained, perhaps motivated by a sense of what is appropriate and inappropriate for the public to do in regard to contracts.[302]

[300] *Agricultural Sector (Wales) Bill - Reference by the Attorney General for England and Wales* [2014] UKSC 43

[301] Jeremy Waldron, 'Can There be a Democratic Jurisprudence?' (2009) 58 Emory Law Journal 675 (2009) 58 Emory Law Journal 675, 704

[302] Ibid (2009) 58 Emory Law Journal 675, 704

Therefore, public and private law categorisation does not negate and exclude the element of publicity from private law.[303] Whatever their differences, public and private laws are a framework for human interaction. For the law to rule, it has to be knowable and predictable so that members of the public know the legal consequences of their acts or omissions. This knowledge can only be acquired through familiarity with judicial decisions, which must be broadly predictable.

Consider the case of *Donoghue v. Stevensons*[304] that laid down the neighbourhood principle. The principle imposed a duty of care on manufacturers to be diligent in producing goods. This case had a profound public consequence beyond the parties to the dispute. The duty imposed by the law is not just on the defendant of this case but on all manufacturers. Therefore, it practically means that anyone harmed by a manufacturer's breach of the duty of care may take similar legal action in the future.

In a similar vein, the problem with the public and private law claims can be seen in *Currie v. Missa,*[305] where the court held that a promise is not legally enforceable without consideration from the promisor. Indeed, this case had a wider impact on society, particularly on anyone considering to enter into a contract.

C. The Rule of Law Argument: Open Justice and the Accountability of Public Officials

[303] Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press 2012)

[304] *Donoghue v Stevenson* [1932] AC 562

[305] *Currie v Misa* [1932] AC 562

In the previous section, I discussed the norm-guidance aspect of the rule of law, which enables citizens to regulate their conduct. I shall now highlight another aspect of the rule of law, which posits the need for judicial accountability and the importance of consistent law application.

With respect to the first point on judicial accountability, this particular aspect is reflected in many scholarly writings on procedural fairness. It has always been argued that open justice can put a restraint so that judges cannot exercise judicial power arbitrarily in the whole law-applying and law-making process. Bentham, who was a well-known advocate of publicity, said, 'upon [the judge's] moral faculties it acts as a check, restraining him from active partiality and improbity in every shape: upon [the judge] intellectual activities it acts as [a] spur, urging him to that habit of unremitting exertion.'[306] This disciplinary effect on the judges is recognised as 'on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning public confidence and respect.'[307]

If we take the Court of Protection, which has gained a reputation as 'Britain's most secretive court'[308] as an example, the Court is not entirely insulated from the requirement of open justice. There has been a paradigm shift among judges on the

[306] Bentham, *Rationale of Judicial Evidence* (John Stuart Mill ed, Hunt and Clarke 1827), 523. Lord Diplock in *Attorney General v Leveller Magazine Ltd* [1979] AC 440 (HL) observed that, 'the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice.'

[307] *Scott v Scott* [1913] AC 417 (HL)

[308] Staff Writer, 'Right to Die Case: How Britain's Most Secretive Court Operates' *The Telegraph* (London, 28 September 2011) <http://www.telegraph.co.uk/news/uknews/law-and-order/8793920/Right-to-die-case-how-Britains-most-secretive-court-operates.html> accessed 03 March 2016

need to be transparent in the Court of Protection practice.[309] A judge clarified that the anonymity order that seeks to protect vulnerable people's privacy is not meant to exempt public officials from accountability. As such, the City Council should not be allowed to take advantage of rules designed to protect vulnerable adults' privacy.[310]

The need for public participation in judicial accountability is rather significant when we take into account that courts, as the ultimate arbiter of legal disputes, do not only have the power to determine the normative situations of the litigants but, more importantly, their 'decisions are binding even when wrong', says Raz.[311] Similarly, Hart says that 'whatever courts decide....stands till altered by legislation; and over the interpretation of that, courts will again have the same authoritative

[309] Amelia Hill, 'Court of Protection Case to be Reported in Real Time After Landmark Legal Ruling' *The Guardian* (8 August 2011) <http://www.theguardian.com/society/2011/aug/08/court-of-protection-case-reporting> accessed 11 June 2014; It was reported that 'for the first time, the public will both be able to follow the step-by-step decision-making process of the court.' Members of the public will be able 'to examine the arguments over whether and when the controversial Deprivation of Liberty Orders…should be applied to hospital patients and residents of care homes.'

[310] Siobhain Butterworth, 'Court of Protection Brings Council Wrongdoing Into the Open ' *The Guardian* (3 August 2010) <http://www.theguardian.com/law/afua-hirsch-law-blog/2010/aug/03/court-protection-manchester-council> accessed 14 May 2014; Siobhain Butterworth, 'Little Protection: Cloak of Secrecy Can Work Against the Vulnerable ' *The Guardian* (14 July 2010) <http://www.theguardian.com/law/2010/jul/14/court-protection-privacy-rights> accessed 11 June 2014

[311] Raz, 'The Institutional Nature of Law' (1975) 38 The Modern Law Review 489, 494; See also Joseph Raz, 'The Argument from Justice, or How Not to Reply to Legal Positivism' in George Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing 2007) Hart is also saying the same thing when he speaks of the rule of adjudication, Hart, *The Concept of Law* (Paul Craig ed, 3rd edn, Oxford University Press 2012), 91-9 and 141-6. The importance of courts, to Raz, has also been explained elsewhere where he made a distinction between 'norm-applying' institutions and 'norm-enforcing' institutions. According to him unlike 'norm-applying' institutions such as the court whose judgment is a norm, 'norm-enforcing' institutions such as the prison service 'apply norms not by making other norms but by physically implementing them'. Raz explains that the court is different from other norm-applying institutions, such as police officers, because the courts 'apply the law by rendering judgments which are themselves norms.' See, Raz, 'The Institutional Nature of Law' (1975) 38 The Modern Law Review 489, 493.

voice.'[312] The "unquestionable" force of judicial decision lies in the fact that unless reversed by legislation, the judicial ruling (subject to appeal) settles what must be done and how the state's coercive power will act in a particular case.[313] This is a unique capacity, yet it is also possibly dangerous.

It is unique for it affirms and portrays a certain level of authority held by the court in the society, which is not given to any other state institution. The division of constitutional authority provides that while the court must listen to the litigants' arguments, the court's view counts at the end of the day.[314] The opinions expressed by judges in their decisions are relevant not only to the immediate parties but may sometimes have an overarching impact on the public because judicial rulings could have created new legal rules that may subsequently be applicable in other similar situations.[315]

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[312] Hart, *The Concept of Law* (Paul Craig ed, 3rd edn, Oxford University Press 2012), 145

[313] The "unquestionable" force of judicial decisions should not be construed as if I am suggesting that the court's decision cannot be reviewed and questioned at all. The term "unquestionable" is only used to imply the enforceability and binding force of the decisions in the context of the court as the ultimate and last resort of institutional settlement. It should be noted here that although arbitral decisions are generally binding to all parties involved (whether correct or not), arbitration does not occupy the same status enjoyed by courts because it is still subjected to the supervisory and appellate power of courts. Courts, as the ultimate arbiter of legal disputes in a legal system, are still empowered to entertain any challenge against arbitral decisions for lack of substantive jurisdiction of the arbitral tribunal or on the ground of serious irregularity. This is provided by virtue of Section 67 and Section 68 of the Arbitration Act 1996, respectively. An appeal to the court on questions of law can also be made under Section 69 of the Arbitration Act 1996.

[314] Raz, 'The Institutional Nature of Law' (1975) 38 The Modern Law Review 489: 'My declaration of the legal situation is not binding at all because it is not binding if it is mistaken. To be a binding application of a norm means to be binding even if wrong, even if it is, in fact, a misapplication of the norm. This seemingly paradoxical formulation illuminates the nature and function of primary norm-applying organs.'

[315] Gardner, *Law as a Leap of Faith* (Oxford University Press 2012)

The value of judicial rulings backed by compulsory power, over which the state has a monopoly combined with the "unquestionable" force of judicial authority, brings me to this point about the need to provide space for members of the public to question and challenge whatever decisions made, if need be, in the form of public scrutiny.[316] Public scrutiny is a mechanism to check the "unquestionable" force of judicial authority so that it does not go beyond what is necessary to change the equilibrium of powers among constitutional actors.

The general public should be given the room and space to "endorse" or "oppose" the creation of a novel legal principle or any changes made to the ordinary meaning of statutory laws through interpretation. Members of the public may oppose judicial decisions by criticising the hearing process and the court's judgment. This kind of participation should never be seen as undermining judicial independence but should be praised instead. Lord Atkin said, 'no wrong is done by any member of the public who exercises the ordinary right of criticising, in good faith, in public or private, the public act done in a seat of justice.'[317]

D. The Rule of Law Argument: Open Justice and Consistency of Law

The ability to register our disagreement with judicial decisions has its roots in being governed by norms commonly accepted by society to serve the wider public's interest. In that rules of a society, the commonality aspect of the law should not be considered law unless it is meant to serve the interest of members of society, which

[316] *Scott v Scott* [1913] AC 417 (HL); *Gannett Co. v DePasquale* 443 US 368 (1979); *Richmond Newspapers Inc v Virginia* 448 US 555 (1980)

[317] *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322, 335

is one of the distinguishing characteristics that differentiate legal norms from others.[318] The public character of law to Waldron, as part of his notion of 'democratic jurisprudence', is 'the way law presents itself as a body of rules dealing with matters that are appropriately matters of public concern and dealing with them in a way that can stand in the name of the public.'[319] He explains that laws:

> might function not merely as commands issued by the powerful or as rules recognized by participants in a socially effective practice' but also '(i) as norms that purport to stand in the name of the whole society, and (ii) as norms that address matters of concern to the society as such, not just matters of personal or sectional concern to the individuals who happen to be involved in formulating them.[320]

This could be drawn from Hart's explanation of the utility of the rule of recognition as a remedy for the primary rules' uncertainty. Hart explains that the rule of recognition 'will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a *rule of the group* to be supported by the social pressure it exerts.'[321] This may be taken as an insinuation that the recognised rule should be acceptable to members of the public.[322]

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[318] Waldron, 'Can There be a Democratic Jurisprudence?' (2009) 58 Emory Law Journal 675, 700-1

[319] Ibid (2009) 58 Emory Law Journal 675, 700-1

[320] Ibid (2009) 58 Emory Law Journal 675, 700-1

[321] Hart, *The Concept of Law* (Paul Craig ed, 3rd edn, Oxford University Press 2012), 94

[322] Law to Hart is what the officials recognise it is. Public opinion does not count as law. Therefore, my point of public endorsement is not a substitute for official practices. It suggests that while the law is what the officials say it is, the law purportedly must be in touch with the public sentiment and subjected to a continuous process of reassessment within the public domain. Under certain circumstances, there is no need to wait for the unpopular opinion of the judge to be reversed by

Sometimes, there may be good reasons for Parliament to "intervene" under certain circumstances. Parliament may introduce new legislation in response to a public campaign calling for legislative intervention to neutralise judicial decisions contrary to the public interest. This form of intervention is proper, and it is part of the 'rules of change' that remedy the static quality of the law.[323]

With regard to the second point on the consistency of law, such requirement is underpinned by the fact that the rule of law is also a reflexive ideal where the law is a system of public rules that reflects not only what officials recognise but also what the general public purportedly accepts. Publicity is, therefore, a necessary condition so that public officials' application (and creation) of legal norms may be gauged and assessed by members of the public to ensure the requirement of consistency and congruence of law is in place.[324] Congruence is 'a standard for the officials charged with enforcing the law and putting its directives into action–police, bureaucrats, judges, and arbitrators. It instructs them to follow the law impartially and with fidelity.'[325]

Congruence and consistency of the law's application by public officials may influence our confidence in the administration of justice. Frequent divergence and unjustified departure from written laws and their application may create resentment

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courts because a prompt popular response may always take place in the form of legislative intervention.

[323] Hart, *The Concept of Law* (Paul Craig ed, 3rd edn, Oxford University Press 2012), 91-6

[324] Postema, 'Law's Rule: Reflexivity, Mutual Accountability, and the Rule of Law ' in Xiaobo Zhai and Michael Quinn (eds), *Bentham's Theory of Law and Public Opinion* (Cambridge University Press 2014)

[325] Luban, 'The Rule of Law and Human Dignity: Re-examining Fuller's Canons' (2010) 2 Hague Journal on the Rule of Law 29, 33

among citizens as they would not know exactly about officials' actual expectations of them.[326] In a similar vein, without rulings (or due to secret rulings), we are incapable of knowing how consistent the law's application is and nor do we know, for example, whether there has been a discriminatory application of the law against litigants.

My point on the need to have synergy between what officials recognise and what members of the public purportedly would accept can be seen in the application of the doctrine of a reasonable person as a legal metaphor. The use of a reasonable person as a legal fiction in referring to members of the public can be found in various cases. In the case of *Metropolitan Properties Co. (F.G.C.) Ltd v Lannon*, Lord Denning M.R. explained the importance of appearances when determining whether a judge must be disqualified by saying that:

> In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact, favour one side at the expense of the other. The court looks at the impression which would be given to other people.[327]

For example, in public repute discourse, the observer of the legal system is a "reasonable person" who is assumed 'to possess certain factual and normative understandings, which affect how he or she would respond to a particular judicial

[326] Coleen Murphy, 'Lon Fuller and the Moral Value of the Rule of Law' (2005) 24 Law and Philosophy 239, 242

[327] *Metropolitan Properties Co. (F.G.C.) Ltd v Lannon* [1969] 1 QB 577, 599

act.'[328] Since it is a metaphor, which is essentially an interpretative exercise, members of the public deserve to know and ultimately respond to whatever the reasonable person would have said.

In the context of promoting consistent application of the law, I wish to add that public scrutiny also tends to minimise the likelihood of officials committing errors. The ability to minimise the possibility of committing errors and provide means to rectify them is another essential quality of a proper administration of justice because errors cover a wide range of aspects, including, but not limited to, instances where cases were intentionally conducted and decided according to judges' whim and fancy. This element of determining a case based on the whim and fancy of a judge appears to be Bentham's dominant emphasis of his argument for publicity.[329] However, apart from a deliberate action driven by an ulterior motive, a judge may commit judicial error by genuine mistake or poor judgment.[330] Inadequate sentencing due to insufficient consideration of the gravity of the offence committed, for instance, may also fall under the "error" category, irrespective of whether it is done in good faith.[331]

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[328] Fredrick Schumann, '"The Appearance of Justice": Public Justification in the Legal Relation' (2008) 66 University of Toronto Faculty of Law Review 189, 126

[329] Bentham, *Rationale of Judicial Evidence* (John Stuart Mill ed, Hunt and Clarke 1827), 523

[330] Hart, *The Concept of Law* (Paul Craig ed, 3rd edn, Oxford University Press 2012), 142-3: 'The scorer may make mistakes, be drunk or may wantonly violate his duty to apply the scoring rule to the best of his ability. He may for any of these reasons record a 'run' when the batsman has never moved. Provisions may be made for correcting his rulings by appeal to a higher authority: but this must end somewhere in a final, authoritative judgment, which will be made by fallible human beings and so will carry with it the same risk of honest mistake, abuse, or violation. It is impossible to provide by rule for the correction of the breach of every rule.'

[331] The inadequacy of the punishment meted out by the trial court may be addressed subsequently by the appellate court by taking into account the sentiment and perception of the public. Read, for instance, Press Association, 'Teenager Jailed for Attacking Malaysian Student during London Riots' The

i) Secret Trial as Domination

The arbitrary use of State power has always been a significant concern in political and legal theory because of the sanctity of an individual's freedom. In the previous discussion, we saw that judicial arbitrariness is anathema to the rule of law on many fronts.[332] In this section, I shall argue that, in addition to the need to avoid actual interference with our freedom through certain arbitrary acts of officials (the judge in particular), which is the main thrust of the rule of law, we could also secure freedom by avoiding, eliminating, or mitigating the situation in which such arbitrary interference could happen.

It is theoretically plausible to hold that there is arbitrariness in the failure to bring in members of the public into the judicial process through complete secrecy or unjustified privacy of certain segments of the judicial process within the contemplation of Pettit's freedom as non-domination.[333] The main idea is that secrecy excludes participation and gives the feeling of being helplessly dominated, having no role in decisions and processes that may affect one's life. While litigants are guaranteed participation in the judicial process through the principle of natural

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Guardian <http://www.guardian.co.uk/uk/2012/mar/09/teenager-jailed-malaysian-student-london-riots> accessed 10 February 2013 and The Telegraph, 'Rioter Who Attacked Malaysian Student Jailed for Seven Years' The Telegraph <http://www.telegraph.co.uk/news/uknews/crime/9134125/Rioter-who-attacked-Malaysian-student-jailed-for-seven-years.html> accessed 10 February 2013

[332] For example, judicial arbitrariness will violate the imperative of providing an effective and reliable norm-guiding source, procedural fairness, and mutual accountability between officials and subjects.

[333] It should be clarified here that when I speak of the need to bring in members of the public into the judicial process, it does not mean that we have to ensure public attendance in the courtroom. Members of the public are certainly given the freedom to attend or not to attend the courtroom. As I have alluded to in the abstract of this thesis members of the public are given a space and assumed to be part of the court adjudication by making the adjudicatory process open, visible, accessible and transparent. It follows that there can be no public participation when a trial is secret.

justice that gives them the right to be heard and the right to confrontation, members of the public would be helplessly abandoned in the absence of open justice.

Pettit claims that the primary focus of his republican ideal of liberty as non-domination is to avoid being arbitrarily interfered with by others.[334] Unlike the principle of non-interference, the principle of non-domination aims to secure a reasonable level of certainty against acts of arbitrary interference, and Pettit contends that democratising power relations is generally the best path to mitigating domination.[335] Political freedom is constituted by rightly-ordered laws, institutions, and norms: 'to enjoy such non-domination, after all, is just to be in a position where no one can interfere arbitrarily in your affairs,' writes Pettit, 'and you are in that position from the moment that the institutions are in place inhibiting potential arbitrary interference.'[336] This implies a presumption in favour of inclusive participation in decisions by which one is affected and a presumption that people should always be free to oppose decisions with which they disagree.

The conception of political liberty as non-domination or independence from arbitrary power is central to contemporary civic republicanism.[337] Skinner defines arbitrary power as the ability to interfere with one's activities without considering

[334] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999), 27

[335] Ibid, 85-86

[336] Ibid, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999), 107

[337] Ibid, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999), 58

one's interests or opinions.[338] Pettit says much of the same thing and adds that an arbitrary act is taken at the "pleasure" of the one interfering.[339]

The emphasis placed on the mere presence of arbitrary power stems from the discourse surrounding the master-slave relationship. Avoiding arbitrary interference is a central idea of Pettit's version of republicanism, which is different from freedom as positive liberty. Republican conception of political liberty aims to capture the condition of not being subjected to the arbitrary or uncontrolled power of a master. The slave lacks freedom because he is vulnerable to the arbitrary power of his master, regardless of whether his master happens to exercise that power or not. In other words, Pettit's theory of non-domination goes against not only the interference but also the possibility of having such interference by your condition or situation.

I consider the republican conception of freedom as non-domination more attractive than freedom as non-interference because the former's core idea is to address one's capacity to interfere rather than actual interference.[340] According to the republican theory, arbitrary interference does not always require a real act of interference to be committed; mere knowledge that I may be arbitrarily interfered with is enough to limit my liberty.[341] Skinner explains that the principle that 'the

[338] Quentin Skinner, 'A Third Concept of Liberty' (2002) 117 Proceedings of the British Academy 237, 'A Third Concept of Liberty' (2002) 117 Proceedings of the British Academy 237), 247-48

[339] Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999), 55

[340] Isaiah Berlin, 'Two Concepts of Liberty' in *Four Essays on Liberty* (Oxford: Oxford University Press 1969), 'Two Concepts of Liberty' in *Four Essays on Liberty* (Oxford: Oxford University Press 1969)

[341] Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999), 23; Skinner, 257

mere presence of arbitrary power has the effect of undermining political liberty' has always been central to the English republican tradition.[342] In other words, exposure to the dominating power is sufficient to affect one's freedom.

Unlike other modes of dispute settlements, such as arbitration and conciliation, the judicial process has certain peculiar and distinct characteristics that befit the position of a master in a master-slave relationship. One should be reminded again of the court's unique position in the legal system to understand the danger of a secret judicial process. As the ultimate arbiter of a legal dispute whose decision carries the force of law, members of the public must be part of the process. While it is true that the court is specifically tasked to determine the normative situation of the litigants, the decision is a combination of both legal rules and legal rulings, which are inherently matters of public interest. Although rulings are enforceable and applicable strictly to the litigants, judicial rulings are still relevant to members of the public to regulate their affairs in their capacity as future litigants.

Another crucial point lies in the "unquestionable" authority that is assumed based on the fact that courts are the ultimate arbiter of legal disputes in our society. While the court must listen to the parties' arguments at a trial, the court's view counts at the end of the day. This authority to "impose" views on individuals will be arbitrary if there is no room for questioning and challenging provided for the wider public.

Without the open justice principle that guarantees public participation, the dominant, imposing character of the court (as the ultimate arbiter of legal disputes

[342] Skinner, 'A Third Concept of Liberty' (2002) 117 Proceedings of the British Academy 237

that has the power to apply and create legal norms) in our society is a form of arbitrariness. As I have pointed out, we arguably lack freedom by having judges who can act arbitrarily, which can happen when their activities are shrouded in secrecy.

Secrecy is a form of domination because society will be kept in the dark, not knowing how the judicial power is being exercised. For example, we shall not know whether the proceedings have been conducted in conformity with the law. Being ignorant of the outcome and reasons for the decision means we cannot assess what effect such proceedings might have had on the litigants or members of the public. We are also possibly deprived of benefiting from the body of legal jurisprudence, which would help the lay members of society, and the legal fraternity understand the law.

The possibility that a secret judicial proceeding may take place in a modern legal system is not remote based on what was reported in Australia. Anthony Whealey, a former New South Wales supreme court judge, says the secret prosecution of a mystery Canberra inmate appears to be a "complete abandonment of open justice" as Australia's peak lawyers' body renews calls for a full review of secrecy laws.[343] Proceedings against the inmate, understood to be a former military intelligence officer, were hidden from members of the public. He was sentenced to imprisonment and began serving time in the Alexander Maconochie Centre before being released in 2019. Commonwealth orders have imposed the secrecy surrounding the case. Those orders, which are not publicly available, prevent the

[343] Christopher Knaus, ''Are we now a totalitarian state?': case of Canberra's mystery prisoner alarms judge' *The Guardian* (20 November 2019) <https://www.theguardian.com/law/2019/nov/21/are-we-now-a-totalitarian-state-case-of-canberras-mystery-prisoner-alarms-judge> accessed 12 January 2020

inmate's identification or the publication of the charges he faced.[344] The inmate was restricted in his communications with friends and family while behind bars, and the Australian federal police asked the prison to tip it off if he attempted to receive any “unusual visitors”.

In conclusion, the need for publicity as an embedded feature of court adjudication does not necessarily have to do with the immediate impact of the judicial process on the immediate parties. Someone having lunch at home would still be interested in how a trial is conducted, even at the Magistrate’s Court level, because he is a member of the society living in the same legal and judicial system. Some people may think that the link is too remote because those at home would not have a keen interest in how cases are heard at the Magistrate’s Court, whether they are heard openly or secretly, as opposed to cases at the High Court or the Supreme Court.

However, Pettit’s notion of freedom as non-domination seems to suggest otherwise. As members of the political community, we have our freedom when we are not treated as if we were in a master-slave relationship. In that context, observing open justice at the Magistrate’s Court would ensure that such a relationship does not exist. Unlike slaves who cannot put pressure on their masters, putting the open justice principle in place will allow us to exert the necessary pressure on judges and officials to behave according to the law and have the right to discuss and criticise judicial decisions.

[344] Ibid

ii) Lack of Democratic Legitimacy and Accountability

One of the major concerns of members of the public that may erode public confidence, if left unaddressed, is the judiciary's democratic deficit. Unlike the executive and legislature, the judiciary does not enjoy the same democratic legitimacy because members of the public do not popularly elect judges (and jurors).[345] The fact that courts do not enjoy the same degree of democratic legitimacy as the legislature may exacerbate public concern about judges' potential "dominating" character. Due to their authority as the ultimate arbiter of legal disputes whose pronouncements carry the force of law, there is a real prospect of having a society governed by the rule of judges rather than the rule of law if judges and the judicial process are left entirely insulated from members of the public.

The purported lack of legitimacy of the judiciary and the prospect of an arbitrary exercise of judicial power may be mitigated by open justice. Transparency is inextricably linked to accountability, a central goal of an institution in a modern democratic government. Resnik argues that democracy

> relies on core commitments to governance by consent of the people whose voices are heard, to governance respectful of the dignity of individuals, to governance constrained by prior commitments to the rule of law, and to governance made accountable by the openness of its processes.[346]

[345] Waldron, 'Can There be a Democratic Jurisprudence?'; Keith Ewing, 'The Unbalanced Constitution' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press 2001), 109; Stephen Sedley, 'The Rocks or the Open Sea: Where is the Human Rights Act Heading?' (2005) 32 Journal of Law and Society 3, 48

[346] In Judith Resnik, 'Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure' Faculty Scholarship Series Paper 759 <http://digitalcommons.law.yale.edu/fss_papers/759> accessed 09 November 2012, 14

In the context of court adjudication, there are many forms of accountability in the judicial process, one of which is the requirement of preparing judgments. The public explanation of a decision is one of the most important means of judicial accountability because it is how judges engage and reach out to the general public.[347] The court gives reasons not just for the benefit of the litigants[348] but also to show the community that they are themselves ruled by law. Judges were made accountable for how they conducted judicial proceedings and their decisions. This minimised the risk of corruption by ensuring that even judges who are qualified and generally trusted by society were not left entirely unchecked.[349]

iii) Law as an Argumentative Discipline

In this section, I shall propose another basis for public participation in the judicial process, relying on the argument that law is an argumentative discipline. Court adjudication is a rational exercise throughout the process.[350] In the context of court adjudication, the particular importance of the public argumentative aspect of trial

[347] Charles Nesson, 'The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts' (1985) 98 Harvard Law Review 1357; Nesson argued that the terms 'acceptable verdicts' and 'acceptability' do not mean the public believes in the court's account of what happened is certainly true. 'Acceptability' rather refers to the qualities of a verdict that enable the public to justify the legal sanction imposed by reference to the verdict.

[348] The court, in the case of Hadjianastassiou v Greece (1992) 16 EHRR 219, is of the view that reasons for decisions are important to ensure appeal rights are meaningful.

[349] For an overview of other mechanisms, see, Matthew Simpson, 'Open Justice and the English Criminal Process' (PhD thesis, University of Nottingham 2007)

[350] Lon Luvois Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353, 366; Fuller asserts that court adjudication is 'a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering.'

proceeds from the realisation that judicial function does not rest in a single-track mechanical application of the law without any room for disagreement and human deliberation.[351] This aspect of disagreement and thoughtfulness of law is valuable in the broad concept of the rule of law.

Waldron argues that a fallacy of modern positivism is in 'its exclusive emphasis on the command-and-control aspect of [the] law, or the norm-and-guidance aspect of [the] law, without any reference to the culture of argument that a legal system frames, sponsors, and institutionalises.'[352] He further explains that while recognising the norms may be essential to guide our life, 'we engage in elaborate interpretive exercises about what it means to apply them faithfully to the cases that come before us'.[353] This notion of a 'culture of argument' that a legal system sponsors would transcend beyond the domain of the parties to trial fits well with the practice of public proceedings.

In the administration of justice, there is no precise test for measuring the accuracy of individual judgments; we can only assess the measures used for reaching a decision, such as the quality of the judiciary and its impartiality.[354] Given that the efficacy and effectiveness of law and the legal system are primarily a matter of

[351] Ibid, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353, 388: Fuller is of the view that what distinguishes judges at an agricultural fair and a baseball umpire from the court is that 'their decisions are not reached within an institutional framework that is intended to assure to the disputants an opportunity for the presentation of proofs and reasoned arguments.' 'Without such opinions the parties have to take it on faith that their participation in the decision has been real, that the arbiter has in fact understood and taken into account their proofs and arguments.'

[352] Jeremy Waldron, 'Thoughtfulness and the Rule of Law' [2011] British Academy Review 1, 8

[353] Ibid

[354] Zuckerman, *Zuckerman on Civil Procedure Principles of Practice* (Second edn, Sweet & Maxwell 2006), 7

evaluation and assessment, it is pertinent for us to question whose assessment and evaluation matters. While litigants are undoubtedly entitled to form an opinion on the quality of the administration of justice, we should be critical of accepting a hypothesis that the evaluation and assessment process should only be left to them. There is always room for members of the public to be part of the evaluation and assessment process, empowering them and underscoring their responsibility in the legal system.

Suppose a plaintiff sued the defendant for trespass, and the court ultimately decided in his favour. Naturally, the plaintiff would believe that the judiciary is efficient and effective in vindicating his legal right, whereas the defendant may think otherwise. In this scenario, it is legitimate for both parties to form their own opinions. Still, their opinions are most likely coloured by their personal interest in the case. To have an objective assessment that is likely free from biases, members of the public (whose primary interest lies in the correct application of the law) seem to be in a better position to evaluate the court's performance.

While the conflict in the judicial process is personal in so far as it is confined to determining the rights and duties of the parties who came to court, the conflict is inherently public because legal norms are sought to be enforced by the judicial authority.[355] The dispute is resolved through a kind of "conversation" regulated by predetermined rules and procedures among the litigants before a judge (and sometimes with the jury). The law gives both parties a fair chance to say and argue

[355] Other elements of publicness include the source of judicial power, the appointment of judges, and the enforcement of decisions backed by the State apparatus.

what they want to convince and persuade the presiding judge to grant what they ask for.

When a case is litigated in court, it is reasonable to expect another kind of "conversation" and "disagreement" to occur in the public domain, which might even last after the trial's conclusion.[356] The strong element of contestation of arguments permitted through a network of legal principles and legal rules in a trial process is in line with liberalism, which tolerates dissent about the substance, scope, and application of legal norms.

The rule of law argument that recognises the importance of thoughtfulness in applying law can be further reinforced by referring to Stuart Hampshire's seminal idea in *Justice is Conflict*.[357] Hampshire believes justice is inherent in all sides' opportunity and ability to be heard within the state's institutions. Given the inevitability of conflicts in our society, Hampshire stresses the importance of institutions, which contribute to social cohesion by virtue of participation. Hampshire believes that 'almost any organised society requires an institution and also a procedure for adjudicating between conflicting moral claims advanced by individuals and by groups within a society.'[358]

Considering the complexities of varying moral outlooks and conceptions of the good we may have over one issue, according to Hampshire, it is impossible that

[356]Judith Resnik, '"Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)"' Faculty Scholarship Series Paper 3856 <http://digitalcommons.law.yale.edu/fss_papers/3856> accessed 11 September 2012; See also, The Harvard Law Review Association, 'Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings' (1978) 91 Harvard Law Review 1899

[357] Stuart Hampshire, *Justice Is Conflict* (Princeton University Press 2000)

[358] Ibid, 7

we could have a specific universal substantive conception of justice that would satisfy everybody in society. Therefore, he argues that the only universal moral value is procedural:[359] the right to be heard. Hampshire seems to accept that the process of resolving conflict in public is universally acknowledged (as part of his broad argument of the right to be heard as the only universal moral value) in most cultures, places, and times because it accords everyone who is involved in the process the same equal concern. It also does not favour any particular substantive conception of justice over the other.

The significant element of publicity in procedural fairness is not just restricted to public reasoning because it has an equivalent significance mirrored in the way we think and rationalise things in our minds.[360] Hampshire argues that 'the words that we ordinarily use to distinguish mental processes - "deliberating," "judging", "adjudicating", "reviewing," "examining," and many others - have both a public and an inner mental use.'[361] The 'discussions in the inner forum of an individual mind naturally duplicate in form and structure the public adversarial discussions' because 'advocates, judges, and diplomats rehearse what they are to say before they get onto the public stage.'[362] They actually 'acquire the habit of

[359] Ibid, 4: Hampshire put forward a very interesting argument about the importance of procedural fairness. He argues that 'fairness in procedures for resolving conflicts is the fundamental kind of fairness, and that is acknowledged as a value in most cultures, places, and times: fairness in procedure is an invariable value, a constant in human nature.'

[360] Ibid, 7: 'The relations between the public activities of deliberating and adjudicating are open to everyone's eyes, and their shadows, the corresponding private mental activities, are assumed to duplicate these relations.'

[361] Ibid, 7

[362] Ibid, 9

balanced adversary thinking'[363] by preparing for rebuttals to what the opponent would say about them.

The interplay between the open justice principle and the imperative of giving all sides the ability to put their case can be seen in, for example, 'the way in which judges justify their decisions, seeking always to demonstrate that they are in accordance with [the] law, reflects the assumptions that judges are applying [the] law, and not merely expressing a personal preference for an outcome.'[364] In my view, this is the practical reflection of the rational process, which is part and parcel of the judges' practice of exercising their right to be heard in conflict (the trial).

Since law is an argumentative discipline, the decision's correctness cannot be ascertained with methods comparable to scientific experiments. A comprehensible public judgment has to be written at the end of the trial so that members of the public would, in turn, be capable of accepting or rejecting the decision based on the reasons given. In the absence of reasons, it is difficult for a decision to claim legal characteristics that would enable us to distinguish a correct and just judgment from an arbitrary one.[365]

E. The Rule of Law Argument: Open Justice and Reciprocity of Action

The previous section has focused on the importance of consistent application of the law and the need for mutual accountability between officials and the subjects; this

[363] Ibid, 9

[364] Gleeson, 'A Core Value' (Judicial Conference of Australia, Annual Colloquium, Canberra, 6 October 2006), 5

[365] Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press 2005)

section attempts to highlight the importance of the bond of reciprocity among members of the public. The rule of law cannot be understood as a matter of principles, standards, and institutions without a suitable and appropriate culture among members of the public to support them. In addition to the established principles, standards, and institutions, the rule of law requires all parties' commitment to society.[366]

Postema invites us to 'look beyond the canonical formal and procedural standards widely accepted as components of the rule of law ideal, and even beyond the more controversial substantive principles often proposed' to understand 'the conditions necessary for the realisation of the rule of law in a polity'.[367] He suggests that the component of legality must be complemented with the element of

[366] This idea of reciprocal expectation is well-rooted in society. Perhaps the earlier formulation of such an idea can be seen, for example, in the biblical teaching of 'do not do unto others what you do not want others to do unto you'. Various scholars have argued the need for a cultural aspect of legality. Read, for example, Brian Z. Tamanaha, 'The History and Elements of the Rule of Law' [2012] Singapore Journal of Legal Studies 232, 246 : 'For the rule of law to exist, people must believe in and be committed to the rule of law. They must take it for granted as a necessary and proper aspect of their society. This attitude is not itself a legal rule. It amounts to a shared cultural belief. When this cultural belief is pervasive, the rule of law can be resilient, spanning generations and surviving episodes in which the rule of law has been flouted by government officials. . .. When this cultural belief is not pervasive, the rule of law will be weak or non-existent.'

[367] Postema, 'Law's Rule: Reflexivity, Mutual Accountability, and the Rule of Law ' in Xiaobo Zhai and Michael Quinn (eds), *Bentham's Theory of Law and Public Opinion* (Cambridge University Press 2014), 19. One of the conditions to establish a political community whose decisions can be legitimately enforced upon individuals, according to Dworkin, is that the community must meet the moral requirements of a true community. It is a community 'one in which genuine political obligations and rights exists between its members and can be legitimately enforced through collective force.' Dworkin further explains that in order to have a true community is that there is reciprocal concern for the well-being of other members of the community. See, Ronald Dworkin, *Law's Empire* (Hart Publishing 1986)

fidelity.[368] Fidelity, to him, is 'the set of relationships, responsibilities, convictions, and commitments constituting the ethos of the rule of law.'[369]

Postema further explains that the ethical aspect of fidelity is served in two ways. First, it is served through what he describes as 'the culture of a polity, the mutual understandings and associated practices of people in a community in which the rule of law is realized.'[370] Secondly, fidelity is 'concerned with the mutual responsibilities borne by members of law's ethos, including the responsibility to hold each other to [a] faithful execution of these responsibilities.'[371]

Everyone is expected to be law-abiding citizens, for laws are some of the norms regulating human interactions. For example, Postema has suggested that law is a public standard realised in the actions, beliefs, and attitudes of community members. Unlike private rules of morality, 'rules of law are common, public rules-shared…in the deeper sense that what they take the rule to be is a matter of mutual understanding, and this mutual understanding is part of the reason for following the rule.'[372]

Fuller also expressed a similar view. Reciprocity plays a crucial role in Fuller's account of duty because the existence of duties, to him, depends partly on others' behaviour. For Fuller, the duties involved in social relationships rest on the reciprocal

[368] Postema, 'Law's Rule: Reflexivity, Mutual Accountability, and the Rule of Law ' in Xiaobo Zhai and Michael Quinn (eds), *Bentham's Theory of Law and Public Opinion* (Cambridge University Press 2014)

[369] Ibid, 19

[370] Ibid, 20-21

[371] Ibid, 21

[372] Gerald J. Postema, 'Coordination and Convention at the Foundations of Law' (1982) 11 The Journal of Legal Studies 165, 188

nature of those relationships. In a particular social relationship, each individual forms expectations about how others they are involved in a relationship with will act.[373] These expectations form the basis for individuals' duties towards one another. It is like saying that it is fair to expect me to act in specific ways only if it is mutual and reciprocal.

A non-positivist account of the special relationship between fellow community members may also be relied on to illustrate that in a political community, interaction per se with each other is not sufficient to form a political community. The interaction among members of the political community ought to be informed by a system of commonly accepted rules. Letsas's argument highlights that friendship is not determined purely by empirical facts but involves an evaluative question. George Letsas argues that

> it is not a matter of empirical fact whether two persons who spend time together are really friends; whether this is the case depends on whether their behaviour and attitudes instantiate the ethical value of friendship, whether, that is, their relationship meets a moral test furnished by our best understanding of the value of friendship.[374]

On the reciprocal expectation among fellow members of the community, let us now consider a situation where there has been an allegation of a breach of contract before the court. Why would members of the public claim the right to attend a public trial? What is so crucial for members of the public to know about a

[373] Fuller, *The Morality of Law*, *The Morality of Law* (Revised edn, Yale University Press 1969); Lon Luvois Fuller, 'Positivism and Fidelity to Law-A Reply to Professor Hart' (1958) 71 Harvard Law Review 630

[374] George Letsas, 'Rights and Duties on Pitcairn Island' in Dawn Oliver (ed), *Justice, Legality and the Rule of Law: Lessons from the Pitcairn Prosecutions* (Oxford University Press 2009), 177

dispute between two parties on an issue of breach of contract, for instance? There are many ways to answer such questions, some of which have been covered above.

In the context of the present discussion, yes, the adjudicatory process must not be confined to the dramatis personae of a trial because it informs the rest of society about potential misconduct by a member of the community whose integrity or moral credibility is under scrutiny.[375] Members of the public would want to know whether Adam has been found liable for violating the mutual understanding of behaving and acting according to the rules and norms acceptable by society. Upon a positive finding of liability, members of the public can then adjust how they deal or interact with him accordingly. Some people may then use the verdict to avoid entering into a contract with Adam anymore because of his dubious character.[376] As Neil MacCormick argued, members of the public could 'have reasonable security in their expectations of the conduct of others, and in particular of those holding official positions under [the] law.'[377]

2.4 Trial as a Fact-finding Process

In this section, I argue that a trial as a fact-finding process is not entirely independent from the trial's previous conception (trial as a law-applying and law-making process) that I spoke of earlier on. They are inextricably connected

[375] This idea of allowing members of the public to pass moral judgment on a fellow member has been articulated by scholars such as Duff who view a trial as a form of moral discourse.

[376] There will be more compelling reasons to demand a public trial when the subject matter involves serious issues such as the existence of a possible threat of terrorism among members of the community. It is uncomfortable to live in a society where the public is kept in the dark without the knowledge of a possible threat of such degree.

[377] Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press 2005), 16

because a trial as a fact-finding process serves the instrumental function of finding out what happened in the past (at the material time) so that appropriate legal consequences may follow through a correct decision.[378] This exercise is sometimes referred to as a pursuit of finding the truth.

A. The Primary Truth

In so far as the primary role of courts is concerned, John Finnis had succinctly explained that:

> the judicial responsibility is to adjudicate between parties who are in dispute about their legal rights and obligations by applying -- to facts agreed between them or found by the court after trial – the law that defined those rights and obligations at that time past when the matter of their dispute (the cause of action) arose.[379]

In other words, the court seeks to determine the truth, established through the reconstruction of the past event built upon the evidence proved in the court, about the moral culpability of the accused person in criminal trials and the right or liability of the litigants in civil hearings. I would call this "the primary truth" as it pertains to specific legal questions framed for the court's determination.

This account is in line with a judicial pronouncement held in the case of *Public Prosecutor v. Dato' Yap Peng*, which has defined judicial power as 'the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to the legal rights and liabilities of one or more

[378] *Estes v Texas* 381 US 532 (1965), 540: 'Courts proceedings are held for the solemn purpose of endeavouring to ascertain the truth which is the sine qua non of a fair trial.'

[379] Finnis, 'Judicial Power: Past, Present and Future', 4. See also, Finnis, *Philosophy of Law*

parties.'[380] In the process, witnesses are then called, and documentary evidence is tendered to unfold the narratives of past events that constitute the dispute's subject matter.[381]

In this regard, Jaconelli has questioned the value of open justice to enhance the quality of testimony, ultimately helping the court establish "the primary truth" on the grounds of its limited applicability. It was argued that the emphasis on evidential consideration to form the basis of open justice might not account for the applicability of the open justice principle to hearings at the appellate stage and sentencing phase, where there will be no witness to be called upon to testify under most circumstances.[382]

This criticism is misplaced because the prominent advocates of the disciplinary value of publicity, such as Bentham and Wigmore, did not claim that such value is the sole ground for the open justice principle. They did articulate a justification that may account for the need for publicity in parts of the trial. Therefore, evidence-oriented justification is desirable, relevant, and plausible in the context of testimony. Depending on the nature of the process, other parts of the trial may have and require different grounds to justify the open justice principle. For instance, the undiminished force of the open justice principle in the sentencing phase and hearings at the appellate courts can be justified based on the imperative

[380] *Public Prosecutor v. Dato' Yap Peng*, 287

[381] It should be noted that this principle of orality and immediacy has been less observed in trial proceedings. There has been an increasing reliance on written submission and witness statements prior to trial. Cyril Glasser, 'Civil Procedure and the Lawyers: The Adversary System and the Decline of the Orality Principle' (1993) 56 The Modern Law Review 307

[382] Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002), 38.

of maintaining public confidence in the administration of justice and the educative role of the trial process.[383]

Although a trial aims to find facts, the process's pith and substance are essentially law-applying and (potentially) law-making processes. I suppose those who do not see the importance of public narration of evidence, particularly in litigation that turned entirely on disputes of facts because they would possibly 'regard fact-finding as a process of historical enquiry, sharply differentiated from the normative enterprise of identifying applying and, where necessary, developing the law.'[384] This assumption is incorrect because 'it is not always easy to distinguish between questions of fact and questions of law'.[385]

Roberts and Zuckerman similarly emphasise that 'in reality, there is no clear and determinate boundary separating the descriptive realm of fact from the normative realm of law.'[386] Moreover, it may be misleading if one can say that a question of fact does not involve points of law. The trial is a juridical process in which the fact-finding process is not free from normative assessment for the truth that to be established is a juridical truth.[387] There is a symbiotic and inter-reliability

[383] An appeal by the aggrieved party to the Supreme Court, for instance, is held in public. Rule 27 of the Supreme Court Rules 2009 provides that 'every contested appeal shall be heard in open court except where it is necessary in the interests of justice or in the public interest to sit in private for part of an appeal hearing.'

[384] Roberts and Zuckerman, *Criminal Evidence*, *Criminal Evidence* (2nd edn, Oxford University Press 2010), 130

[385] *Farmer v Cotton's Trustees* [1915] AC 922, 932

[386] Roberts and Zuckerman, *Criminal Evidence* (2nd edn, Oxford University Press 2010). See also, Adrian Zuckerman, 'Law, Fact or Justice?' (1986) 66 Boston University Law Review 487

[387] Adrian Zuckerman, *The Principles of Criminal Evidence* (Oxford University Press 1989), 1: Zuckerman observes, 'the doctor, the scientist, the journalist, and the historian are also interested in finding the truth about facts, yet each of these adopts different procedures to that end. The

of facts and law in the presentation of evidence during the trial as 'values pervade fact-finding, just as fact-finding is sometimes a kind of law-making.'[388]

B. The Connection between Public Narration of Evidence and the Primary Truth

In the previous section, I have highlighted the significance of legal rules and judicial rulings to members of the public in guiding their future behaviour. One may argue that the need for members of the public to know legal rules and judicial rulings may be satisfactorily served by making the judgment public. Thus, there is no need to have an immediate and contemporaneous public narration of evidence. I would state to those who might eschew the relevance of public narration of evidence on the grounds of respecting the right to privacy that there is a strong connection between the public presentation of evidence and public judgment, at least in the context of educating members of the public.[389]

Apart from the diagnostic and accountability purposes, public presentation of evidence before the court is put in place so that members of the public can understand the litigants' legal arguments and, ultimately, the court's decision. Judicial rulings are not like statutes that merely stipulate legal provisions. Judicial rulings are the practical application of legal rules to the facts of the case before the court. We cannot expect members of the public to fully appreciate the text (legal

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procedure that each follows is influenced by the purpose for which the investigation is carried out and by the conditions under which it is conducted.'

[388] Roberts and Zuckerman, *Criminal Evidence* (2nd edn, Oxford University Press 2010), 135

[389] When a matter is submitted to the courts of justice, the parties cannot expect that the details of their dispute shall remain private. Traditionally, the courts have indicated that the embarrassment that results from having one's affairs subjected to public viewing is an insufficient justification for curtailing the openness of court proceedings. See, *A G (Nova Scotia) v MacIntyre* [1982] 1 SCR 175

argument or legal reasoning) without the context (facts of the case). In the absence of public narration of evidence or due to an information embargo, members of the public are incapable of knowing whether a learned judge had failed to evaluate the evidence before him properly and had committed severe misdirection, which would vitiate the decision.

It is particularly so in the light of our adversarial system, where it is assumed that the truth is more likely to emerge from the open contest between the two conflicting parties when presenting the evidence and opposing legal arguments before a judge. This is achieved through a rigorous process of argument and counter-argument, examination-in-chief and cross-examination, where each side of the divide will test the truthfulness, relevance, and sufficiency of the opponent's evidence and arguments.

In a public trial, the evidence is presented to the judges (including juries) and made accessible to the general public. Although it can be done in many forms, including video recordings and live-link CCTV transmissions, there is an essential connection between the requirement of open justice and the practice of oral testimony. Live oral testimony in court is the best opportune time for members of the public to see that the evidence is actually given in a relatively safe public environment.[390] Despite our technological advancements, Roberts and Zuckerman argue that video recordings or even live telecasts of proceedings 'would provide an inferior form of transparency and accountability compared with live oral

[390] Roberts and Zuckerman, *Criminal Evidence*,294

testimony.'[391] A substantial part of the pre-trial of the evidence-gathering process is done far from public reach, further complicating the matter. If live oral testimony were to be dispensed with, it 'would tend to insinuate this *de facto* insulation from democratic accountability into the procedure by which evidence is presented.'[392]

Interestingly, the value of legal arguments ventilated in court is not limited to written submissions but includes skeleton arguments. Although skeleton arguments used as a reference during oral submission do not always reflect all the arguments presented before the court as opposed to written submissions, they are still important to members of the public.

The value of the skeleton argument was argued in *R (on the application of Davies and another) v HMRC* ex p. Kessler.[393] There was an application for permission to inspect and take copies of the Respondents' skeleton arguments in the substantive case heard before the Court of Appeal (Civil Division). The Respondent was the Commissioners for Her Majesty's Revenue and Customs. The application was ultimately allowed by the Court of Appeal, considering the case was of great public importance beyond the concern of the individual Appellants. It deals with the meaning and effect of the Revenue's longstanding guidance on the meaning and scope of residence of individuals for taxation.

It is interesting to note, too, that courts have acknowledged the

[391] Ibid, 294

[392] Ibid, 294

[393] This case was decided in July 2011. See, http://www.kessler.co.uk/foi-2/. The application was allowed and it can be retrieved at http://www.kessler.co.uk/wp-content/uploads/2012/04/Court-of-AppealDecision.pdf

importance of open justice in serving the right of members of the public to have an informed discussion about issues of public interest.[394] The right of members of the public to be informed about matters of public interest is not only confined to disputes and legal arguments ventilated in courts; it even includes minute details such as the identity of those involved in the case. The identity of those involved in the trial becomes a matter of public concern, and it should be made public because names are part of factual details that would facilitate an informed discussion in society.

In the *Application by Guardian News and Media Ltd and others in Her Majesty's Treasury (Respondent) v Mohammed Jabar Ahmed and others*,[395] the Supreme Court unanimously made an order disclosing the identity of five persons who had their assets frozen by the Treasury for suspicion of supporting terrorist activities. The Court rejected the appellants' argument that anonymity orders were necessary because their identification as claimants in the substantive proceedings would infringe on their privacy protected under Article 8 of the European Convention on Human Rights (ECHR).

In arriving at this decision, the court emphasised the importance of informed debate in society about issues of public interest, which would be hindered by the respondents' undisclosed identity. The importance of factual details in engaging the public's attention should not be downplayed as 'the public

[394] *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, [38]-[40]

[395]*Application by Guardian News and Media Ltd and others in Her Majesty's Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants)*

is more likely to be engaged by an article which focuses on the facts of a particular case than by a more general or abstract discussion'.[396] Although the open justice principle was not directly discussed in this case, the decision was based on Article 10 of the ECHR, which is inextricably linked to the right to receive and impart information.

The Supreme Court recently ruled in *Cape Intermediate Holdings Ltd (Appellant/Cross Respondent) v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK) (Respondent/Cross-Appellant)*, reinforcing the right of the media and members of the public to access documents used during a trial.[397] The declaration came in a decision by five Supreme Court justices who rejected an asbestos company's appeal against a decision allowing Graham Dring, representing the Asbestos Victims Support Groups Forum UK, access to a wide range of documents used in a High Court trial in 2017. The Supreme Court's decision is a landmark decision for access to documents to non-parties as it was held, not only that the Court of Appeal had the jurisdiction to make the order to allow Dring to access documents, but also that it had the jurisdiction to issue a more comprehensive order if it were right to do so.

One of the main issues involved was how much of the written material placed before the court in a civil action should be accessible to those not privy to the proceedings. The Forum applied under rule 5.4C of the Civil Procedure Rules, which

[396] *In re Guardian Newspapers Limited* [2010] 2 AC 697; and *Flood v Times Newspapers Limited* [2012] UKSC 11

[397] *Cape Intermediate Holdings Ltd (Appellant/CrossRespondent) v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK) (Respondent/Cross-Appellant)* [2019] UKSC 38

deals with third-party access to the records of the court, for copies of all the documents used at or disclosed during the trial, including bundles and transcripts. The group believed the documents would contain valuable information about the asbestos industry's knowledge of the dangers of the material, which could be extremely important for current and future asbestos cases brought by sufferers of asbestos-related diseases and their families.

The High Court and Court of Appeal ruled in the Forum's favour, but Cape Holdings subsequently appealed to the Supreme Court, arguing it was wrong to equate the court's inherent jurisdiction to allow third parties to access documents with the open justice principle. The Media Lawyers Association intervened in the case when it reached the Supreme Court, arguing that most members of the public could only scrutinise courts through media reporting, meaning media access to court documents is essential.

C. The Subsidiary Truth

In my view, there is a subsidiary category of truth that a trial may reveal apart from "the primary truth". A trial may tell the "truth" not only of factual and legal narratives about events in our society but also regarding our social, political, moral, and philosophical assumptions. Critique of judicial proceedings and any matter thereof is crucial in revealing and challenging our shared values, learning about our rights and obligations as members of society and striving for what is best for all of us. This second category of truth is subsidiary because it does not form the core substantive legal dispute (facts in issue) of the case before the court.

Public interaction in the legal and political system helps to generate and develop society's norms. Resnik suggests that 'norms are generated in the interaction among disputants and adjudicator, and among disputants, adjudicator, and the public.'[398] Resnik believes that the norm-generating process through court adjudication is essential because society is not a 'single, homogeneous community. Rather, we are a series of public, with values at great variance, and we live a fragile coexistence.'[399]

Court adjudication has a role within the modern democratic political framework as 'within democratic systems, the conflicts generated by courts often produces changes in legal norms, demonstrating the power of popular input and the utility of courts to contemporary democracy.'[400] High-profile cases may underpin debate in Parliament and stimulate parliamentarians' political interrogation about a particular issue of public concern.[401] Zuckerman argues that 'by bringing into the open moral, social and legal issues, the open trial promotes public debate that is so important to the democratic shaping of moral and legal rules.'[402]

In this regard, equalising the age of consent in 2000 through the Sexual Offences (Amendment) Act provides an excellent example of how rational

[398] Resnik, 'Due Process: A Public Dimension' (1987) 39 University of Florida Law Review 405, 417

[399] Ibid

[400] Resnik, '"Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)"'

[401] Robert Booth, 'MPs' 'Super-Injunction' Debate to Go Ahead' *The Guardian* (18 October 2009) <http://www.theguardian.com/politics/2009/oct/18/mps-superinjuction-debate-to-goahead> accessed 15 January 2014

[402] Zuckerman, *Zuckerman on Civil Procedure Principles of Practice* (Second edn, Sweet & Maxwell 2006)

discussion and argument contestation can bring reform. One can observe that norms can be reconfigured through the democratic process of the back-and-forth of courts, legislatures, and the public. In this instance, the Parliament was driven to debate following an adverse decision by the European Court of Human Rights in *Sutherland v the United Kingdom*.[403]

The Applicant, Mr Euan Sutherland, had his first sexual encounter with another homosexual man at sixteen. Although the Applicant was never prosecuted, there was a justified fear that he may be charged in future. In the United Kingdom, since 3 November 1994, the minimum age for consensual male homosexual relations has been 18. In contrast, the age of consent for consensual heterosexual and lesbian relations has at all material times been 16. The Commission had to determine whether there had been a violation of Article 8[404] and Article 14[405] of the European Convention on Human Rights.

After taking into account a wide range of opinions and factors, including the views of medical staff as to what a reasonable age limit is and the rationale for a higher age of consent for homosexual acts, it was held that the existence of

[403] Application no. 25186/94

[404] Article 8 – Right to respect for privacy and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[405] Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

different age limits was discriminatory and there was no valid reason to justify such discrimination. Hence, the Commission believed that the age of consent for homosexual acts should be lowered to sixteen.

Perhaps the point I am trying to make about the importance of "subsidiary truth" can be vividly seen more in the context of a criminal trial, constitutional and human rights litigation. For example, there is always a debate about the extent to which we cherish and uphold moral values in a criminal justice system. The continuous struggle to balance the need to discover truth and relentless respect for moral values in the criminal process is a perennial interest among legal scholars.[406]

A criminal trial is not only about the moral culpability of an accused person, but it may simultaneously concern with the accountability of the State, which is in line with Hock Lai's conception of a criminal trial as 'a process of calling upon the executive to account for its request to have a citizen officially condemned and punished for an offence.'[407] It should be noted that the issue of accountability of the State is not exclusively in the domain of legal evaluation, but it is also a political issue in pith and substance. Therefore, focusing on the accused person might be inaccurate when we speak of a criminal trial as if he is the only person who should account for his past actions. When the accused person is put on trial,

[406] Zedner, *Criminal Justice* (Oxford University Press 2004), 169. Zedner observes that: 'The adversarial trial is wrought about with procedural safeguards which sometimes act as inhibitions upon the finding of truth. The rules as to exclusion of evidence, for example, are a powerful tool for the protection of the defendant against abuse of state power but they may inhibit the discovery of truth.'

[407] Ho Hock Lai, 'Liberalism and the Criminal Trial' [2010] Singapore Journal of Legal Studies 87, 'Liberalism and the Criminal Trial' [2010] Singapore Journal of Legal Studies 87, 90-1

there will be a whole range of issues involving the government agencies which conducted the investigation and, subsequently, the prosecution. We may find that key institutions in the administration of justice may be called into question.[408]

In a criminal trial, the accused person may, for example, claim that his fundamental right to a fair trial has been violated, such as in situations where the procedural integrity of the proceeding was purportedly compromised.[409] Illegally obtained evidence is a good example of competing interests that have to be dealt with, as the process of gathering evidence was not done correctly according to the law.[410] The court must consider the balance between the need to admit the illegally obtained evidence because of the high probative value and the importance of excluding it for legal fairness.

With regard to human rights-related litigation, Abu Qatada's case may be used as another illustration to highlight the relevance of getting informed of what is litigated in the court. Qatada is a Jordanian national who was granted asylum in the UK in 1993, having fled Jordan, where he had been tortured while in detention. However, since 2001, the UK Government has sought to deport him back to Jordan, and it could finally do it in 2013.[411] The United Kingdom Government regarded Qatada as a high-profile radical Islamic cleric and a threat to national

[408] Ashworth and Redmayne, *The Criminal Process* (4th edn, Oxford University Press 2010)

[409] Section 78 (1) of Police and Criminal Evidence Act 1984 provides that 'In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'

[410] *R v Mason* [1988] 1 WLR 139 CA; Ashworth and Redmayne, *The Criminal Process* (4th edn, Oxford University Press 2010)

[411] https://www.theguardian.com/world/2013/jul/07/abu-qatada-deported-from-uk

security.[412] This case took years and millions of taxpayer's money.[413] It was initially thought of as a simple deportation case. Subsequently, it generated intense debate within the society because of the protracted legal disputes between Abu Qatada and the British government.[414]

This case was difficult for the court because it involved some tough ethical and moral questions. The court had to deal with the dilemma of deporting foreign nationals to face a trial in circumstances where evidence obtained through torture may be adduced to convict him. The dilemma of maintaining national security on the one hand and respecting liberty, human rights and the rule of law are some of the intricate issues that are not easy to reconcile. While the Supreme Court's decision may have settled legal issues, it does not mean society should stop discussing them and other aspects of the case in the public political sphere.

2.5 Criminal Trial as a Moral Discourse

Apart from the above-explained conceptions (a trial as a law-applying and law-making process and a trial as a fact-finding process), which apply to both civil and criminal trials, the rationalisation of open justice in a criminal trial may additionally

[412] Read *Omar Othman Aka Abu Qatada v Secretary of State for the Home Department* [2013] EWCA Civ 277; *Abu Qatada v United Kingdom (8139/09)* (2012) 55 EHRR 1

[413] 'Abu Qatada Case Has Cost UK £1.7m, Home Secretary Says' *BBC News* (14 June 2013) <http://www.bbc.co.uk/news/uk-22909465> accessed 20 July 2013 and Tom Whitehead, 'Qatada Legal Bill Passes £1.7 Million' *The Telegraph* (14 Jun 2013) <http://www.telegraph.co.uk/news/uknews/law-and-order/10121457/Qatada-legal-bill-passes-1.7-million.html> accessed 20 July 2013

[414] Read 'Abu Qatada Timeline' *BBC News* (10 May 2013) <http://www.bbc.co.uk/news/uk-17769990> accessed 20 July 2013

be argued in a slightly different tack built upon certain normative aspects of the criminal justice process.

Such an approach can be seen in Duff and his collaborators' work on criminal trials, in which they suggest that criminal trials 'are designed to show the proper degree of respect for those suspected of public wrongdoing.'[415] This is because the criminal trial is conceived as 'a communicative process in which the defendant out to be respected as a participant rather than treated merely as an object.'[416] The 'proper degree of respect' towards the accused is central in their notion of a criminal trial as a process of moral discourse.[417] A criminal trial as a moral discourse is another conception of the trial that would highlight the need for public participation in court adjudication.

According to Duff and others, a criminal trial is 'a process through which defendants are called to answer a charge of criminal wrongdoing and, if they are proven to have committed the offence charged, to answer for their conduct.'[418] A public process of calling the defendant to account for his alleged criminal wrongdoing means the public would be able to observe the display of 'not only the

[415] Duff and others, *The Trial on Trial Volume Three: Towards a Normative Theory of the Criminal Trial The Trial on Trial Volume Three: Towards a Normative Theory of the Criminal Trial* (Hart Publishing 2007). 269

[416] Ibid, 153

[417] The conception of trial as a moral discourse is not free from sceptics. For instance, Galligan doubted whether there was a moral discourse between the prosecutor and the accused. Even if it is accepted that there is one special connection between them, the direct relationship between participation and respect for a person cannot be extended to other legal processes. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford University Press 1996), 140

[418] Duff and others, *The Trial on Trial Volume Three: Towards a Normative Theory of the Criminal Trial The Trial on Trial Volume Three: Towards a Normative Theory of the Criminal Trial* (Hart Publishing 2007), 3

norms of the criminal law, which is commonly regarded as an ambition of the criminal justice system, but also the norms of criminal justice.'[419] This is because 'just as criminal offences have a communicative role in communicating what the polity holds to constitute public wrongdoing, so the rules and practices of criminal justice communicate to the public of norms according to which suspects should be treated.'[420]

Duff and others further emphasised the importance of a public trial because of the significance of a criminal verdict, which is a 'normative judgment that [either] declares the defendant's guilt and thus condemns her, or declares that the presumption of innocence has not been defeated, and thus clears her name.'[421]

According to Duff and others, a guilty verdict 'constitutes a condemnation of the defendant as a public wrongdoer, a condemnation that, at least in institutional voice, articulates a commitment to the relevant norms of the criminal law.'[422] 'Such condemnation purports to be in the name of the public, in the sense that it condemns a wrong with which the public have a proper concern.'[423] Therefore, a criminal trial verdict should be capable of being affirmed or rejected by members of the public. To do so, members of the public must know not only the verdict but

[419] Ibid, 269

[420] Ibid

[421] Ibid , 128

[422] Ibid, 268

[423] Ibid

'should be able to scrutinise…both that the grounds for the verdict were adequate and that the proceedings were conducted in a fair manner.'[424]

2.6 Conclusion

So far, I have highlighted the importance of open justice in three different conceptions of the trial. The combined factors of the centrality of courts in the administration of justice and the importance of publicity reflected in the trial process would, in my mind, expound the necessary foundation upon which the open justice principle is based. In the next chapter, I will reinforce my argument about the strong interest that members of the public have in court adjudication, which grants them the status of participants in the judicial process. The discussion is centred on the proposition that members of the public have the right to open justice to serve their interests, know the law to regulate their lives, and have confidence in the judicial system. In so doing, I shall rely on the Interest theory, one of the primary theories in the right discourse.

[424] Ibid, 269

Chapter 3: Open Justice and the Right to a Public Trial

3.1 Introduction

This chapter is written to address three main questions. The question is whether the principle of open justice necessarily entails legal rights such as the right to observe and report judicial proceedings, and if so, what is the basis and whose right? I will try to provide some answers to these questions, and in so doing, I shall engage primarily with Jaconelli's criticisms that argue that the right to a public trial is jurisprudentially unsound.[425]

He contended that the Will theory and the Interest theory could not adequately explain the basis of such a right to the litigants or members of the public.[426] I will explain that some of the arguments need to be revisited. While the litigants' right to a public trial may not be sufficiently explained under the Will theory, it can be explained under the Interest theory.

I will demonstrate the Interest theory's ability to survive Jaconelli's criticism and form the basis for the litigants' right to a public trial and members of the public's right to open justice stands. As far as members of the public are concerned, the terminology "the right to open justice" is used instead of "the right to a public trial"

[425] Jaconelli, *Open Justice: A Critique of the Public Trial*, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002); Jaconelli, 'Rights Theories and Public Trial'

[426] This difficulty leads Jaconelli to conclude that 'the fact that neither of the principal theories of rights can make sense of it gives weight to the arguments that no such right exists: that, however valuable the open conduct of trial may be, it can be explained in terms other than those of rights.', Jaconelli, 'Rights Theories and Public Trial' (1997) 14 Journal of Applied Philosophy 169, 174. Other commentators such as Trechsel have followed suit and raised doubt as to the correctness of characterizing 'the rule that trials have to be held in public as an individual right.', Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press 2005), 121.

because the latter sits comfortably with the types of rights litigants have. A more generic terminology is also required to circumvent the fact that, unlike litigants, members of the public are not the ones on trial.

This chapter would serve a few purposes in the context of my thesis. Firstly, the importance of public proceedings may be recognised and enforced through the open justice principle and protected and advanced through the language of a right. While the right to a public trial is typically discussed as a right of the litigants,[427] I argue here that it is plausible and suitable to consider that members of the public have the right to open justice. The plausibility of protecting their interest in open justice that is couched in the language of right is another testament that members of the public are not just bystanders.

For the sake of clarity, the account of the right to open justice given to members of the public that I propose and defend in this chapter is not a collective right given to members of the public as a group, but it is instead a right given to individuals who are not privy to and immediately involved in the case litigated before the court. The right to open justice given to members of the public then remains an individual right held severally.

Secondly, the idea of public participation in the judicial process is not driven solely by the litigants' well-being and interest. Members of the public also have an equal share of interest in the judicial process. Given that there is always a public

[427] This is because of the explicit provision in most of the international human rights instruments. Article 6 (1) of the European Convention on Human Rights which is heavily relied upon and referred to by litigants in the United Kingdom provides that 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing…Judgment shall be pronounced publicly… '

dimension to the open justice principle, the judge's duty to hold a public trial is not only owed to the litigants.[428] The practical implication of this aspect can be seen in the limited application of the doctrine of waiver of a legal right. While litigants may opt to waive their right to a public trial, it does not follow that the court should subsequently hold the trial behind closed door because a waiver of the right would not create a new claim of right and generate new sets of duty, i.e. the right to a private trial and the obligation to hold proceedings behind closed doors. The waiver effect is limited to the fact that the court cannot be taken to task in future by the litigants if, indeed, there was a breach of a particular duty owed to them.

Thirdly, the litigants' interest in having a fair trial is partly contingent upon having public participation through the judicial process's publicity. This contingency assertion is significant because members of the public who claim access to the court's documents and proceedings are potentially seen as busybodies who want to meddle in others' personal and private affairs. To say that the interest of the litigants is, to an extent, advanced by public participation would help allay the misconception that members of the public play a negligible role in court adjudication.

3.2 The Value of Right

In the second chapter, I have explained that the importance of a public trial has been acknowledged and recognised in common law through the principle of open justice.[429] The open justice principle demands, among others, that a trial should be

[428] *Lilly Icos Ltd v Pfizer Ltd* [2002] EWCA Civ 02[2002] EWCA Civ 02

[429] *The Queen (on the Application of Guardian News and Media Limited) v City of Westminster and Magistrates' Court* [2012] EWCA Civ 420; *JIH v News Group Newspapers* [2011] 1 WLR 1645

held in public, and members of the public should, therefore, be allowed to observe and report the judicial proceedings. In many instances, the court was only willing to derogate from the principle of open justice if the judges had no choice but to give in to other, more weighty interests.[430] Even then, the derogation was only permitted under minimal and strict conditions.[431] Considering that the need for a public trial has been recognised and somehow protected through the principle of open justice, one may ponder the necessity of reinforcing such protection as a matter of right to both the litigants and members of the public.

Right discourse is influenced by the need to appreciate various interests in our lives. These interests are sometimes conflicting, and they demand different types and levels of action to serve them because some interests are more important than others. The concept of right also gains its popularity as a protection against the creeping expansion of the state's interference in an individual's life under the pretext of public interest.[432] Legal rights are more vital than mere ordinary interests, so 'if someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so.'[433]

[430] The exceptions are broadly stipulated in Article 6 (1) of the European Convention on Human Rights. It reads, '...the press and public may be all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

[431] *Ntuli v Donald* [2010] EWCA Civ 1276; *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 0794 [2010] EWCA Civ 0794

[432] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977)

[433] Ibid, 269

The most popular and attractive account of value associated with the right is the notion of the right as "trump", where one should not be asked to forgo his right even if it gives more significant gains to others. Dworkin says 'individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury on them.'[434] Those who believe in the importance of rights say that we should recognise that utilitarian reasoning has limits, and they use the concept of rights to capture these limits.

There is a qualitative distinction between ordinary and more fundamental interests. Dworkin gives the example of a law that forbids motorists to drive up to Lexington Avenue:

> Though the New York government needs a justification for forbidding motorists to drive up to Lexington Avenue, it is sufficient justification if the proper officials believe, on sound evidence, that the gain to the many will outweigh the inconvenience to the few.'[435]

However, advocates for rights argue that it is different when it comes to invading more fundamental interests. They say that such interests are too vital to be left to the mercy of a cost-benefit utilitarian exercise, and we should mark this by giving them the status of a right. Having a right to something means the person should not be asked to forego it merely because the more significant gains will outweigh the loss to others. This strong, individuated characteristic of the right would not, for

[434]Ibid, xi

[435] Ibid, 191

instance, allow someone to be tortured or persecuted on racial grounds to bring benefits to other people.[436]

The idea of a right to limit utilitarian reasoning of maximising greater happiness has a forceful impact on other interests. Right as a 'trump' could be used against propriety, efficiency and communal interests as it accords a special recognition status and a higher level of protection of specific interests. Rights rightly claimed to render other factors or considerations to give way. Proceedings conducted in a chamber without members of the public and in a relaxed manner with less formality are more comfortable, convenient and potentially preferred by some litigants. Avoiding public pressure and scrutiny is a great attraction and relief. However, regardless of how attractive and beneficial they may be to certain people, these interests are not interests that may easily outweigh others' right to open justice.

While giving rights is an effective form of protecting one's interest against others, this does not necessarily mean that rights are absolute and can never be violated.[437] Other interests may outweigh and defeat a right.[438] In Schauer's view, 'rights are like shields or suits of armour against governmental interest.' He says,

> wearing a suit of armour would protect me against arrows, knives, blackjacks, fists and small bullets, and

[436] Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press 2006), 31

[437] This notion should be contrasted with Robert Nozick's position where he argued for the principle of self-ownership. Nozick was of the view that individuals have the right to protect themselves against having to make any sacrifices for the sake of others without their consent, regardless of what social benefits could be achieved. Read Robert Nozick, *Anarchy, State and Utopia* (Basil Blackwell 1974)

[438] Jeremy Waldron, 'Rights in Conflict' (1989) 99 Ethics 503

> thus it is plain that wearing a suit of armour provides me with a degree of protection I would not otherwise have had. But, that suit of armour does not protect me against large-bore ammunition, bombs or artillery fire and is, as a result, less than totally protective.[439]

Even Dworkin, famous for his thesis on rights as Trump, acknowledged the possibility of rights being violated in exceptional circumstances such as during wartime. Rights may be curtailed when there is a sufficient threat to society. However, considering rights pick out certain interests for special protection, so rights cannot be overridden simply because the benefits outweigh the costs.[440]

3.3 The Will Theory: A Brief Overview

Rights are constituted by norms that govern relations between those who have rights and those who have duties arising from those rights. By saying I have the right to something, someone else must act towards me in a certain way. These norms impose constraints on the duty-bearers' actions so that the duty-bearer must act by the norms. Failure to abide by the norms amounts to a breach of the right of its holder. What I have explained just now deals with the relational aspect of right. Rights are relational in that the obligations implied by rights are owed to someone. Although the relational aspect of the right explains to whom the right is owed, it does not explain the nature of the relation between the right holder and the duty bearer. There are at least two major competing theories of how these relations may be analysed: Will and Interest theories.[441]

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[439] Frederick Schauer, 'A Comment on the Structure of Rights' (1993) 27 Georgia Law Review 415, 429

[440] Dworkin, *Taking Rights Seriously* (Duckworth 1977), 191-2, 195, 200-4

[441] These two theories are the most prominent theories of all in the discourse of right. The strengths and weaknesses of each theory have been the subject of intense debate between the advocates of

According to the Will theory, 'a right exists when the necessary and sufficient condition, of imposing or relaxing the constraint on some person's conduct, is another person's choice to that effect'.[442] It essentially protects the right holder's freedom of will to decide on what is best for him. The Will theory's core element is autonomy, which is the ability to decide whether to enforce the performance of the duty-bearer's duty or waive it. This decision is the sole discretion of the right-holder, and it is to be made regardless of its consequences. A disadvantage and detrimental decision to the right-holder is perfectly fine with the Will theory as long as the right-holder freely makes it.

Unlike the Interest theory, which I will explain later, the Will theory's primary concern is the right holder's ability to decide. For the Will theory advocates, 'to have a right is not simply to stand to benefit from the performance of a duty, but to stand to benefit from the performance of a duty that you control.'[443] This is a distinct value of the Will theory, for it is against paternalism, where 'to have a right is to choose to benefit, not merely to benefit.'[444] Hart, who is one of the advocates of the Will theory, explains that

> the idea is that one of the individuals being given by the law exclusive control, more or less extensive, over another person's duty so that in the area of conduct

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the respective rights. See, Matthew H. Kramer, Nigel Simmonds and Hillel Steiner, *A Debate Over Rights: Philosophical Enquiries* (Clarendon Press 1998). Apart from these the Will theory and the Interest theory, there are other alternative theories. Wenar, for example, has introduced Several-Functions theory in Leif Wenar, 'The Nature of Right' (2005) 33 Philosophy and Public Affairs 223. Sreenivasan has introduced a Hybrid theory in Gopal Sreenivasan, 'A Hybrid Theory of Claim-Rights' (2005) 25 Oxford Journal of Legal Studies 257

[442] Hillel Steiner, *An Essay on Rights* (Blackwell 1994), 57-58

[443] Paul Graham, 'The Will Theory of Rights: A Defence' (1996) 15 Law and Philosophy 257, 263

[444] Ibid

> covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed.[445]

The Will theory captures the unique and powerful link between rights and normative control of the right-holder. Unlike the Interest theory, the Will theory 'does not construe rights as value-based', and they 'constitute a dimension of morality distinct from the dimension of value and value-based reasons for action.' This distinctiveness is what makes the Will theory intriguing and engaging.[446] The Will theory is not concerned with the 'moral quality' of individuals' actions. Then, such rights of choice are not hostage to the value of what the right-holder will choose. A's right that B performs as he has promised is not determined by the value it brings to A or B or the world at large.[447] This is the essential reason why, according to the Will theory, rights constitute a dimension of morality distinct from the dimension of value and value-based reasons for action.

The resonant connection between rights and one's authority to control what others may do is a matter of definition to the Will theorists. Such a position is very much agent-centric in that the enforcement and decision to relieve duty is controlled and made by the right-holder.[448] It depicts the usual and typical usage of the word among people.[449] On the other hand, the strict connection between rights and one's authority over what others may do is a source of significant criticisms posed to the

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[445] HLA Hart, 'Legal Rights' in *Essays on Bentham: Jurisprudence and Political Philosophy* (Clarendon Press 1982)

[446] Eric Mack, 'In Defense of the Jurisdiction Theory of Rights' (2000) 4 The Journal of Ethics 71, 92-3

[447] Rowan Cruft, 'Rights: Beyond Interest Theory and Will Theory?' (2004) 23 Law and Philosophy 347

[448] This is very anti-paternalistic, for the right-holder is empowered to decide what is best for him.

[449] Hart, 'Legal Rights' in *Essays on Bentham: Jurisprudence and Political Philosophy* (Clarendon Press 1982)

Will theory because it cannot assign rights to entities that are not agents, such as infants, senile people and comatose people who are incapable of exercising choice.[450]

According to some scholars, the Will theory fails to account for some instances central to rights discourse. For example, it cannot account for the very conceptual possibility of inalienable rights, such as the right not to be tortured.[451] Ironically, the most fundamental protections granted by law, namely the protection of one's inalienable right to life and liberty, would not be classified as rights, while the protection of lesser interests, such as property, would be recognised as such.[452]

The Dilemma of the Will Theory

The Will theory's central thrust is the right-holder's autonomy to enforce his right or relieve the corresponding duty owed to him by the duty-bearer. The suitability of using the Will theory to explain the litigants' right to a public trial and members of the public's right to open justice depends on the right holder's ability to control the action of the duty-bearer, such as the court. It has been argued that the Will theory fails to account for the situation where one's decision to waive his right to a public trial would not change the mode of trial.[453] An accused person, for example, would not be able to have private judicial proceedings by waiving his right to a public

[450] Matthew H. Kramer, 'Do Animals and Dead People Have Legal Rights?' (2001) 14 Canadian Journal of Law and Jurisprudence 29

[451] Neil MacCormick, 'Rights in Legislation' in Peter Michael Stephan Hacker and Joseph Raz (eds), *Law, Morality and, Society: Essays in Honour of HLA Hart* (Clarendon Press 1977), 197-9

[452] Ibid

[453] Jaconelli, 'Rights Theories and Public Trial' (1997) 14 Journal of Applied Philosophy 169

trial.[454] The right holder's inability to relieve the court of its corresponding duty owed to him amounts to a fatal blow to the Will theory because it fails to fulfil one of the defining elements in the definition. For the Will theorists, 'the essence of a legal right consists in its provision of opportunities for its holder to make significant choices.'[455]

In contrast to the accused's right to be tried in public, perhaps the Will theory may have no difficulty explaining other rights, such as the right of the prosecution to charge a suspect and the right to discontinue the criminal proceedings.[456] While the court is obliged to hear and determine the criminal charge brought against the accused person, such a duty could be relieved from the court by the prosecution's

[454] It could be suggested that an accused person has the option to relieve the court of its duty to hold the trial in public by pleading guilty. Pleading guilty may not be a good and relevant example in our present discussion because, by pleading guilty, there is no trial at all. The crux of the problem faced by the Will theorist is when the accused person claims trial while simultaneously insisting not to have a public trial. One ought to remember that a criminal trial, for instance, is carried out to determine one's guilt in the eyes of the law, where the determination process must be done in public. When the guilt has been established either by the accused person's plea of guilty or the court's decision at the end of the defence case, there is no longer a need for a public trial. Similarly, there will be no need for a full public hearing in civil cases if the litigants opt for an out-of-court settlement. An out-of-court settlement is reached among the litigants without the need to go through the court's formal and official determination. I would say that as long as there is no determination of legal dispute before the court, then the court is not duty-bound to hold a public trial. This is supported by a plain reading of Article 6 (1) of the ECHR itself that provides the right of the public trial would be available 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing …'.

[455] Matthew H. Kramer, 'Refining the Interest Theory of Rights' (2010) 55 The American Journal of Jurisprudence 31

[456] In the Malaysian context, for example, Article 145 (3) of the Federal Constitution provides that: 'the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.' The Court of Appeal in the case of *Mat Shuhaimi Shafiei v Public Prosecutor* [2014] 5 CLJ 22 held that: 'the Attorney-General has the sole discretion of determining criminal prosecutions…and it is not open to this court to interfere or question the discretion exercised by the Attorney-General.'

sole discretion.[457] The duty to determine the criminal liability of the accused, for instance, ceased the moment the prosecutor decided to discontinue the proceedings.

Similarly, in civil trials, litigants are autonomous and generally given the right to conduct their case as they deem fit. While courts are obliged to hear, the litigants retain the right to withdraw the case and settle the matter out of court.

The issue of waiver is relevant and needs to be discussed to understand the interplay between the right holder's decision and the duty-bearer's corresponding duty. The waiver is 'an intentional relinquishment...of a known right or privilege.'[458] Individuals can waive their rights to specific aspects of the judicial adjudication process and their right to adjudication in its entirety.[459]

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[457] It was held by the Federal Court in the case of *Long bin Samat v Public Prosecutor* [1974] 2 MLJ 152 that: 'In our view,…the supreme law clearly gives the Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the Courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue.'

[458] *Johnson v Zerbst* 304 US 458 (1938), 464

[459] In the United Kingdom, the possibility of waiving human rights by the right-holder has been judicially acknowledged such as on the issue of waiving the right to be present during trial. *R. v Jones (Anthony William)* [2002] UKHL 5; The possibility of the waiving the right to be present during trial is reflected in para.I.13.17 of the Consolidated Criminal Practice Direction that provides, "a defendant has a right, in general, to be present and to be represented at his trial. However, a defendant may choose not to exercise those rights by voluntarily absenting himself and failing to instruct his lawyers adequately so that they can represent him". In the context of the European Convention on Human Rights, it seems that the Strasbourg case-law has accepted the possibility of waiving at least certain rights guaranteed by the Convention. This was held, for instance, in the case of *Albert and Le Compte v. Belgium* (1983) Series A no 58 (1983) Series A no 58. There is no clear criterion on the basis of which the Strasbourg case law determines which rights can be waived and under what circumstances they can be waived. From a review of the case law, it emerges that both the nature and importance of the right and, generally, the demands of public interest are taken into account in order to decide whether a particular right can be waived. The facts of the particular case in which the question arises

In the context of the European Convention on Human Rights, Strasbourg jurisprudence acknowledges that there are also rights that are not susceptible to the waiver doctrine. It was held that 'the nature of some of the rights safeguarded by the Convention is such as to exclude a waiver of the entitlement to exercise them, but the same cannot be said of certain other rights'.[460] With regard to the litigants' right to a public trial specifically, the court is of the view that 'the rule requiring a public hearing, as embodied in Article 6 [of the ECHR], may also yield in certain circumstances to the will of the person concerned.'[461] because it was held that 'neither the letter nor the spirit of Article 6 (1) [of the ECHR] prevents an individual from waiving his right to a public hearing of his own free will, whether expressly or tacitly.'[462]

Waiver of a legal right is a qualified doctrine. While a waiver of the right to a public trial is allowed, the court explained that it 'must not run counter to any important public interest' for a waiver to be effective.[463] This broad exception is problematic because what amounts to an important public interest is not explained. Does it imply that a waiver is ineffective when the case involves a subject matter of public interest, or must the act of waiving the right itself not run counter to an important public interest? It is also unclear whether the exception implies a public

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are also taken into consideration to determine the gravity and seriousness of the impact of waiver to the right-holder.

[460] *Albert and Le Compte v. Belgium*(1983) Series A no 58

[461] Ibid

[462] (1981) Series A no. 43

[463] *Scoppola v. Italy (No. 2)* App no 10249/03 (ECtHR, 17 September 2009) App no 10249/03 (ECtHR, 17 September 2009), 135; *Håkansson and Sturesson v. Sweden* (1990) Series A no 171-A (1990) Series A no 171-A; *Albert and Le Compte v. Belgium*(1983) Series A no 58

interest in an open trial that litigants cannot waive or whether the right to a public trial itself is not exclusively theirs.

There are conflicting judicial opinions on this matter. For instance, the Court in *Schuler-Zgraggen v. Switzerland* described the lack of public interest as the ground for its decision.[464] The appellant contended that his right to a public trial guaranteed under Article 6 of the ECHR had been breached because of no oral hearing, and the national authority dealt with the case in a written procedure. The court rejected the appellant's appeal because the dispute did not raise issues of public importance that necessitated a public hearing.

In *Håkansson and Sturesson v. Sweden*,[465] the court held that the applicants had tacitly waived their right to a public hearing by not requesting it. One reason for the court's decision was that there were no questions of public interest in the case that could have made a public hearing necessary.[466] Nonetheless, in his dissenting opinion, Judge Walsh supports the view that the question of public interest in a particular case should not be decided upon by the lack of public interest (as in lack of public enthusiasm) in the subject matter.[467]

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[464] *Schuler-Zgraggen v. Switzerland* App no 14518/89 (ECtHR, 24 June 1993)

[465] *Håkansson and Sturesson v. Sweden* (1990) Series A no 171-A, [67]

[466] Ibid

[467] Para 4 of the Partly Dissenting Opinion of Judge Walsh in ibid case: 'In my opinion it would radically alter the interpretation of Article 6 para. 1 (art. 6-1) to hold that the mandatory requirement of a public hearing is to be interpreted as meaning that it is qualified to the extent of being dependent upon an express or tacit request. The public-hearing requirement of Article 6 para 1 (art. 6-1) is enshrined in the Convention because the Contracting States thought it was important, not because a party may think that it is important...The fact that the public may not manifest any particular interest in a given case is not a consideration. Equally a lack of interest in having a hearing in public on the part of one or both parties to a suit does not alter the matter.'

Although the law allows waiver in some areas of law,[468] it should not include the right to a public trial. The right to a public trial is deeply imbued with the public interest, which makes it unsuitable to be determined solely by the litigants. Apart from the litigants, the court also owes the duty of holding a public trial to members of the public. Other underlying reasons compel the court to conduct the trial in public, such as the need to avoid a potential pernicious impact on the public confidence in the administration of justice.[469] The right to a fair trial is often termed an absolute right, not itself susceptible to modification or restriction, even in the public interest or national security.[470]

It is of public interest to have a public trial because publicity is integral to procedural fairness. While the litigant may, for argument's sake, have no qualms about being unfairly treated, it does not absolve judges from the duty to be just and fair to him. It has been suggested that the most apparent procedural right incapable of waiver 'must be the right to a fair trial' because it is 'essential for the maintenance of confidence in the legal system and cannot depend on individual citizens'

[468] Waiver of right may be possible in some cases such as in relation to the right to be present and participate in one's own trial. Edward L. Rubin, 'Toward a General Theory of Waiver' (1981) 28 UCLA Law Review 478

[469] James Goudkamp, 'The Rule against Bias and the Doctrine of Waiver' (2007) 26 Civil Justice Quarterly 310

[470] *McLean v. Buchanan* [2001] 1 WLR 2425 ; *Montgomery v. H.M. Advocate* [2001] 2 WLR 779 ; *Brown v. Stott* [2001] 2 WLR 817

decisions.'[471] For the same reason, the litigants should not also be deemed to have the right to waive the right to a public trial.[472]

Even if the right-holder may waive his right to a public trial based on the mainstream view, it does not follow that the court should then hold a trial behind closed doors because a waiver of the right will not create a new claim of right and generate new waves of duty, i.e., the right to a private trial and the obligation of the court to hold a trial behind closed doors.[473] The doctrine of waiver is a doctrine to amend the legal relationship between the right holder and the duty bearer. When there is a waiver, the right holder absolves the duty-bearer from a corresponding duty owed to him under some pre-existing legal relation. If we were to accept that the litigants could waive the right to a public trial, what they did was to relieve the court of the duty owed to them.

In practical terms, a valid waiver means the duty-bearer (the judge in particular) can no longer be taken to task when the purported duty is breached once there is a valid waiver.[474] In other words, once a litigant has waived the right to a public hearing, he cannot later complain that the hearing was in private, but the

[471] P.W. Ferguson, 'Trial in Absence and Waiver of Human Rights' [2002] Criminal Law Review 554, 560

[472] Olivier De Schutter, 'Waiver of Rights and State Paternalism under the European Convention on Human Rights' (2000) 51 Northern Ireland Legal Quarterly 481

[473] Timothy L. Kern, 'Peering into the Courtroom: An Analysis of the Public Interest' (1981) 15 Valparaiso University Law Review 371, 373. He makes a similar argument by relying on the case of *Gannett Co. v DePasquale*. It was held in this case of *Gannett Co. v DePasquale* 443 US 368 (1979), 382 that: "While the Sixth Amendment guarantees to a defendant in a criminal case the right to a public trial, it does not guarantee the right to compel a private trial."

[474] Loukis G. Loucaides, 'Questions of Fair Trial Under the European Convention on Human Rights' (2003) 3 Human Rights Law Review 27

court has no duty to hold a hearing in private, and if the hearing is in public, the litigant cannot complain notwithstanding the waiver.

In the preceding paragraphs, I have revealed the Will theory's unsuitability to explain the nature of the right to a public trial because the wish and demand of the right-holder to completely relieve the court of its duty to hold a public hearing is impossible. It is impossible because the court also owes such a duty to the litigants and members of the public. As such, the litigants are in no position to completely alter the legal relationship between them and the court, giving rise to the obligation of holding the trial publicly. I shall now turn to the Interest theory to explore the possibility of using this theory as an alternative to the Will theory.

3.4 The Interest Theory: A Brief Overview

Apart from the Will theory, the Interest theory is another leading theory within the right discourse. As the name suggests, the Interest theory captures a vital link between the existence of rights and the interest that needs to be served or protected through the performance of a duty. One has a right when a specific interest is worth special protection by the law against trade-offs. Jaconelli has challenged the litigants' right to a public trial due to the uncertainty about what and whose interest a public trial could serve.[475] I will now shed some light on these two main issues.

The Interest theory has advanced on many fronts. An early and basic version of the Interest theory claimed that to have a right is 'to be the beneficiary of

[475] Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002)

another's duty or obligation'.[476] The Interest theory is then developed by a more refined and sophisticated elaboration, such as arguments based on purposes and justification of the norms[477] or effects on the right-holder.[478] It should be borne in mind that interest does not necessarily entail right.[479] It is wrong to say that all interests generate rights because 'it is only when there is a particularly important moral reason for protecting the good or interest in question that we speak of there being a right to it.'[480]

Raz, who is a lead proponent of the Interest theory, proposes a definition that '"x has a right" if and only if x can have rights, and other things being equal, an aspect of x's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.'[481] It, therefore, means that A has a right to C only if the interest A has in having C is sufficient for imposing a duty on B. It also means that rights, according to Raz's view, are grounds for duties in others. The interest then becomes the justification for both the rights and the duties because Raz's definition

[476] David Lyons, 'Rights, Claimants, and Beneficiaries' (1969) 6 American Philosophical Quarterly 173, 173. This definition is Lyon's formulation based on his understanding of Bentham's theory discussed in the paper.

[477] Joseph Raz, 'On the Nature of Rights' (1984) 93 Mind 194

[478] Kramer, Simmonds and Steiner, *A Debate Over Rights: Philosophical Enquiries*(Clarendon Press 1998); Raz promotes the Interest theory with his emphasis on justifications, whereas Kramer, on the contrary, focuses on the effects on the right-holder.

[479] Interests have degrees. Some degrees are more important than others, which is why the law treats different interests differently. Interests which are not important enough do not attract the entitlement of right. Due to the nature of interest that is contestable thus, we have the classification of ordinary rights and constitutional rights within legal rights.

[480] Hartney, 'Some Confusions Concerning Collective Rights' (1991) 4 Canadian Journal of Law and Jurisprudence 293, 303. Hartney further explains that 'the core idea of right-to language appears to be that of a good or interests protected by a duty: some things are considered to be goods, and to say that one has a right to such a thing is a way of saying that one's interest in such a thing is deserving protection.'

[481] Raz, 'On the Nature of Rights' (1984) 93 Mind 194, 195

'identified the interest on which the right is based as the reason for holding that some persons have certain duties.'[482]

According to Raz, it is the rationale behind the imposition of a duty that brings a right into existence. By saying that a person has a right is to say that 'an interest of his is sufficient ground for holding another to be subject to a duty, i.e. a duty to take some action which will serve that interest, or a duty the very existence of which serves such interest.'[483] To establish a right, what matters to Raz is to identify interest and why it should be taken seriously.[484] Thus, in the context of open justice, when A is said to have the right to a public trial, what is claimed is that A's interest in having a public trial is sufficiently important in itself to justify holding other people to have duties to hold a public trial for A.

The Will theory focuses more on the relationship between the right and the right-holder, positing that the right-holder has a right because he can control and decide whether to enforce or waive it.[485] Unlike the Will theory, the Interest theory focuses on the relationship and the interplay between the interest that grounds the right and the duty of the duty-bearer. As such, the Interest theory has, to a certain extent, the advantage over the Will theory in explaining the right of litigants to a public trial and the right of members of the public to open justice because the issue

[482] Ibid, 208

[483] Joseph Raz, 'Legal Rights' (1984) 4 Oxford Journal of Legal Studies 1, 5

[484] Ibid

[485] This is why the Interest theory has no difficulty to extend the notion of a claim right to inalienable rights and defend the plausibility of the incompetence to have rights. See, Sreenivasan, 'A Hybrid Theory of Claim-Rights' (2005) 25 Oxford Journal of Legal Studies 257, 261

of enforcement and waiver of a right is not the paramount concern of the Interest theory.

3.5 Defending the Right to a Public Trial: A Response to Jaconelli

The requirement of holding a public trial is beneficial to the litigants on many accounts. I shall explain the reasons for saying so by addressing a few contentions posed by Jaconelli, who is doubtful about the propriety of giving litigants the right to a public trial. He argues that the Will and Interest theories cannot explain such an entitlement.[486] I have explored the strength of his argument against the Will theory earlier, and I shall now turn to revisit his claims concerning the Interest theory.

Jaconelli's analysis of the litigants' right to a public trial, premised upon his understanding of the Interest theory, can be reduced into two main points: firstly, it is doubtful whether a public trial could be regarded as an interest of the accused as the putative right holder.[487] Secondly, Jaconelli asserted that 'not only must the arrangements that constitute the right to be beneficial; they must also be beneficial to the putative right holder.'[488]

I shall examine the issues by focusing on the criminal trial. In the context of a criminal trial, Jaconelli argues that the accused person's interest is in his acquittal to save him from punishment.[489] If open justice can enhance the veracity of witnesses,

[486] Jaconelli, 'Rights Theories and Public Trial' (1997) 14 Journal of Applied Philosophy 169, 171-2

[487] Ibid, 171-2

[488] Ibid, 171

[489] Ibid, 171-2

then it must be shown that the enhancement will benefit the accused.[490] Jaconelli seems to suggest that enhancing truthful testimony by any measure will not be beneficial to a "guilty" person because truthful testimonies of witnesses will help the prosecution secure a conviction. Thus, the Interest theory cannot explain the accused person's right to a public trial because a "guilty" person who wants an acquittal to avoid the punishment may see open justice as detrimental to his interest in getting the much-desired acquittal.[491]

The main flaw of Jaconelli's view is in his presupposition that there is such thing as a guilty person at the commencement of trial when he speaks of the interest in an acquittal. It is improper and premature to talk of a guilty person's interest at the beginning of a trial simply because there is no liability established yet. We do not know whether someone is guilty of the (alleged) crime or not, and the court must decide on this issue. It is settled law that the suspect and the accused person are never assumed guilty prior to conviction.[492] This presumption of innocence will continue to protect the accused person from unfair trial and treatment.[493]

Moreover, Jaconelli would have to distinguish between guilty and innocent accused. It is not clear how he could have done that *ex-ante*. Jaconelli's argument seems to have overlooked the reality that it is within the sole realm of the court's

[490] The veracity of the witnesses is enhanced through the disciplinary value of publicity. It is assumed that witnesses will tell the truth for fear of public rebuke and the possibility of criminal charges for perjury if they were caught lying in court.

[491] Jaconelli, 'Rights Theories and Public Trial' (1997) 14 Journal of Applied Philosophy 169, 173

[492] Article 6 (2) of the European Convention on Human Rights reads 'everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.'

[493] Roberts and Zuckerman, *Criminal Evidence* (2nd edn, Oxford University Press 2010), 220-90

judgment to determine one's liability, whether civil or criminal. Therefore, it is in one's interest to have a trial mode that promotes accurate fact-finding and correct application of the laws. In this regard, a public trial is more likely to promote accurate fact-finding and correct application of the laws than a private trial.[494]

Even if we assume, for argument's sake, that by "guilty" one may mean that the facts alleged by the prosecution are true, the facts are true or false regardless of the court pronouncement, Jaconelli cannot claim that the Interest theory recognises a right that a guilty person has to be acquitted because under the Interest theory to be deserving of a right, the underlying interest must be thought worthy of protection. It cannot be said that the interest in obtaining an erroneous decision is worthy of protection.

Another problem with Jaconelli's explanation is his bare emphasis on an acquittal as the accused's paramount interest. It implies that the accused's interest in getting an acquittal must be secured at all costs. I do not think the law has recognised and accepted this kind of interest because the legitimate interest to get an acquittal must be qualified. The pursuit of an acquittal at all costs, as Jaconelli implies, is not, and cannot be, a justified reason to reject the importance of a public trial to the accused person.

If the trial is arranged to acquit the accused, then there is no point in charging him in the first place. It will be damaging to our legal system if the trial process is arranged to secure an acquittal, even for those who do not deserve it. Undeserved acquittal runs contrary to the criminal justice process activities, which are to 'identify

[494] Wigmore, *Evidence in Trial at Common Law*, vol 5 (Chadbourn Revision 1976)

wrongdoing, attribute responsibility, assess harm, and impose penalties in an attempt to do justice, restore order or prevent a recurrence.'[495] Instead, criminal law and the criminal justice system purport to ensure an accused's acquittal if and only if he deserves it.[496]

In the preceding paragraphs, I have addressed Jaconelli's contention that a public trial could only be beneficial and of interest to the accused if it enhances his chances of an acquittal.[497] I have rejected a bare assertion of acquittal without any such qualification. However, for argument's sake, let us briefly embrace Jaconelli's point about the accused person's interest in acquittal. Will the argument amount to a fatal blow to the Interest theory as a theory that could explain the propriety of granting the accused person the right to a public trial? In my view, the answer is negative. Jaconelli's contention, if it is valid, does not defeat the Interest theory in totality. He may have mistakenly thought that the Interest theory counts only on an aspect of one's well-being (which is the acquittal, according to Jaconelli). Therefore, since publicity may potentially enhance the chances of conviction, publicity cannot be said to benefit the accused person. I shall now address two issues. First, does the Interest theory speak of and require a complete advancement of the right-holders interest and well-being in all aspects? Second, is there other interest of the accused,

[495] Zedner, *Criminal Justice* (Oxford University Press 2004), 10

[496] An accused person deserves an acquittal for various reasons in different circumstances, such as due to lack of evidential support to prove the charge and successful invocation of legal defences. An accused person also deserves an acquittal if he had been tried unfairly.

[497] Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002); Jaconelli, 'Rights Theories and Public Trial' (1997) 14 Journal of Applied Philosophy 169

apart from securing an acquittal, which can be served or protected by having a public trial?

On the first issue, Jaconelli may have overlooked the resilience and flexibility of the Interest theory. Jaconelli's contention that doubts the ability of the Interest theory to explain the entitlement of the accused person to a public trial may only hold water if he can prove, which he failed in my view, that the arrangement of having judicial proceedings in public is not beneficial to the accused *in any way*. This is the only possible way of challenging the plausibility of relying on the Interest theory after considering that the Interest theory naturally would not recognise rights that do not serve the right holders' interests.

Kramer says the Interest theory maintains that '*X* does not ever hold any legal right with some specified content unless the existence of a legal duty correlative to such a right would typically be beneficial for someone like X'.[498] Kramer further explained that for the Interest theorists, 'the essence of a legal right consists in its tendency to safeguard some aspect of the well-being of its holder'.[499] As such, the Interest theory remains relevant to provide the underlying theoretical support for the right to a public trial if I can explain how it benefits the accused person in some way.

I turn now to the second issue that would answer Jaconelli's criticism. If publicity would reduce the chance of an accused getting an acquittal, what is the

[498] Kramer, 'Refining the Interest Theory of Rights' (2010) 55 The American Journal of Jurisprudence 31, 33

[499] Ibid, 33

benefit of guaranteeing a public trial to him? The answer to this question is important because it would explain and form the basis for granting an accused person the right to a public trial. The interest of all accused persons and litigants in a fair trial is as follows. According to Rawls, the standards of fairness are determined in the first place by people considering the matter behind a curtain of ignorance. Behind such a curtain, we do not know, *ex-ante*, whether we will be accused of a crime or whether we are guilty or innocent. Given this uncertainty, most people would opt for a trial that is most likely to lead to the truth. Similarly, according to the behind-the-curtain-of-ignorance choice, people, on the whole, cannot control false accusations, but they can avoid crimes and the risk of well-grounded prosecutions by controlling their conduct.

I submit that the accused has an interest in having a public trial because an open trial may contribute to the attainment of a fair trial.[500] The interest of an accused person (including litigants in civil hearings) in being tried fairly will be furthered if they are endowed with the right to demand a public trial. As a legal right, a judge cannot simply derogate from the requirement of holding a public trial without a valid and strong reason. If we ask whether an accused is typically better-off when he possesses the right to a public trial than when he does not, the answer is, to me, affirmative. The accused would be able 'to clear his name in open court, with the bracing sunshine of publicity helping to dry off the mud on his name.'[501] His interest in presenting his case and mounting defence against the charge may be

[500] *Sutter v. Switzerland* A 74 (1984); *Diennet v. France* App no 18160/91 (ECtHR, 26 September 1995); *Martinie v. France* ECHR 2006-VI

[501] Akhil Reed Amar, 'Foreword: Sixth Amendment First Principles' (1996) 84 The Georgetown Law Journal 641, 677

impaired if the element of publicity is removed from the trial because he is deprived of one of the best means to ensure the neutrality of the judicial process.

Public proceedings are a neutral domain in the sense that all of the parties involved in the case are forced to treat each other respectfully by following the procedural rules because they are under public watch.[502] Publicity, in this regard, acts as a restraint to ensure parity among parties.[503] It levels the playing field and avoids one party from taking an unfair advantage over the other, who may have lesser financial resources and lack of familiarity with judicial proceedings.

A. The Purported Disconnection between Fairness and a Public Trial

The standards against which a trial is to be assessed regarding procedural fairness are numerous and constantly evolving. Generally, the right of the litigants to a fair trial comprises a bundle of specific rights.[504] The principle of equality of arms, the right to be heard, the right to confront the accuser and the right to a public hearing are some of the elements that have to be taken into account in the overall

[502] In Resnik, '"Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)"', 4: Resnik argued that courts can truly be 'sites in which democratic norms of equal treatment, of popular engagement with legal rulemaking, and of constrained government authority are put into practice.' The government, at times, has the tendency to keep its activities under the cloak of secrecy on the pretext of public interest and national security, such as in the case of Al-Rawi. In modern liberal society, government cannot afford to be seen as disrespectful towards the rule of law. The visibility of the trial obliges the government to behave properly with the judge and disputants.

[503] Judith Resnik, 'Detention, the War on Terror, and the Federal Courts' Faculty Scholarship Series Paper 678 <http://digitalcommons.law.yale.edu/fss_papers/678> accessed 09 November 2012, 90

[504] This bundle of rights can be divided into two types: rights which are expressly mentioned in Article 6 of the ECHR and rights which are held to be implicit by the European Court of Human Rights. Those implicit rights are: the right of access to court; the right to an adversarial hearing; the right to equality of arms; the right to fair presentation of evidence; the right to cross examine and the right to a reasoned judgment.

assessment of fairness. The standard of procedural fairness may have been tainted in any trial that fails to observe and meet the demands of these requirements.

In the context of open justice, the European Court of Human Rights has recognised the publicity of court proceedings as fundamental for protecting litigants from the abuse of procedural rights, which may go unchecked.[505] Zuckerman observed that violation of this litigant-related aspect of publicity might invalidate judicial proceedings.[506]

However, there is a need to address some queries raised by some scholars who were sceptical about the link between procedural fairness and the provision of a public trial.[507] Trechsel, for example, argues that Article 6 of the ECHR on its own does not adequately explain the rationale for the open justice principle. He contended that even decisions of the European Court of Human Rights on Article 6 have not helped elucidate the value of the principle apart from being connected to the general right of a fair trial.[508] He is of the view that most of the judicial remarks 'are unhelpful and somewhat circular.'[509] He pointed out that the court would

[505] Axen v Germany A/72, (1983) 6 E.C.H.R. 195, ECtHR

[506] Zuckerman, *Zuckerman on Civil Procedure Principles of Practice* (Second edn, Sweet & Maxwell 2006), 89

[507] Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002); Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press 2005); Summers, *Fair Trial The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing 2007)

[508] Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press 2005), 120

[509] Ibid, 120.

generally recall 'that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6.'[510]

The scepticisms about the link between procedural fairness and the public trial revolve around two main arguments. The first argument is what I call the "disjunctive reading of Article 6 of the ECHR"-argument. The second argument is what I consider as the "collateral damage"-argument. The third argument is what I call the "quantitative rarity"-argument.

B. The Disjunctive Reading of Article 6 of the ECHR

Apart from being recognised both statutorily and at common law, the open justice principle is also enforced through human rights-based protection. Various human rights conventions guarantee open justice because it is a component of the right to a fair trial of litigants. The incorporation of the right to a public trial is provided in the Universal Declaration of Human Rights (UDHR) 1948,[511] the International Covenant on Civil and Political Rights (ICCPR) 1964,[512] the European Convention on Human Rights (ECHR),[513] and the Charter of Fundamental Rights of the European Union

[510] Ibid, 120.

[511] Article 10 (1) of the Universal Declaration of Human Rights 1948 reads 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'

[512] Article 14 (1) of the International Covenant on Civil and Political Rights 1964 reads 'everybody shall be entitled to a fair and public hearing…' The United Kingdom has an international obligation to respect and observe human rights provided in the ICCPR. It was passed by the United Nations and monitored by the ICCPR Human Rights Committee. ICCPR is an important document although less frequently discussed. See, Ashworth and Redmayne, 29. David Harris and Sarah Joseph (eds), *The Internation Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon Press 1995)

[513] Article 6 (1) of the European Convention on Human Rights provides 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing…Judgment shall be pronounced publicly… ' The ECHR was ratified by the United Kingdom in 1951 and came into force in 1953.

2000.[514] Of all the international human rights documents, the ECHR may be the most important and relevant to our discussion as it has been domestically enforced in the United Kingdom by the Human Rights Act 1998, which came into force in 2000.[515]

The connection between Article 6 of the ECHR and English law with the open justice principle may be seen in three aspects: firstly, in addition to the common law principle and the statutory recognition of open justice, the entitlement of litigants to a public trial and the protection from secret proceedings is couched in a language of human right. Article 6 (1) of the ECHR provides that litigants are entitled to two things explicitly: public trial and public pronouncement of judgment.[516] According to the European Court of Human Rights, Article 6 of the ECHR applies to all civil and

[514] Article 47 of the Charter of Fundamental Rights of the European Union 2000 reads, 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.' The Charter of Fundamental Rights of the European Union 2000 is also applicable in the United Kingdom. It is part of the Lisbon Treaty establishing a Constitution for Europe. The extent of the application in the United Kingdom can be read here House of Commons European Scrutiny Committee, *The application of the EU Charter of Fundamental Rights in the UK: a state of confusion* (Forty-third Report of Session 2013–14, 2014)

[515] William Wade and Christopher Forsyth, *Administrative Law* (11th edn, Oxford University Press 2014), 129-56. It should be noted, though, that despite the availability of human rights protection, the common law principle of open justice remains relevant until today, and its development has not ceased with the introduction of the Human Rights Act 1998. Lord Toulson emphasised, in the case of *Kennedy v The Charity Commission* [2014] UKSC 20, 60 [133], that 'it was not the purpose of the Human Rights Act that the common law should become an ossuary.' Thus, a dispute that falls within the ambit of Article 10 of the European Convention on Human Rights (ECHR) may be decided solely by applying the common law principle of open justice[515] because 'the common law principle of open justice remains in vigour, even when Convention rights are also applicable.' *The Queen (on the Application of Guardian News and Media Limited) v City of Westminster and Magistrates' Court* [2012] EWCA Civ 420

[516] Article 6 (1) of the European Convention on Human Rights (ECHR) provides 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing…Judgment shall be pronounced publicly… ' The court in *Pretto v Italy* (1984) 6 EHRR 182 held that it is not necessary that a judgment is read out loud in public. It is sufficient if the judgment is made available to the public.

criminal proceedings that determine the rights and obligations created or recognised by domestic law.[517]

Secondly, the application of the open justice principle and its development cannot be insulated from the influence of the Strasbourg jurisprudence because public authorities, including courts, must conform to the ECHR in all decisions and policies.[518] Courts are duty-bound to interpret statutes, both primary and secondary legislation, that give effect to the Convention rights so far as possible,[519] and in the course of the interpretation, judges should take into account the Strasbourg jurisprudence.[520] Although strictly, the Strasbourg jurisprudence does not have the force of binding precedent, there should be strong reasons if courts were to depart and disagree with the decisions of the Strasbourg Court.[521] Therefore, it has somehow influenced how the law on open justice applies and develops in the United

[517] *Matthews v Ministry of Defence* [2003] UKHL 4. Article 6 does not create a new substantive right which has no basis in the domestic law. This was held in *Kehoe v Secretary of State for Work and Pensions* [2005] UKHL 48

[518] Section 6 of the Human Rights Act 1998 renders it 'unlawful for a public authority to act in a way which is incompatible with a Convention right.' See, paragraph 1.4A of Practice Directions 39A of the Civil Procedure Rules: 'the judge should also have regard to Article 6(1) of the European Convention on Human Rights. This requires that, in general, court hearings are to be held in public, but the press and public may be excluded in the circumstances specified in that Article. Article 6(1) will usually be relevant, for example, where a party applies for a hearing which would normally be held in public to be held in private as well as where a hearing would normally be held in private. The judge may need to consider whether the case is within any of the exceptions permitted by Article 6(1).'

[519] Human Rights Act 1998, s.3

[520] Paragraph 8.1 of Practice Directions 39A of the Civil Procedure Rules

[521] *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [20] Lord Bingham held that, 'a national court subject to a duty such as that imposed by section 2 should not without strong reasons dilute or weaken the effect of Strasbourg case law...since the meaning of the Convention should be uniform throughout the states that party to it. The duty of national court is to keep pace with Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.' See also, *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; *Anderson v Home Secretary* [2002] 4 All ER 1089 and *R v Horncastle* [2009] UKSC 14.

Kingdom.[522] For example, in the exercise of discretionary power in an application for an interim injunction to restrain publication, the court has to consider the protection of freedom of expression in Article 10 of the ECHR.[523]

Thirdly, the aggrieved parties in the United Kingdom, whose right to a public trial may have been deprived domestically, may bring a case to the European Court of Human Rights.[524] The application to have the matter heard in Strasbourg may only be made when all domestic remedies have been exhausted.[525] There have been many applications to the European Court of Human Rights for alleged violation of the right to a public trial under Article 6 of the ECHR.[526]

Despite the unequivocal recognition in human rights jurisprudence, several writers believe there is no apparent connection between the requirement of a public trial and the right to a fair trial.[527] Jaconelli, for example, suggests that explaining the link between public trial and fairness could be difficult because 'to judge by the contents of many human rights document, [a] public trial is seen as valuable quite independently of the fairness of [the] trial procedure. Public trial and fair trial are

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[522] Zuckerman, *Zuckerman on Civil Procedure Principles of Practice*, 50-9

[523] *A v B (a company) and another* [2002] EWCA Civ 337

[524] Article 34 of the European Convention on Human Rights

[525] Article 35 (1) of the European Convention on Human Rights provides that: 'the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.'

[526] See, for example, *Albert and Le Compte v. Belgium*; *Håkansson and Sturesson v. Sweden*; *Scoppola v. Italy (No. 2)*

[527] Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002); Summers, *Fair Trial The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing 2007)

guaranteed on an equal and independent footing.'[528] For example, Article 6 (1) of the ECHR reads: 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing…'. According to him, the right to a public trial is not conceptually related to the right to a fair trial because both provisions are stipulated independently.[529]

There are two ways of answering Jaconelli's argument. Firstly, if a fair trial and open justice are genuinely independent of each other, as he claimed, then both requirements need to be met. There is nothing wrong with a requirement of open justice in addition to a fair trial.

Secondly, I believe Jaconelli's interpretive argument of the provision above is narrow and exclusive. It excludes the possibility of embracing the requirement of open justice in the broad concept of procedural fairness based on a restrictive reading of the text. The word "and" in the text was read disjunctively as if the requirement to hold a public trial is unrelated to the standard of fairness. I cannot find any good reason that may justify the disjunctive approach of reading Article 6 (1) of the ECHR.

Jaconelli may have overlooked the fact that if we were to accept the argument that there is no clear link between the right to a public trial and the standard of fairness simply because of the explicit guarantee of both items on an equal and independent footing, then one may have to draw the same conclusion

[528] Jaconelli, 'Rights Theories and Public Trial' (1997) 14 Journal of Applied Philosophy 169, 172

[529] Ibid

that the value of other rights such as the rights available in Article 6 (3) of the ECHR has nothing to do with the fairness of the trial process as well.[530]

Jaconelli seems to suggest that the relation between the two rights could be established if the right to a public trial is derived from the right to a fair trial. I argue that the fact that both rights are mentioned on an equal and independent footing should not be understood as if they are mutually exclusive. The word "and" in the provision can be read conjunctively instead of disjunctively. The fact that the right to a public trial is mentioned independently should be treated more like emphasising what is already imbued in the broad concept of a fair trial. In other words, the absence of such an explicit provision does not mean one would not be entitled to a public trial, for the open justice principle is a well-established common law principle.[531] The advantage of having one's entitlement to a public trial mentioned in the human rights document is that it reinforces his position when the court has to

[530] Article 6 (3) of the ECHR reads:

Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[531] The common law principle of public judicial proceedings is in force, and its development has not ceased with the introduction of the Human Rights Act 1998. In *Kennedy v The Charity Commission* , Lord Toulson says that 'it was not the purpose of the Human Rights Act that the common law should become an ossuary.'

manage the competing demands of dispensing justice in public and other interests through the metaphor of balancing exercise.

The criticism that doubts the inextricable connection between the provision of a public trial and fairness would be tenable if and only if publicity was seen as a foreign element to the general concept of procedural fairness. However, this is not the case because open justice has been treated as an intrinsic element of the trial process. The imperative of procedural fairness affirms that accurate fact-finding is not the sole primary aim of the trial, but it is intertwined with the need to respect human rights and observe moral values.[532] The concomitant aim of respecting rights and other important values in a trial can be seen in situations where procedural safeguards are observed even though they may inhibit the pursuit of finding the truth. For example, the court has occasionally applied the doctrine of abuse of process and the exclusion of improperly obtained evidence which may seemingly run contrary to the pursuit of finding the truth of what happened at the material time.[533]

I argue that there is potentially a danger if we were to accept that open justice has nothing to do with a fair trial. It opens a discussion that secrecy should be allowed if it could somehow contribute to the overall fairness of a trial. Perhaps, what happened in the case of Al-Rawi may illustrate my concern.[534] In Al-Rawi, the government argued that a Closed Material Procedure was not only in the interest of national security but also in the interest of justice. The government made it clear

[532] Ashworth and Redmayne, *The Criminal Process* (4th edn, Oxford University Press 2010); Zedner, *Criminal Justice* (Oxford University Press 2004)

[533] Ashworth and Redmayne, *The Criminal Process* (4th edn, Oxford University Press 2010)

[534] *Al-Rawi v Security Service* [2011] UKSC 34 (SC)

that they shall claim Public Interest Immunity (PII) in respect of those documents and information the disclosure of which was likely to be harmful to the national security. If the court accepted the PII claim, the claimant would be deprived of the full evidential support for his claim. Hence, it was argued that a more just solution in such a situation is to hold a Closed Material Procedure because, at the very least, the evidence would be available to the court and special advocates, although it may violate the principle of open justice.

C. The "Collateral Damage" Argument

Jaconelli suggests that 'there is no inevitable link between public trial and fairness of [the] trial' because publicity does not necessarily benefit the litigants.[535] An accused person in a criminal trial would opt for a private trial if given the option to avoid 'the stress and ignominy of publicity'.[536] He argued that there was no necessary causal link between public trial and procedural fairness because publicity may lead to an unfair trial.[537] There were cases where the principle of fairness was arguably tainted by adverse media publicity that undermined the accused's ability to have an unbiased trial.[538] It is generally not an easy and delightful experience for the accused person and witnesses to be in the limelight and at the centre of public attention. Therefore, the pursuit of finding the truth may be hindered by the pressure and ignominy of testifying in a public trial.

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[535] Jaconelli, 'Rights Theories and Public Trial' (1997) 14 Journal of Applied Philosophy 169), 172

[536] Ibid, 170

[537] Ibid

[538] *R v McCann* (1991) 92 Cr App R 239; *R v Taylor and Taylor* (1993) 98 Cr App R 361; *R v Wood* [1996] 1 Cr App R 207

The fact that publicity sometimes may have caused unfairness to parties to trial should not be construed as a public trial that is inimical to fairness. Publicity may taint a trial's overall fairness if it amounts to an abuse of process. For example, this could happen when the publicity given to a case was blown out of proportion fuelled with speculation and distortion of facts over sensationalism that may influence jurors and even judges to decide the case partially.

I believe any claim of unfairness by litigants due to the prejudicial effect of adverse publicity is mostly a question of fact. Any decision on whether publicity has gone beyond the acceptable limit is to be determined by the judge on a case-by-case basis. There are legal remedies to address prejudicial publicity in a criminal trial.[539] If there was an abuse of process, the court might stay the proceedings, fearing the defendant would not get a fair trial.[540]

Under normal circumstances and in most cases, open justice serves its purpose of being a procedural safeguard to the litigants. Although it may be true that a private trial may have been preferred and would have been opted by many litigants if given the option, there is nothing implausible about the law stipulating what is best for society in general and for litigants in particular.[541]

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[539] Bronwyn Naylor, 'Fair Trial or Free Press: Legal Responses to Media Reports of Criminal Trials' (1994) 53 Cambridge Law Journal 492; J. Thomas McCarthy, 'Fair Trial and Prejudicial Publicity: A Need for Reform' (1965) 17 The Hastings Law Journal 79

[540] *R v Beckford* [1996] 1 CrAppR 94 ; Ashworth and Redmayne, *The Criminal Process* (4th edn, Oxford University Press 2010), 271-2

[541] MacCormick, 'Rights in Legislation' in Peter Michael Stephan Hacker and Joseph Raz (eds), *Law, Morality and, Society: Essays in Honour of HLA Hart* (Clarendon Press 1977)

A private trial may indeed be the preferred option to some litigants, and there were occasional reverses to the accused persons because of media coverage, but these instances must be treated as anomalies. They should not also in any way be seen as denying the validity and authority of law that could ever vest such a right in individuals based on the assumption that it may be of interest to them in certain aspects under normal circumstances.[542]

Critics also suggest that open justice could be manipulated as a political persecution tool and legitimise the state's abuse of power.[543] The persecution of Stalin's political adversaries during the Soviet Union is an example of how publicity could be manipulated.[544] It was contended that the possibility of using the public

[542] Ibid, 202: 'It is not necessarily the case that each individual acquiring a right under the law should experience it as a benefit, an advantage, an advancement or protection of his interests. Perhaps there are some people who have been more harmed than benefited by an inheritance. Perhaps in some cases, property inherited, e.g. slum properties subject to statutory tenancies at controlled rents, are literally more trouble than they are worth, and, besides, something of an embarrassment to their proprietor. None of that is in any way inconsistent with the proposition that the *function of the law is to confer what is considered to be normally an advantage on a certain class by granting to each of its members a certain legal right*.'

[543] Duff and others, *The Trial on Trial Volume Three: Towards a Normative Theory of the Criminal Trial The Trial on Trial Volume Three: Towards a Normative Theory of the Criminal Trial* (Hart Publishing 2007); Jaconelli, 'Rights Theories and Public Trial' (1997) 14 Journal of Applied Philosophy 169, 172

[544] Jaconelli, 'Rights Theories and Public Trial' (1997) 14 Journal of Applied Philosophy 169, 172. Read Sadakat Kadri, *The Trial: A History from Socrates to OJ Simpson* (Harper Collins 2005) in Peter Michael Stephan Hacker and Joseph Raz (eds), *Law, Morality and, Society: Essays in Honour of HLA Hart* (Clarendon Press 1977). For further discussion on political trials, see, ibid; Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton University Press 1961) and Ronald Christenson, 'A Political Theory of Political Trials' (1983) 74 The Journal of Criminal Law and Criminology 547. Contrast the dark history of political persecution during Stalin's era with other instances in history whereby a public trial had been used by freedom fighters and politicians as a powerful tool to engage with the wider public against imperialists and tyranny. The guaranteed right to be heard and the right to have a public trial had been used, for instance, by Mahatma Gandhi to send out political messages to the wider public. Gandhi launched a campaign of tax resistance and non-violent protest against the British salt monopoly in colonial India. Gandhi pleaded guilty to the charge of disobeying the order to leave Champaran and later read a brief statement explaining the reasons why he disobeyed the order. Gandhi said 'I venture to make this statement not in any way in extenuation of the penalty to be awarded against me, but to show that I have disregarded the order served upon me, not for want of respect for lawful authority, but in obedience to the higher law of

trial to achieve unjust ends dilutes the instrumental value of publicity as a safeguard of procedural fairness.

Be that as it may, criticism of this sort does not adequately attack the normative value of a public trial. Persecutions of political adversaries by dictators are not good examples of detracting the value of open justice in a society where values of liberal democracy, such as the rule of law and constitutionalism, are adequately put into practice. People, in general, are wise enough to realise that those political trials, in the absence of an independent and impartial judiciary, are none other than a complete mockery of the judicial system to achieve unjust ends of tyranny.

D. The "Quantitative Rarity" Argument

The usefulness of open justice is sometimes questioned because cases are always heard in the absence of members of the public, particularly in the lower courts that deal with minor offences and simple civil cases. This criticism, if unaddressed, may weaken the disciplinary value of publicity because, for the disciplinary value of publicity to take effect, the public gallery in the courtroom should not be vacant. The lack of interest among members of the public to attend trials would only show that the value of publicity to enhance the quality of evidence may not work as effectively as it is envisaged to be.

However, the absence of members of the public in the courtroom may not entirely demolish the whole argument of the disciplinary value of publicity for two reasons. Firstly, the mere potentiality of observers being present in the courtroom is

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our being, the voice of conscience.', Mohandas Karamchand Gandhi, *An Autobiography or the Story of My Experiments with Truth* (Mahadev Desai tr, Navajivan Publishing House 1927), 344-346.

already a deterrent to malpractice in itself. Secondly, such criticism (the quantitative rarity of a public appearance in the courtroom) seems to be focusing on an element of the open justice principle. The permissibility to attend the court and observe the proceedings is just a component of open justice. It is a necessary but not sufficient condition of a public trial. The court must observe many other elements, such as public disclosure of the court's documents.

The disciplinary value of publicity remains plausible even in the absence of members of the public in the courtroom because the testimony of the witnesses will be recorded. Whatever they say in the course of giving evidence is made publicly available as part of the court's document.[545] Witnesses then have to bear in mind that, even in the absence of members of the public in the public gallery, their lies may be potentially discovered later because their oral testimony is recorded as part of the court's proceeding. Any interested party may apply to the court to get access to the testimony, which is part of the court's documents.[546] It should be noted here

[545] Recording of the proceedings may be obtained with permission of the court. See Paragraph 6.3 and Paragraph 6.4 of Practice Directions 39A of the Civil Procedure Rules.

[546] Considering the increasing reliance on documentary evidence and the decline of oral evidence presentation particularly in civil cases, the court recognised the need for public access to documents used or referred to in courts. Lord Bingham CJ observed that 'the practices of counsel preparing skeleton arguments, chronologies and reading guides, and judges pre-reading documents (including witness statements) out of court, have become much more common.' Such practices have resulted in a situation in which 'even an intelligent and well-informed member of the public, present throughout every hearing in open court, would be unable to obtain a full understanding of the documentary evidence and the arguments on which the case was to be decided.' Lord Bingham CJ then stressed that 'public access to documents referred to in open court, (but not in fact read aloud and comprehensively in open court) may be necessary…to avoid too wide a gap between what had in theory and what had in practice, be passed in public domain.', *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498, 511-12. Further discussion on documentary evidence, see, Zuckerman, *Zuckerman on Civil Procedure Principles of Practice* (Second edn, Sweet & Maxwell 2006), 96-100.

that the absence of members of the public may not be a big problem, too, in jurisdictions that have allowed for a live broadcast of trial proceedings.[547]

3.6 The Interests of Members of the Public

Waldron argues that rights are always seen as individualistic.[548] He explains that 'rights purport to secure goods for individuals…A right is always somebody's right, and we never attempt to secure things as a matter of right unless there is some individual or individuals whose rights are in question.'[549] The individualistic aspect of rights is also reflected in the idea that 'rights are for the benefit or interest of each individual taken separately, whereas a collective good pertains to the interests of all members of the society taken together.'[550]

The individualistic theory implies that any human right is justified ultimately by how it serves its holder. Rowan Cruft emphasised that 'each person's basic needs are the source of his or her human rights, and justify his or her human rights independently of whether this serves collective well-being or the wider community.'[551] Therefore, to qualify as a human right, the kind of interest justifying members of the public's right to open justice must have the peculiar character of being beneficial to the putative right-holder.

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[547] For discussion on the pros and cons of a live-telecast of trial proceedings, see, Audrey Winograde, 'Cameras in the Courtroom: Whose Right Is It Anyway?' (1997) 4 Southwestern Journal of Law & Trade in the Americas 23; Thompson

[548] Jeremy Waldron (ed) *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen 1987), 185

[549] Ibid, 185

[550] Alan Gewirth, 'Why Rights are Indispensable' (1986) 95 Mind 329, 332

[551] Rowan Cruft, 'Human Rights and Positive Duties' (2005) 19 Ethics and International Affairs 29, 36

Before delving into the discussion on what sort of interest members of the public deserve special protection, it is germane to briefly recall the core of the Inclusivity thesis that I propose. The Inclusivity thesis argues that the basic underlying idea of the open justice principle is in the idea of "inclusivity" in that members of the public are recognised as "participants" in court adjudication alongside the litigants privy to a case before the court. It moves away from the conventional wisdom where the court adjudication is framed purely based on the tripartite structure of judges and litigants (plaintiff and defendant; the prosecutor and accused person).

It also challenges the orthodoxy that regards members of the public as either bystanders or observers, sitting at the periphery of the judicial process with negligible role and interest. In this thesis, members of the public are given a space and assumed to be part of the court adjudication by making the adjudicatory process open, visible, accessible, and transparent. In this context, open justice is treated as the medium by which members of the public are brought into the judicial process.

A. The Interest of Knowing the Law to Regulate One's Affairs

One could glean from the brief encapsulation of my thesis's core idea that the interest that grounds the right and the duty of holding the trial in public is directly related to the interest of being a "participant" in the judicial process. Members of the public stand to suffer if they are deprived of participation in a process they have an interest in. The primary underlying interest here is in the imperative of knowing the law to regulate one's life.

As I have alluded to in Chapter 2, the public's interest in a public trial stems from the basic premise that courts are a source of law identification, a place where the law is applied and can sometimes be created. If members of the public are expected to abide by the law, they should not be deprived of access to the source of law where the law can be identified and referred to.

It is trite that law, as much as possible, should be certain, intelligible and predictable for a straightforward reason that it can be easily enforced and so that people can know where they stand.[552] As Raz puts it, 'the law must be capable of guiding the behaviour of its subjects.'[553] The law can only guide its subjects' behaviour if its content is accessible and the process of applying it is transparent.[554] It is an anathema to the rule of law if the trial is held in secrecy, for it will frustrate the long-standing commitment to making law certain, intelligible and predictable.

B. The Interest of Having Confidence in the Administration of Justice

The second underpinning interest concerns securing confidence in the administration of justice. In addition to the first one, this interest is strong enough to necessitate ensuring that judicial proceedings are always open and transparent. Our

[552] Jeffrey Jowell, 'The Rule of Law and its Underlying Values' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (7th edn, Oxford University Press 2011); Raz, *The Authority of Law* (2nd edn, Oxford University Press 2009); Fuller, *The Morality of Law* (Revised edn, Yale University Press 1969)

[553] Raz, *The Authority of Law* (2nd edn, Oxford University Press 2009), 214

[554] It was held in *Sunday Times* 26 April 1979, Series A no. 30, (1979-80) 2 EHRR 245, 49: 'Firstly, the law must be adequately accessible: the citizens must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable citizen to regulate his conduct: he must be able-if need be with appropriate advice-to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.'

understanding of certain aspects of procedural law, particularly concerning the requirement of holding judicial proceedings in public, should consider the non-litigants' perspective.

In the literature, the bulk of discussion about procedural law is always litigants-centric, where their well-being becomes the central concern. Hence, we have all sorts of principles and rules derived from satisfying the rule of law requirement of procedural fairness, such as the principle of natural justice and equality of arms to serve and protect the litigants' interests.[555] However, I argue that although the need to put procedural safeguards to attain procedural fairness is usually presented as a litigant-centric matter, it is unnecessary to limit the discussion about procedural laws and procedural fairness as if they are meant to serve the interest of the litigants only.[556] In court adjudication, litigants and members of the public share interests, and open hearings are used as a tool to serve some of these interests.

One of the benefits of a public trial is attaining the primary aim of the trial: accurate determination of the dispute in a fair manner.[557] The attainment of this aim

[555] Summers, *Fair Trial The European Criminal Procedural Tradition and the European Court of Human Rights Fair Trial* (Hart Publishing 2007)

[556] J.A. Jolowicz, *On Civil Procedure* (Cambridge University Press 2000), 70-71. Jolowicz wrote that 'it is appropriate that the interest of the parties, as defined by the law, should be seen as paramount when attention is directed to proceedings in an individual case. It does not follow, however, that procedural law as such can be based on the single hypothesis that its business is no more than to provide for the resolution of a sequence of disputes one after the other. The importance of achieving justice between individuals by recognition that the process of litigation, considered as a whole, serves at least two other ends, connected but distinct, and their attainment should be included in the purposes of the procedural law. First, civil process proceeding served to demonstrate the effectiveness of law; secondly, they provide the opportunity for the judges to perform their function of interpreting, clarifying, developing and, of course, applying law.'

[557] Epistemic aims of trial are accurate determination of the dispute and fairness of process. Read Ashworth and Redmayne, *The Criminal Process* (4th edn, Oxford University Press 2010)

is an interest mutually shared by the litigants and members of the public. Procedural fairness to members of the public is a public interest in itself because 'the public has an interest in maintaining a certain standard of fairness in the general administration of justice which can be separated from each defendant's right to a fair trial.'[558] If litigants would want fair and accurate determinations of legal dispute because their rights and obligations are at stake, members of the public (who are potential litigants in future), in all likelihood, want the same standard of fairness to be put in place so that they have confidence in the system.

It is legitimate to expect that legal norms are applied accordingly in the judicial process.[559] Such expectation is reflected in the doctrine of the rule of law, which requires a satisfactory level of consistent application of law in a legal system.[560] After all, members of the public are potential future litigants, and they would reasonably want to know how they will be treated if they end up being in court. Therefore, if we ask whether members of the public are typically better off when they have the right to open justice than when they do not, the answer is, to my mind, affirmative.

As a participant in the judicial process, I am far better off with the right to open justice, for I would not be, at least, summarily excluded from the trial. The test

[558] Harold Shapiro, 'Right to a Public Trial' (1951) 41 Journal of Criminal Law and Criminology 782, 786

[559] Donaldson MR held in the case of *R v Chief Register of Friendly Building Societies ex p New Cross BS* [1984] QB 227, that: 'the Queen's courts are open to all. And when I say that they are open to all, I do not limit this to those who have business in the courts…No one is more entitled than a member of the general public to see for himself that justice is done.' This excerpt is one of the many judicial pronouncements that reflect the general sentiment of the Bench on the issue of public participation in a trial process.

[560] Luban, 'The Rule of Law and Human Dignity: Re-examining Fuller's Canons' (2010) 2 Hague Journal on the Rule of Law 29, 33

and process to exclude me would also be more stringent and onerous because my interest in the trial is recognised as a matter of legal right.[561] I will only be excluded if legitimate, conflicting legal rights or interests of a higher degree could only be served with my exclusion from certain parts of the judicial process.[562]

Before I end the discussion of this chapter, there is one minor issue left that I wish to address. Thus far, I have tried to show that it is a legitimate and worthwhile interest for members of the public to know and be convinced that justice is being administered properly. While what I have described earlier on that the ability to have confidence in the administration of justice is a practical self-interest of non-litigants (which is sufficient by itself to ground a duty to hold a public trial), such interest may nonetheless be seen as altruistic because litigants appear to be the immediate beneficiary of a public trial.[563]

Jaconelli contended that the interest in knowledge about how courts work through public judicial proceedings does not directly serve the interest of members of the public.[564] If this contention was valid, then the plausibility of granting the right to open justice to non-litigants on this ground may not be possible because the interest that a right seeks to protect or serve must be an interest of the right holder personally (who are the individual members of the society in the context of this

[561] *Ntuli v Donald* [2010] EWCA Civ 1276

[562] In *Daubney v Cooper* (1829) 109 ER 438,440, Bayley J said that:' . . . we are all of the opinion, that it is one of the essential qualities of a Court of Justice that its proceedings should be in public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose, - provided they do not interrupt the proceedings and provided there is no specific reason why they should be removed – have the right to be present for the purpose of hearing what is going on.'

[563] Jaconelli, 'Rights Theories and Public Trial' (1997) 14 Journal of Applied Philosophy 169

[564] Ibid

thesis).[565] The identification and ascription of interest to the putative right-holder are quite an important subject within the right discourse because rights have typically been individualistic.[566]

There are two ways of responding to this criticism. The first way, which I did earlier on, is by pointing out that knowing how justice is dispensed with is, on its own, a practical self-interest of members of the public individually. The second way is by examining whether this specific issue of a seemingly altruistic interest poses a problem to my formulation of the right to open justice as a right of members of the public. Can the Interest theory provide any solution to this? I find the Interest theory is flexible enough to cover situations such as this. Kramer holds that:

> A necessary though insufficient condition for the holding of a legal right by some potential right-holder *R* is that the right, when actual, protects some aspect of *R*'s situation that is normally in the interest of a human being or collectivity or non-human animal. What should be made explicit here is that an interest of the requisite sort cannot be wholly vicarious. That is, it cannot reside wholly in the furtherance of somebody else's interests. The mere fact that somebody else will benefit from the fulfilment of a certain duty *d*, coupled

[565] Matthew H. Kramer and Hillel Steiner, 'Theories of Rights: Is There a Third Way?' (2007) 27 Oxford Journal of Legal Studies 281, 304; Kramer states: 'When an Interest Theorist ascribes to *R* a right correlative to some duty *d*, she is presupposing that one or more of *R*'s own interests (perhaps one of his altruistically oriented interests) will stand to be advanced by the fulfillment of *d*. She is not presupposing, or is not merely presupposing, that one or more of the interests of someone else will stand to be advanced.'

[566] E.g. Dworkin, *Taking Rights Seriously* (Duckworth 1977); J. L. Mackie, 'Can There be a Right-Based Moral Theory?' (1978) 3 Midwest Studies In Philosophy 350: 'It may be asked whether this theory is individualist, perhaps too individualist. It is indeed individualist in that individual persons are the primary bearers of rights, and the sole bearers of fundamental rights, and one of its chief merits is that, unlike aggregate goal-based theories, it offers a persistent defence of some interests of each individual.'

> with the fact that that other person is a close relative or friend of *R*'s, is not sufficient to endow *R* with any non-vicarious interest in the fulfilment of *d*. If *R* is to hold a right correlative to *d*, his interest in the fulfilment of *d* must go beyond the fact that somebody else—even one of his close friends or relatives—will have gained from it.[567]

I argue that the interest of having the means to know or observe judicial proceedings to ensure a proper administration of law is not wholly vicarious. It does not reside entirely in the furtherance of a litigant's interest that may be simultaneously advanced.[568]

Members of the public have a direct interest in the fulfilment of the duty to hold a public trial because open justice promotes an effective and efficient administration of justice that is equally beneficial to all members of a liberal society. Open justice would enable members of the public to contribute towards a proper administration of justice by, among others, exerting pressure on public officials while at the same time reaping the benefit of living in a legal and judicial system that they have confidence in. Members of the public shall have confidence in the legal and judicial system when they can see for themselves the acts of officials, criticise judicial

[567] Kramer and Steiner, 'Theories of Rights: Is There a Third Way?', 303

[568] Furthermore, I think the situation of the public demanding the correct application of the law is comparable to a scenario of a third-party beneficiary in the case of promises where it is the interest of the promisee in having promises kept that justifies the promisor's duty even if the primary beneficiary is a third party. While one may say that the primary beneficiaries are the parties to trial who benefit from the correct application of laws, it does not outweigh the interest of the public to see laws being applied in trial as they should be. As I have explained in Chapter 2, such interest is grounded in the rule of law argument that calls for consistent application of laws.

decisions, if necessary, and may, to a certain extent, respond to wrong judicial decisions through democratic legislative intervention.[569]

Let us examine the following scenario in Malaysian jurisdiction, which provides for the superior courts' revisionary power over decisions made by the inferior courts in criminal cases.[570] Suppose an accused has been convicted and later sentenced to a maximum term of imprisonment by the Magistrate Court on a guilty plea for stealing a bicycle. Both the convict and the prosecution did not make any appeal as to the sentence meted out by the Magistrate, even though it may be too excessive for a first-time offender with no aggravating factors. A concerned citizen then writes a letter informing a High Court judge that the sentence was passed in violation of established principles of sentencing.[571] The High Court then looked into the matter and reduced the sentence accordingly.

Based on this scenario, it seems that the convict has benefitted from the revision of the sentence, which was done to ensure that the law is administered accordingly. It should be noted in this scenario that the benefit enjoyed by the concerned citizen who wrote the letter to the judge, I would say, is not wholly vicarious to the benefit enjoyed by the convict with the lesser punishment. Members

[569] I have talked about the grounds for public observation of judicial proceedings, public discussion of judicial decisions and legislative intervention at length in chapter 2 when I discussed the importance of open justice in court adjudication as a law-applying and law-making process.

[570] It has to be noted here that this revisionary power and process does not contravene the *functus officio* principle. This is because a superior court does the revisionary process, not the court of the first instance.

[571] The example is based on Malaysian jurisdiction that permits the High Court to revise the decision made by the inferior courts. In England, Wales and the Northern Ireland, similar action by such concerned citizen can be done with the Criminal Cases Review Commission. For discussion on the principles of sentencing, see, Zedner, *Criminal Justice* (Oxford University Press 2004), 178-97.

of the public's interest in the punishment (which was reduced because of a complaint by a non-litigant) is in the fact that the judge meted out the sentence based on established principles of sentencing that are orientated for the public good.[572]

3.7 Conclusion

I have explained in this chapter that members of the public may claim the right to open justice, which includes the right to attend a public trial because of their interests in the process. Those interests are not ordinary interests but interests that fit into the Interest theory of legal rights. It is a testament that members of the public are not mere observers and bystanders. To deprive them of the right to open justice will make them markedly less effective in enjoying the benefit of a public trial.

[572] In the case of *Public Prosecutor v Muhari Mohd Jani & Anor*, the decision of the subordinate court was revised by the High Court judge acting upon a complaint from members of the public. In *Public Prosecutor v Burhanuddin*; the High Court judge exercised his revisionary power upon reading the news about a convict of armed robbery who was sentenced to 30 months of imprisonment and one stroke by the Magistrate in the newspaper.

Chapter 4: The Scope of Exceptions to the Open Justice Principle

4.1 Introduction

This chapter seeks to investigate the extent to which the metaphor of balancing used by the court can manage the competing demands of open justice with other interests. In doing so, I shall examine whether some key ideas which I have articulated in Chapter 2, for example, freedom as non-domination, congruence, and the reflexive idea of law, were at stake when confronted with the need to decide on any formal request to curtail the application of the open justice principle.

Similarly, I would like to draw on two main interests that necessitate the need to ensure that there should always be open and transparent judicial proceedings: the interest of knowing the law for the sake of regulating one's affairs and the interest of maintaining public confidence in the administration of justice, which I have discussed in Chapter 3. Hopefully, key principles drawn from the discussion will help judges, law, and policymakers frame exceptions consistent with the need to protect these two interests.

A complete account of the open justice principle has to consider why it does not apply in certain scenarios and why its application is circumscribed in some cases. This chapter is allocated to examine the extent to which the open justice principle applies in the area of privacy. It is arguable that considering the limits of, or exceptions to, the open justice principle can shed light on the functions of the open justice principle. I am going to approach this topic in two areas, namely, the grant of Super Injunction and the applications for anonymity orders. By analysing selected

exceptions to the open justice principle, it seeks to show that the extent to which the exceptions apply cannot completely undermine public interests in the judicial process. It further suggests that the current strict necessity test carried out through a balancing exercise of all competing interests should additionally include the behind a curtain test.

4.2 Some General Principles

The open justice principle is not absolute, and just like most other legal rights, the principle may be exceptionally curtailed in limited circumstances according to law. The House of Lords's decision clearly explained the law on this in which it was held that:

> …since the purpose of the general rule is to serve the ends of justice, it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court, in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice.[573]

Before discussing the extent to which open justice applies in judicial proceedings, it is crucial to establish some related general principles.

[573] *Attorney General v Leveller Magazine Ltd* [1979] AC 440 (HL), 450. See also, *In re S (FC) (a child) (Appellant)* [2004] UKHL 47

Firstly, the courts in England have traditionally been cautious towards any application for the secrecy of proceedings because they viewed secret proceedings as inimical and an unacceptable impingement of the principle of open justice.[574] The exceptions to the fundamental rule of open justice are strictly defined by common law or by a clear stipulation of statutory provisions and rules of procedure. In civil matters, CPR 39.2(3), for example, stipulates several circumstances where derogation may be granted.

The introduction of the Single Justice System through the Criminal Justice and Courts Act 2015 is an example of the ability of Parliament to introduce radical changes to certain aspects of public proceedings where Criminal Procedure Rules were also amended by the Criminal Procedure (Amendment No 2) Rules 2015 to accommodate this change. Under this system, Section 16A (6) of the Magistrates Courts Act 1980 provides that 'the court is not required to conduct any part of the proceedings in open court' because the government is of the view that it is unacceptable that valuable time in magistrates' courtrooms is taken up by minor offences such as speeding and driving without insurance when very often defendants do not attend the hearings.[575]

Secondly, the starting point of any discussion about the nature of a particular judicial proceeding in English law has always been one of openness and not privacy

[574] *Scott v Scott* [1913] AC 417 (HL); *McPherson v McPherson*

[575] See, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/322167/fact-sheet-regulatory-cases-single-justice-procedure.pdf

in most circumstances.[576] The fact that openness is regarded as a starting point of discussion speaks volumes because it implies that the ordinary state of judicial affairs, by default, is a matter between the judge, litigants and members of the public.[577] Such presumption of openness in judicial proceedings may be defeated through a formal application by the litigants,[578] and there is a stringent test that needs to be satisfied before a certain degree of reasonable derogation may be allowed to the extent that is necessary to enable the court to do justice and are a proportionate means to facilitate the proper administration of justice.[579]

Thirdly, whether a trial or any part of it should be held in private is determined by the judge based on facts. Whenever judges were invited to decide whether a particular judicial proceeding should be heard in public or private, the decision to derogate from the requirement of open justice is not left at their whim and fancy.[580] Legal rules and legal principles guide judges in weighing the degree of

[576] The combined effect of Article 6 of the ECHR, judicial authorities such as *Scott v Scott* [1913] AC 417 (HL) and *W v M* [2012] EWHC 1679 (Fam) CPR 39.2(1) is that civil proceedings will be heard in public. An exception to the general presumption of openness is applicable to the Court of Protection and certain Family and Children Act 1989 proceedings. Section 51(2) (h) of the Mental Capacity Act 2005 and r.90 and 91 of the Court of Protection Rules 2007 provide that proceedings in the Court of Protection are to be held in private as a general rule. Administration of Justice Act 1960 s12, Children Act 1989 s97, Family Proceedings Rules 2010 r. 7.16, 11.7, 12.73, 14.14, 24.8, 27.10, 33.5 provide similar provision to the same effect in relation to certain Family and Children Act 1989 proceedings.

[577] While the presumption of judicial proceedings is one of openness, arbitration on the contrary is one of privacy. See, Article 28 (3) of the United Nations Commission on Trade Law (UNCITRAL) Arbitration Rules (as revised in 2010) provides that 'hearings shall be held in camera unless the parties agree otherwise.'

[578] In civil matters, CPR 39.2(3), for example, stipulates a number of circumstances where derogation may be granted. Derogations from it can only be made where they are strictly necessary to enable the court to do justice, and are a proportionate means to facilitate the proper administration of justice.

[579] *Scott v Scott* [1913] AC 417 (HL), 48; Lord Haldane LC held that the party seeking secrecy or privacy has to 'satisfy the Court that by nothing short of the exclusion of the public can justice be done'. *Pink Floyd Music Ltd v EMI Records Ltd*,[67]; *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] 1 QB 103, [03]

[580] *Ivan William Allan v Glory Anne Clibbery*, [42]

all competing interests,[581] and any decision on whether any part of the judicial proceedings should be held in private has to be objectively justified based on facts.[582] Once the relevant test is applied, the judge has to decide whether to allow the exception or reject the application.[583]

Fourthly, while recognising that a reasonable degree of derogation from the open justice principle may occasionally be necessary, there can never be complete and permanent secrecy of the entire judicial proceedings.[584] For example, temporary secrecy provided by a non-disclosure order is justified when the absence of secrecy would be likely 'to lead, directly or indirectly, to a denial of justice....'[585] The use of non-disclosure orders is entirely sensible, justified and unobjectionable as long as they provide a form of short-lived, temporary secrecy that lasts no longer than strictly necessary.

4.3 The Strict Necessity Test

A stringent test needs to be satisfied before a certain degree of derogation can be allowed. The test the court will use is neither controversial nor novel, although its application to the facts of a particular case might be.

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[581] *JIH v News Group Newspapers* [2011] 1 WLR 1645, [21]; *Ntuli v Donald*

[582] *Ivan William Allan v Glory Anne Clibbery* [2002] EWCA Civ 45, [16]; *R v Legal Aid Board ex p Kaim Todner* [1999] 1 QB 966 [1999] 1 QB 966

[583] *AMM v HXW* [2010] EWHC 2457 (QB), [34]

[584] Zuckerman, 'Super Injunctions-Curiosity -Suppressant Order Undermine the Rule of Law'; Zuckerman, 'Common Law Repelling Super Injunctions, Limiting Anonymity and Banning Trial by Stealth'

[585] *PM v KH & Another* [2010] EWHC 870 (Fam)

Firstly, the law is settled that any application to derogate from the principle of open justice must be subject to 'intense scrutiny' of the court',[586] and it is allowed if it is strictly necessary for the interest of justice.[587] The applicant who seeks derogation from the general principle must establish clear and cogent evidence that it is strictly necessary.[588] Once the court has applied the relevant test, the judge must either grant or refuse the derogation.[589] A grant of such an exception is not a question of discretion; rather, it is a 'matter of obligation' if justified.

Secondly, the court must ensure that derogations from open justice are kept to the absolute minimum, and the parties are obliged to assist the court in this exercise. Maurice Kay LJ put it in *Ntuli*, 'the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which [an applicant] is entitled.'[590] The court should consider whether any 'less drastic course' of action could be adopted in assessing the need for derogation.[591]

Thirdly, where derogations from the general principle are sought on a without-notice application, applicants are duty-bound to draw the court's attention

[586] *Terry v Persons Unknown* [2010] 1 FCR 659, [108]; *Memory Corporation Plc v Sidhu* [2000] 1 WLR 1433, 1459

[587] The strict necessity requirement was laid down by Lord Haldane LC in *Scott v Scott* [1913] AC 417 (HL), 438: ' . . . unless it is strictly necessary for the attainment of justice, there can be no power in the Court to hear in camera either a matrimonial cause or any other where there is a contest between the parties.'

[588] *Ntuli v Donald*, [54

[589] *AMM v HXW*, [34]

[590] *Ntuli v Donald*, [54]

[591] *Ambrosiadou v Coward* [2011] EWCA Civ 409, [52]

to the requirement that those exceptions be subjected to intense scrutiny. This scrutiny is necessary when the application contains derogations from CPR PD 25A.

Fourthly, applications to derogate from the open justice principle are case-sensitive and depend on a proper consideration of all the circumstances of the case. Among those considerations may be the respective, and perhaps competing, Convention rights of the parties and the Article 10 rights of the public.[592]

Fifthly, the court cannot merely give effect to an agreement between the parties to derogate from the principle of open justice. Unless the strict necessity test is satisfied, such agreements are inconsistent with the public interest element of the proper administration of justice and members of the public's right to Article 10 Convention, which parties cannot agree to waive.[593] Courts cannot agree to sit in camera at the convenience of the parties to proceedings, even if that is by mutual consent of the plaintiff and defendant.[594] Similarly, an order for anonymity and reporting restrictions cannot be merely granted because none of the litigants objected.[595]

[592] *Ntuli v Donald*, [52] – [54]

[593] *Gray v UVW* [2010] EWHC 2367 (QB), [33]

[594] *Scott v Scott* [1913] AC 417 (HL); *Gray v UVW*, [33]; *Lilly Icos Ltd v Pfizer Ltd*, Buxton L.J. observed 'patent litigation is of considerable importance, involving as it does potential restrictions on competition in respect of goods of great public benefit. It should so far as possible take place in public, whatever the contrary wishes of the parties.'

[595] *JIH v News Group Newspapers*

4.4 Super Injunction

In the case of RJW v Guardian News and Media Limited,[596] also known as the Trafigura case, the super-injunction the court granted was heavily criticised because of its nature. While a temporary prohibitive injunction may be needed to ensure justice, the public interest does not accept that the order will be in effect forever and it should not last beyond what is necessary. In 2009, Trafigura attempted to use a super-injunction to prevent the press from reporting details of toxic waste dumping in the Ivory Coast. This super-injunction was overturned after Paul Farrelly MP brought up the topic during Parliamentary Questions.

An anonymised injunction is an interim injunction that restrains a person from publishing information that concerns the applicant and is said to be confidential or private where the names of either or both parties to the proceedings are not stated. According to the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice, a *s*uper-injunction is:

> an interim injunction which restrains a person from (i) publishing information which concerns the applicant and is said to be confidential or private; and (ii) publicising or informing others of the existence of the order and the proceedings.[597]

Super-injunctions and anonymised injunctions have often been used to protect novel rights or recent extensions of existing rights, namely rights stemming

[596] [2009] EWHC 2540 (QB)

[597] In Master of the Rolls, *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice* (2011), 20

from Article 8, which have been incorporated into the law of confidentiality.[598] However, they have also been used to protect types of confidential information that have been passed between individuals in a commercial or an established and confidential personal relationship, which, depending on the nature of the relationship, has long been held to be capable of protection by court order.[599]

A non-disclosure or anti-tipping-off order prohibits the publication or disclosure of the facts of the proceedings and any order made for a short period to ensure that the purpose of the order is not frustrated through publicity. Such an order contains what can be characterised as the super-injunction element. Examples of such orders in the context of civil proceedings are, for instance, search orders (CPR 25 PD2A forms) and freezing injunctions. In such cases, temporary secrecy is essential to ensure that alleged wrongdoers are not tipped off to the order's existence, enabling them to frustrate its primary purpose.[600]

A. Criticisms towards Super Injunction

A Super Injunction is an excellent example of an extreme derogation from the open justice principle. If it were to last forever and become a permanent feature of the judicial system, it would go against the norm of an open court, which will ultimately erode public confidence.

[598] In ibid, *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice* (2011)

[599] In ibid

[600] *Terry v Persons Unknown*, [138]

The open justice principle requires the judicial proceedings to be open because the court is a norm-applying institution tasked to evaluate the subject's behaviour against a set of applicable rules. The underlying authority of the court is by virtue of the office and the law it administers. As an institution with a binding and coercive authority of the law, 'the activity of judging furnishes the occasion for making authoritative statements of legal norms and for restating the rules in order to make clear the entitlements and, more importantly, the obligations of the citizen.'[601] This is a function typically used to define the courts. Although courts may be defined by the social functions they fulfil, such as resolving legal disputes and avoiding self-help, it is likely that the same functions can be and are served by other means as well.

I would argue that the Super Injunction is also problematic as it reverses the open nature of judicial proceedings, which should be part of how we define the courts. Both Hart's and Raz's formulations are incomplete in explaining courts' institutional characteristics, for they are understood solely in terms of output without addressing the mode of operation or procedure. I draw on Raz's argument that norm-applying institutions (the court in the context of my thesis) 'should be identified by the way they fulfil their functions rather than by their functions themselves.'[602] He describes the importance of these 'primary norm-applying organs as follows, 'they are institutions with [the] power to determine the normative situations of specified individuals, which institutions are required to exercise these powers by applying existing norms, but whose decisions are binding even when

[601] Zedner, 126-7

[602] Raz, 'The Institutional Nature of Law', 492

wrong.'[603] Hart also regarded the court as essential in a legal system when he introduced the concept of secondary rules that empower officials 'to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken.'[604]

On the contrary, Waldron argues that the court's conception cannot be defined simply by its output function.[605] If so, then it seems that a Star Chamber secret proceeding and a secret verdict to have someone executed would satisfy Hart's definition.[606] If the Star Chamber determined the application of a norm, which it did, it would meet Hart's definition, at least in part. One might, however, usefully extend Hart's method and think about the social need to which the rule of adjudication is an answer, which is partly fair and public resolution of disputes in such a way as to avoid self-help, partiality and waste. Publicity is relevant to all these points.

I echo Waldron's argument in his discussion about the importance of courts in our understanding of the concept of law, which, apart from the functional imperative of determining one's normative situation, is also a question of structural and procedural arrangement.[607] Courts should be characterised as 'institutions which apply norms established in the name of the whole society through the

[603] Ibid, 494

[604] Hart, *The Concept of Law*, 96

[605] Waldron, 'The Concept and the Rule of Law', 21-23

[606] Ibid, 21

[607] Ibid, 21, 23, 49, 60

medium of tightly structured proceedings.'[608] The tightly structured proceedings, to my mind, should include the element of publicity as a distinctive defining feature of the judicial process.

Super Injunction was also criticised because of a lack of transparency. Transparency of the judicial process and comprehensibility of the legal arguments (both lawyers' submissions and judgments) are crucial because they are the enabling factors that enable members of the public to have confidence in the judicial system. For present purposes, the grant of Super Injunction was heavily criticised because 'the entire legal process [is] conducted out of the public view and for its very existence to be kept permanently secret under pain of contempt.'[609] The inability to know and follow the proceedings means the judicial process is spared from the transparency requirement. The judicial process should not be spared from the requirement of transparency because, as Zuckerman rightly argues:

> a system governed by the rule of law, the law itself has to be known, the process by which it is made and applied has to be transparent so that public debate can take place about objectives that the law serves and the measures taken to achieve them.[610]

4.5 Anonymity Order

Anonymity orders are a long-established feature of family, criminal and civil procedural law. They have been used only sparingly and only when strictly

[608] Ibid, 20

[609] Zuckerman, 'Super Injunctions-Curiosity -Suppressant Order Undermine the Rule of Law' (2010) 29 Civil Justice Quarterly 131, 134

[610] Ibid

necessary.[611] They render private a part of proceedings or a judgment where publicity would undermine the legal process's efficacy, e.g. where questions of blackmail, national security, public interest immunity, trade secrets, or personal privacy or confidence are involved.[612] Subject to limited restrictions imposed to give effect to the privacy order, the identity of the parties, and the existence of the proceedings, any judgments remain public.[613]

Anonymity orders provide for the names (and hence the identities) of the parties or any witnesses to be anonymised under CPR 39.2(4).[614] The Rule provides that

> the court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or witness.

They do not render proceedings private, nor do they prohibit reporting the existence or any of the details of the proceedings. Proceedings and judgments may remain public.

As we know, anonymity orders cover many areas, but for present purposes, I will discuss cases of anonymity orders made in connection with an application under the Variation of Trusts Act 1958. I shall review the contention that anonymity orders

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[611] *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice* (2011), 21

[612] Ibid, 21

[613] Ibid, 21

[614] *JXF v York Hospitals NHS Foundation Trust* [2010] EWHC 2800 (QB)

should be the norm following the court's approach in *JXMX v Dartford and Gravesham NHS Trust* by contrasting it with the decisions in *V v T* and *MN v OP*.

As a matter of principle, a trustee may depart from the terms of the trust instrument with the consent of all beneficiaries of full age and capacity. However, the Variation of Trusts Act 1958 provides that a trust may only be varied with the court's approval if the beneficiaries include minors. The court will only approve if satisfied that the arrangement varying the trust is for the minor's benefit. Often, an application to vary trusts will be accompanied by an application for orders that hearings will be made in private and restrictions to court papers put in place because sensitive information about an individual or a family's private financial and even personal affairs may be exposed to members of the public through the evidence adduced.

Both the principle and the exceptions are reflected in Part 39 of the Civil Procedure Rules. Those exceptions include cases where a private hearing is 'necessary to protect the interests of any child or protected party' as per Rule 39.2 (3) (d) provides 'a private hearing, is necessary to protect the interests of any child or protected party'. A plain reading of this rule would suggest that the onus is on the applicant to prove that a hearing or any part of it is necessary to secure the proper administration of justice and protect a child's interest. Arguably, open justice has a priority claim over other competing interests in this light.

JXMX *v Dartford and Gravesham NHS Trust*

Rule 21.10 of the Civil Procedure Rules seeking the court's approval in respect of a compromise of a claim by or on behalf of a child or protected party (i.e. a person who lacks capacity within the meaning of the Mental Capacity Act 2005) was considered in detail by the Court of Appeal in JXMX *v Dartford and Gravesham NHS Trust.*[615] In this case, the gist of the decision was that anonymity orders should be the norm for approval hearings, given that the court is exercising its protective function on behalf of children and protected parties.

V v T

The High Court's decision in the case of *V v T* is an excellent example of how the court has been persistently insistent on upholding the open justice principle. This case was about a variation of a trust under the Variation of Trusts Act 1958. The parties requested for the application to vary the trust to be heard in private on the basis that, among others, the application was not contentious and the need to protect the interest of a minor who was the beneficiary based on Rule 39.2 (3) (f) and Rule 39.2 (3) (d) respectively. Rule 39.2 (3) (f) of Civil Procedure Rule provides, 'a hearing, or any part of it, maybe in private if it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate.' Rule 39.2 (3) (d), on the other hand, provides 'a private hearing is necessary to protect the interests of any child or protected party'.

[615] *JXMX (A Child) v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96

The variation order was ultimately granted, but the application for a private hearing was refused. The court held that it is not a sufficient justification to have a private hearing about an application under the 1958 Act if it was merely based on the argument that the subject matter is purely a matter of the family's private financial affairs.[616] The High Court's decision serves as a good reminder that although the application may be regarded as a private family matter, it was insufficient to justify derogation from the principle of open justice.

It was also argued before the court about the possible adverse impact that publicity may cause on the business. It was pointed out that the trust owns shares in a private company. The applicants were worried that an open hearing might damage the value of the trust assets because the customers may squeeze the profit margin of the company if they know the levels of profit made, and it will, in turn, be detrimental to the child's welfare. Apart from the lack of evidence supporting the application, the court also appeared reluctant to accept such an argument because it would mean that there would be very few cases in the Companies Court that would be suitable to be heard in open court.[617]

MN v OP

Similar issues in the case of *V v T* were then brought up for the Court of Appeal's decision in *MN v OP* [2019] EWCA Civ 679. In this case, the trust in question had been established in 1961 and comprised precious assets held in several funds for the benefit of members of the same family, including minor grandchildren. The

[616] *V v T, A* [2014] EWHC 3432 (Ch) [20]

[617] Ibid, [21]

application under the 1958 Act sought approval from the court on behalf of those minors for a proposed arrangement containing two elements. First, an extension of the perpetuity period for 125 years from the date of the order making the variation. Secondly, an extension of the period during which income could be accumulated.[618]

Evidence was filed in support of a final anonymity order stating that although information about the trust property was in the public domain, there was no such information about the beneficiaries' interests, and disclosure of such information would undermine the family's approach to the upbringing of the minor grandchildren, in particular the need to introduce them to the trusts only when it was considered appropriate.[619]

The court dismissed the application for a final anonymity order in the first instance. In doing so, it was acknowledged that there were common factors between applications under the 1958 Act and approval hearings, but this did not justify extending the principles identified in Gravesham's case. Further, the evidence was insufficient to justify any such order in light of the judicial approach in *V v T*.[620]

All the parties to the application wanted the judgment to be anonymised, and they argued that the relevant considerations were similar to those applicable to applications for the court's approval of a compromise under CPR Rule 21.10.[621] In

[618] Read Thomas Fletcher, 'My business is your business: the Court of Appeal's decision in MN v OP' (2019) 25 Trust & Trustees 753, 754

[619] Ibid, 755

[620] Ibid, 755

[621] Civil Procedure Rules, r 21.10 provides that

(1) Where a claim is made –

other words, the applicants tried to persuade the court to endorse the approach adopted in *Dartford and Gravesham's* case. The Court of Appeal for determination identified two issues: firstly, whether anonymity orders should be the norm for applications under the 1958 Act or should continue to be decided on a case-by-case basis and secondly, even if such orders should not be the norm, whether an anonymity order should have been made on the facts.[622]

As to the first issue, the Court of Appeal upheld the approach in *V v T* and refused to extend the approach in *Gravesham's* case. The court acknowledged that before the enactment of the 1958 Act, the court's jurisdiction to sanction variations of trusts on behalf of children or protected parties would have been treated as part of the court's *parens patriae* jurisdiction.[623] However, the approach in *Gravesham's*

(a) by or on behalf of a child or protected party; or

(b) against a child or protected party,

no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court.

(2) Where –

(a) before proceedings in which a claim is made by or on behalf of, or against, a child or protected party (whether alone or with any other person) are begun, an agreement is reached for the settlement of the claim; and

(b) the sole purpose of proceedings is to obtain the approval of the court to a settlement or compromise of the claim,

the claim must –

(i) be made using the procedure set out in Part 8 (alternative procedure for claims); and

(ii) include a request to the court for approval of the settlement or compromise.

(3) In proceedings to which Section II or Section III of Part 45 applies, the court will not make an order for detailed assessment of the costs payable to the child or protected party but will assess the costs in the manner set out in that Section.

[622] *MN v OP* [2019] EWCA Civ 679, [2]

[623] *MN v OP* [2019] EWCA Civ 679, [55]

case was justified because of the nature of the evidence required for approval hearings, being 'evidence of a highly personal nature relating to the claimant's injuries, current medical condition, future care needs and matters of a similar nature'.[624]

By contrast, the evidence required for applications under the 1958 Act will generally concern the minor's interest, which 'is of a different order of sensitivity to the sort of highly personal medical and other information which parties to approval hearings are required to put before the court'.[625] Similar evidence may be required in a particular application under the 1958 Act. However, that will not be the norm, and the issue must be assessed consistently on a case-by-case basis, following the approach advocated in *V v T*.

As to the second issue, the Court of Appeal agreed that the evidence was insufficient to justify an anonymity order. The Court of Appeal held, in a case involving a substantial family trust, no presumption that an anonymity order would be made in a variation of trusts application.[626] Applicants cannot use the application, potentially as a disguise, to hide all information. If granted, such an order is to protect minors, not adults. For that reason, the judge refused anonymity about the adult beneficiaries' interests even though the allocation of their beneficial interests had not previously been made public.

[624] *MN v OP* [2019] EWCA Civ 67, [69]

[625] Ibid, [69]

[626] *MN v OP* ibid

Instead, the Court of Appeal held sufficient evidence on the issue of demonstrable harm to the minor grandchildren to justify a less extensive order, which would prohibit the identification of those minors.[627] That prohibition did not extend to the identity of any other party to the litigation, the trust, or the trust property at all, while the minors themselves can be identified when they turn 18 years old.[628] Fletcher contends that

> the practical utility of an order under the 1933 Act is, therefore, dubious, to say the least. It is most unlikely that such orders will be viewed as anything but a poor alternative to the anonymity orders which have commonly been sought to date.[629]

At least two main conclusions can be drawn from these cases. Firstly, the Court of Appeal's decision in *MN v OP* is very much in line with the open justice principle. It remains that anonymity orders in connection with applications under the 1958 Act will only be granted where the court is satisfied that it is appropriate in the particular circumstances of the case where the success of an application would be based on the strength of the evidence in support.

Secondly, while it may be intuitively appealing to argue that financial matters were mostly private matters in which there is no public interest for others to know about, such an argument needs a revisit in light of the decisions in *V v T* and *MN v OP*. These two decisions seem to affirm that an anonymity order will not be allowed because the applicants do not want members of the public to know about private financial affairs. Private financial affairs brought before the court may no longer be

[627] This was done under Section 39 of the Children and Young Persons Act 1933.

[628] Fletcher, 755

[629] Ibid, 755

private unless a unique situation justifies anonymisation. Suppose private financial or family affairs are an *ipso facto* basis for granting an anonymity order, then a similar treatment should be given to claimants in other civil proceedings, which should not be the case.

With regard to the evidence, Fletcher argues that:

> it is implicit from the Court of Appeal's decision that evidence of a character similar to that put forward in support of approval hearings under Rule 21.10 of the CPR would carry considerable weight in determining whether an anonymity order should be made in this context.[630]

Realising the threshold set by the court was quite high, he contends that there is 'a considerable degree of uncertainty over the prospects of success for the vast majority of applications for anonymity orders in this context.'[631] While the standard of evidence required in support of an application for an anonymity order may be high, such a requirement is well justified considering the importance of the open justice principle.

4.6 The Metaphor of Being a Future Litigant

Open justice is always justified by relying on the often-quoted legal maxim that "justice must not only be done but seen to be done". However, this maxim alone does not explain what open justice entails. As it goes, the maxim is open to interpretation whether justice ought to be done in the eyes of the litigants or preferably in the eyes of the public. There has to be a sound approach to explicate

[630] Ibid, 756

[631] Ibid, 756

what the maxim entails because one would naturally ponder whose judgment or opinion matters in deciding whether justice has been done and seen to be done.

One of the striking themes argued in this thesis is the reality that members of the public are potential litigants in the future. If members of the public lack confidence, so would the litigants. Litigants bring the baggage they carry before becoming involved in legal proceedings. If members of the public lack confidence, they would not seek court adjudication when they become involved in a dispute, and the rule of law would thereby be eroded.

There is a real risk of being a litigant in future, either as a plaintiff who wants to enforce his legal rights or as a defendant who has to answer a claim. Litigants, thus, do not have the luxury and privilege to pick and choose what norm they are comfortable dispensing with, for example, the need to hold judicial proceedings openly because, as Zedner argues, the two opposing parties, at trial, 'agree not only to the involvement of a third party to resolve [the] dispute but also to the norms and laws according to which the resolution is sought.'[632] Considering that court adjudication is an institutional settlement backed up by a compulsory process, which is the State's monopoly, the so-called "agreement" does not have to be mutual and voluntary. The agreement, therefore, may be foisted upon one party against his will.

As future litigants, members of the public have a legitimate expectation that courts will adjudge whatever case is brought before them fairly, effectively, efficiently, and accurately. The incapability of the judicial system to meet the

[632] Zedner, 75. In the context of the mode in which disputes are resolved, English law currently requires judicial proceedings to be held in public except for certain limited circumstances.

necessary legal standards both in the present case before the court and in the future would erode confidence. It was held by the New Zealand Court of Appeal in *Moevao v Department of Labour* that:

> … the public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction, the Court is protecting its ability to function as a Court of law in the future, as in the case before it. This leads to the second aspect of the public interest, which is the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice.[633]

The legitimate expectation stems from the fact that judges are the public's representatives who are supposed to administer justice transparently, for judicial power is exercised in the name of the public on their behalf. It was held in the case of *Broadcasting Corporation of New Zealand v Attorney-General* that:

> The judges speak and act on behalf of the community. They necessarily exercise great power in order to discharge heavy responsibilities. The fact that they do it under the eyes of their fellow citizens means that they must provide daily and public assurance that so far as they can manage it, what they do is done efficiently, if possible, with human understanding it may be hoped, but certainly by a fair and balanced application of the law to the facts as they really appear to be. Nor is it

[633] New Zealand Court of Appeal in *Moevao v Department of Labour* [1980] 1 NZLR 464, 481

> simply a matter of providing just answers for individual cases, important though that always will be. 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.[634]

The metaphor of members of the public as future litigants bears some resemblance to James Spiegelman's notion of the public. James Spiegelman, former Chief Justice of New South Wales, argued that the "public" that the judiciary serves, 'must not be understood in any immediate populist sense. The judiciary serves the "public" understood as a historical continuum: acknowledging debts to previous generations and obligations to future generations.'[635]

4.7 Behind the Curtain of Ignorance Test

Judges must balance the need to observe the open justice principle, and the demand of other competing interests sought by applicants. In so doing, a balancing exercise is carried out to determine whether the strict necessity test has been satisfied. In addition to the balancing process, courts should consider using the behind-the-curtain ignorance test.

The standard requires one to decide with the same degree of knowledge, experience, fair-mindedness and awareness of the law that the community would expect of a hypothetical reasonable person. Whether the person is in such a position

[634] *Broadcasting Corporation of New Zealand v Attorney General* [1982] 1 NZLR 120, 122

[635] J Spigelman, 'Seen to be Done: The Principle of Open Justice' (31st Australian Legal Convention, Canberra, 9 October 1999), 30-1

would have reasonably accepted the derogation in those circumstances. Behind the curtain test will direct a judge to think like an ordinary member of the public and a potential future litigant. The question that ought to be asked is whether an ordinary member would reasonably accept such derogation in light of the evidence. The answer will most likely be negative if such derogation would impede his ability to know laws and cast aspersion on the judicial proceeding's integrity.

Similarly, according to Rawls, the standards of fairness are determined in the first place by people considering the matter behind a curtain of ignorance. Behind such a curtain, we do not know, *ex-ante*, whether we will be accused of a crime or guilty or innocent. Given this uncertainty, most people would opt for a trial that is most likely to lead to the truth.

Using the behind-the-curtain of ignorance test may be useful to avoid cognitive biases. Our general opinions regarding justice and injustice are informed and shaped by our experiences and sometimes prejudices. Behind the curtain of ignorance, the sole motivation we are biased towards is self-preservation, which is arguably equivalent to preserving the whole society.

Applicants who seek to derogate from the open justice principle are free to mount arguments moved by their interest in the case. However, behind the curtain of ignorance, no one knows what position they will be in the future. Anyone deciding whether a particular derogation from the open justice principle is reasonable in the given scenario before the court would have to face the possibility that they will end up as litigants in that case.

One way to understand the behind-the-curtain of ignorance in resolving the tension between open justice and other competing interests is to remember that you want to ensure that the process will not be detrimental to your confidence in the system. There is no test for measuring the accuracy of individual judgments; we can only assess the measures used for reaching a decision, the quality of the judiciary and its impartiality. The only way to ensure this is to make the process accessible, reasonable and comprehensible to future litigants.

The test is not to replace the metaphor of balancing exercise and the strict necessity test currently used but rather to complement them. It serves as an additional mechanism to ensure that the ability to know the law and public confidence in the administration of justice remains preserved. It requires not only the applicability of an exception to be justified in light of the evidence, but the measures adopted by the court to mitigate the impact of derogation should also be adequate.

4.8 Conclusion

Based on the discussion above, the extent to which the open justice principle applies in a given case will be determined by the quality of evidence adduced by the applicants in support of any application to derogate from open justice. While the strict necessity test is the required test used by judges, it is submitted that judges may additionally rely on the behind-the-curtain test to balance competing interests.

Concluding Chapter

In this concluding chapter, I summarise this thesis's contributions and possible impact, the central arguments of each chapter, and the plausible important directions of future work.

A. Summary of Thesis Contributions

This thesis's central problem concerns the necessity of open justice, which is conveyed by explaining the connection and importance of transparency in the judicial process to both litigants and members of the public. Before I summarise the specific contributions in the remainder of this section, the main conclusions we see emerging from the discussion are below.

i. Members of the public are not just bystanders and observers of judicial proceedings. They are participants in the judicial process, albeit in a different manner and degree from the *dramatis personae* of court adjudication. Members of the public are assumed to participate in court adjudication whenever the judicial process is held openly and transparently. When I said that it was compelling to ensure that members of the public participate in the judicial process, it refers to the fact that the judicial proceedings cannot generally be held privately. Active and direct participation amongst members of the public is limited only to those who are legally allowed to do so under certain circumstances, and the practice varies across jurisdictions.

ii. Members of the public have the right to open justice, and such a legal right may be jurisprudentially justified based on the Interest theory. Apart from

freedom of speech and expression, which is usually invoked to justify one's right to be kept informed about a particular judicial proceeding, the right to open justice has also been advanced in this thesis on the basis that members of the public are future litigants whose confidence in the judicial system is crucial.

iii. Participation of members of the public in the judicial process serves the interest of litigants in having a fair trial because the risk of judges acting unfairly to them is mitigated by open justice. Open justice also helps to level the playing field in the judicial process and mitigate the risk of bullying by an opposing party with more resources and better social standing, as all parties are being pressured and watched to follow the rules. In other words, the notion that members of the public are of less value to the litigants is not entirely true because open justice often forms an intimate and symbiotic relationship with the notion of a fair trial.

iv. Various justifications for open justice in the literature are tied coherently with each other when divided into two types: the justificatory aims and the justificatory basis. A justificatory aim for open justice resides in its efficacy to serve or achieve a particular end, such as promoting accurate fact-finding and correct application of laws. On the contrary, the justificatory basis for open justice does not pay much attention to what open justice can achieve. Instead, it focuses more on certain key elements or characteristics of legal adjudication, the existence of which would, in turn, attract the application of the open justice principle.

The distinction between the justificatory aim and the justificatory basis for open justice is vital because if justificatory aims justify the open justice principle, then the principle should strictly apply to the non-judicial dispute resolution process in the same breadth and manner. To explain the paradox that the open justice principle is only applicable in the judicial process, the primary reason for open justice then must be beyond the pursuit of achieving specific aims. In this regard, the exercise of judicial power itself is the peculiar factor that explains the strict applicability of the open justice principle in court adjudication as opposed to other modes of dispute settlement. Other plausible justifications (they are grouped under justificatory aims) may, nonetheless, additionally explain the need for transparency and open justice in court adjudication.

v. The open justice principle seeks to protect and advance the interest of members of the public more than of the litigants, even though the values of specific justifications may be mutually shared between them. Establishing this hierarchical order is essential, especially in the context of a balancing test exercise to resolve, for example, a competing claim between members of the public (such as journalists) to be informed about particulars of a judicial proceeding and the litigants' right to privacy through an anonymity order application.

vi. While litigants are guaranteed participation in the judicial process through the principle of natural justice, which gives them the right to be heard and the right to confrontation, members of the public would be helplessly abandoned in the absence of open justice.

B. Summary of Each Chapter's Arguments

Chapter 1 (**Understanding Open Justice: A Conceptual Framework)** explained my proposal of open justice as the idea of bringing members of the public, who are not privy to the dispute, into the judicial process and recognising them as "participants." The discussion began by pointing out the flaws of the bundling approach because it did not synthesise all interests of members of the public in the judicial process and provide a clear hierarchy of priority among the stakeholders of open justice.

Despite the widespread usage of this bundling approach in various judicial decisions and scholarly writings, I questioned the lack of an adequate theoretical exposition about the status of members of the public in court adjudication as well as the basis of their entitlement to a laundry list of legal rights expounded by the bundling approach. Referring to members of the public as bystanders, overseers, and observers of the judicial process did not do them justice, nor could it justify their entitlement to many legal rights. This contention was based on the following points.

Firstly, it was inaccurate to reduce the status of members of the public to bystanders, overseers, and observers of the judicial process because of their strong interest in the judicial process, which sometimes trumps the interest of litigants to privacy. Although the rationale for open justice was to protect litigants against the potentiality of judicial arbitrariness, a claim that was always associated with one's right to a fair trial, litigants, on many occasions, were willing to abandon that protection for privacy. Some litigants might have considered it a worthy trade-off because if they were insistent on having open justice, it would practically compromise their interest in privacy to a certain extent. Courts nevertheless have

rejected, in many instances, such requests to curtail the application of the open justice principle and, in turn, favourably upheld the right of members of the public to open judicial proceedings because there is a public dimension to the open justice principle that makes a judge owes a duty to hold a public trial to both litigants and members of the public.

Secondly, in my analysis of the constitutive elements of open justice (as listed in the bundling approach), I argued that open justice seeks to protect and advance the interest of members of the public (non-litigants) more than the interest of litigants. I observed that, of all rationales for open justice, the need to maintain public confidence in the administration of justice, apart from being a justification in and of itself, seems to be the ultimate aim of other justifications. It was pertinent to question why it was so crucial to maintain the confidence of those not immediately involved in a trial through open justice. If there is ever a need to maintain confidence, logically, it should be the confidence of the litigants that is maintained because they are privy to the dispute, and the court's decision will directly affect their rights and obligations.

My answer to the query was twofold: firstly, public confidence must be maintained because members of the public are potential litigants in the future. If they lack confidence, so would the litigants. Litigants bring the baggage they carry before becoming involved in legal proceedings. If members of the public lack confidence, they would not seek court adjudication when they become involved in a dispute, and the rule of law would thereby be eroded. It is essential to allow members of the public to get involved in the judicial process and acknowledge

them as participants through the open justice principle. Secondly, the need to maintain public confidence in the administration of justice was pretty obvious when we realised the range of issues of public concern involved, including the issue of the integrity of public officials, the lack of democratic accountability of the judiciary, and the issue of the effectiveness of the judicial system.

Thirdly, the reductive description of members of the public as bystanders, observers, and overseers would not adequately account for their position in all situations because there was a spatial and temporal limitation to the terminology. Bystanders, for example, may only be used to describe members of the public who were present in the courtroom because bystanders linguistically refer to those who are at a scene but do not take part.[636] I argued that the terminology was also incapable of describing the position and role of those who were, for example, watching a live-streaming broadcast of the judicial proceedings at home, choosing to read the newspaper report after work, and giving a critical assessment of the court's judgment in academia.

The current literature's unsatisfactory explanation of the status of members of the public and their relationship with court adjudication brought me to the next point of suggesting an integrated approach to understanding the open justice principle. In contrast to the bundling approach of describing the open justice principle as an abbreviated reference to several legal rules (the constitutive elements of open justice), I offered an alternative way of understanding what open

[636] In the context of judicial proceedings, unlike lawyers and litigants, bystanders are not allowed to take an active part in the process. In this thesis, I maintain that bystanders who sit in the public gallery participate in the judicial process by exerting the necessary pressure on judges, lawyers, witnesses and litigants through their observation of the proceedings.

justice is by emphasising the principle's underlying general theme and aim.

I argued that a holistic reading of the relevant legal rules suggests that the basic underlying idea of open justice is in the imperative of bringing in members of the public - who are not privy to the dispute - into the judicial process. Without open justice, members of the public would be in a precarious position to protect their interests compared to litigants, whose right to a public trial is explicitly guaranteed statutorily and in various international human rights documents. Moreover, the emphasis on bringing members of the public into the judicial process through open justice will accentuate the structural difference between the judicial and non-judicial process of dispute settlement.

The integrated approach is superior to the bundling approach as the former shifts the focal point of discussion about the judicial process from a litigant-centric perspective to a discussion that puts a considerable emphasis on the role and interest of members of the public in court adjudication. The explanation highlights the value of the procedural aspect of the law to those who are traditionally not part of the trial. The recognition of members of the public as participants in the judicial process is a concrete step towards a more substantive articulation of their position, as opposed to mere bystanders or observers in the broad scheme of the administration of justice.

I anticipated and addressed some possible objections. One of the significant concerns about the plausibility of recognising and treating members of the public as participants in the judicial process was in the obscurity of determining the scope and nature of such participation in court adjudication. As far as the scope of public

participation is concerned, I highlighted the essential and distinct role of members of the public in the administration of justice by making a useful comparison between public participation through agency and public participation through the open justice principle (by making court adjudication open, accessible and transparent). Agency representation is a possible way of arguing that members of the public are, to a certain extent, involved in the judicial process wherein their interest is served, advanced, or defended by at least four different agencies that are directly and actively involved in a case which is before the court: judges, jurors, the Public Prosecutor or the Attorney-General and intervenors.

While acknowledging that the notion of public participation in the administration of justice may be broadly conceived and explained, depending on the context, in two different ways: participation through an agency and participation through the open justice principle, a useful comparison between them indicated that the latter is indispensable for three reasons. Firstly, exclusive reliance on public participation through an agency will practically limit the notion of participation of members of the public. Participation is practically limited because the available opportunities to assume official roles in the administration of justice (such as judges, lawyers, jury, intervenors, and interpreters) are finite.

Secondly, I said public participation through several agencies, such as judges, lawyers, and prosecutors, was potentially defective in the absence of transparency and public accountability because the so-called representatives could commit misrule because of the lack of instantaneous, contemporaneous, and constant involvement of members of the public in the judicial process.

Thirdly, public participation that is actualised through the open justice principle is a key and constitutive element of a public trial that cannot be wholly replaced with agency representation. Therefore, there would be real and practical implications for the judicial process if we conflate these two types of public participation. In extreme cases, if public participation through agency representation is considered a sufficient component of open justice, a private trial may be held as a general norm without offending the open justice principle. It means there will no longer be a significant structural difference between private and court adjudication.

With respect to the nature of public participation that I envisaged in this thesis, the idea of recognising members of the public as participants in the judicial process was not devoid of concrete examples. My analysis of rationales for the open justice principle clarified and amplified the notion of members of the public as participants in court adjudication. I gleaned from the analysis of the rationales for the open justice principle that the values of open justice may be summarised and categorised into two categories. In the first category, some of the rationales capitalised on the instrumental value of publicity whereby members of the public are used to secure the twin primary objectives of trials: to resolve disputes correctly and fairly. Members of the public are believed to be capable of exerting the necessary pressure on judges, lawyers, and witnesses by observing judicial proceedings. Observation of judicial proceedings thus is a real form of participation, albeit a passive one.

In the second category, publicity values are directed towards achieving ends beyond the primary aim of trials (dispute resolution), such as community catharsis

and education. These values are designed to benefit the public. These two categories share that the realisation of open justice values in both categories depends on the public's active participation in the judicial process. The role of open justice in bringing about mutual benefits to both litigants and non-litigants should be seen as compelling evidence that members of the public are an integral part of judicial proceedings.

Furthermore, the fact that the open justice principle entails various legal rights, such as the right of journalists to report judicial proceedings, and generates different legal obligations, such as the duty of the court to hold a public trial, underscores the ongoing involvement of the public in the judicial process. In addition to creating various legal rights and legal obligations, I inferred from various applications for the physical exclusion of the attendees from the courtroom or information embargo that there was a tacit acknowledgement that members of the public were indeed participants in the judicial process. The inference could be logically concluded because there was no need to make such formal applications to the court if members of the public did not participate and they were just bystanders with no legitimate interest and sound legal standing in the trial.[637]

While Chapter 1 endeavoured to explain my proposal of open justice as the idea of bringing members of the public into the judicial process, Chapter 2 (**Reasons for Public Participation**) expounded the basis of claiming that they should be

[637] This application must be reasoned out by the applicants and supported with evidence. Under most of the circumstances, the application is heard in an open court with the presence of both parties, ensuring a fair and transparent process. Ex-parte application may only be allowed in certain limited circumstances for the sake of securing justice, further reinforcing the system's commitment to fairness.

considered participants in court adjudication by virtue of the open justice principle. I began the discussion by dividing the rationales for open justice into two types: primary and secondary. As opposed to the secondary justifications (such as the promotion of accurate fact-finding and correct application of the law, procedural fairness, community catharsis, and education), which are justificatory aims, the primary justification, on the other hand, is more aptly described as a justificatory basis.

In this thesis, it has been argued that court adjudication is required to be open because it is *a process of public enforcement or application of legal norms by the judicial authority*. This peculiar aspect of court adjudication, I argued, constitutes the primary justification for open justice because (i) it encapsulates the basis of bringing in members of the public into the judicial process; (ii) it integrates other plausible justifications (such as the promotion of an accurate fact-finding and correct application of the law; procedural fairness, community catharsis, and education) which may also explain the need for transparency in court adjudication into a single coherent unifying argument in support of the open justice principle; (iii) it explains the inapplicability of the open justice principle in the non-judicial dispute settlement process; and (iv) it is relevant and applicable to all types of cases in both civil and criminal trials (inclusive of the trial and appellate stages).

Drawing, in particular, on the principle of the rule of law, I contended that the requirement to hold judicial proceedings in public is an institutional process that cannot, in most situations, be dispensed with. The grammar and logic of judicial openness that I explored suggest that the absence of, or an unjustified dispensation

with the requirement of open justice may jeopardise many elements of the rule of law, such as the need for the law to guide human affairs, the promotion of a consistent application of the law, the accountability of public officials and the actualisation of reciprocal expectation among fellow members of the society to abide laws. The possibility of putting these elements of the rule of law in jeopardy was elaborately discussed in three different yet inter-related conceptions of trial: (i) trial as a law-applying and law-making process, (ii) trial as a fact-finding process, and (iii) criminal trial as a moral discourse. I suggested that the extent to which law facilitates openness of the judicial process may express the intensity of our commitment as a community to the idea of government under the rule of law.

Extending the discussion on the need to curb the exercise of arbitrary state power, a major theme in the rule of law discourse, I have also considered the impact of secret trials or an unjustified dispensation with the open justice principle on our freedom as members of the society, who are not privy to a dispute which is before the court. Political theorists have written much, offering different analyses and conceptions of what freedom is and how freedom can be secured in our society. Of all theories, I adopted Pettit's version of republicanism as the basis of discussion on the notion of freedom in chapter 2.[638] Pettit claims that the primary focus of his republican ideal of freedom as non-domination is to eliminate or, at least, mitigate

[638] I find that Pettit's republican conception of freedom as non-domination is more attractive than liberty as non-interference because of its emphasis on the capacity to interfere with someone rather than actual interference matters. The potential to dominate others is problematic and needs an institutional response to prevent domination. Being subjected to arbitrary interference does not always require that an actual act of interference be committed: mere knowledge that I may be arbitrarily interfered with is enough to limit my liberty. In other words, being exposed to the dominating power is sufficient to affect one's freedom. See, Pettit, 58

the possibility of being arbitrarily interfered with by others.[639] Eliminating the possibility of arbitrary interference is a central idea of Pettit's version of republicanism, which is different from freedom as positive liberty.[640] I argued that it was plausible to hold that "secret justice", as opposed to open justice, is arbitrary within the contemplation of Pettit's freedom as non-domination because, according to this view, one is sufficiently deemed to be dominated and less free if he was in a vulnerable situation wherein arbitrary interference by others is likely to occur.[641]

The emphasis on rejecting the mere presence of arbitrary power in freedom as non-domination stems from the discourse surrounding the master-slave relationship. Republican conception of political liberty aims to capture the condition of not being subject to the arbitrary or uncontrolled power of a master. A slave lacks freedom because he is vulnerable to the arbitrary and uncontrolled power of his master, regardless of whether his master happens to exercise that power or not.

In the context of this thesis, I argued that we are being dominated and less free when judges can act arbitrarily if and when there is no legal obligation to hold a public trial. I argued that the absence of such obligation is a form of domination when judges may keep us in the dark about how the judicial power is being exercised, rendering it impossible to assess what effect such proceedings have had on the litigants and potentially on us.

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[639] Ibid, 27

[640] Freedom as a positive liberty is thoroughly discussed in Berlin. Unlike the principle of non-interference, which is part of the concept of freedom as positive liberty, the principle of non-domination rejects not only the actual arbitrary interference but also the possibility of having arbitrary interference.

[641] Pettit, 85-86

Chapter 3 **(The Right to Open Justice)** was written to address three main questions: whether the principle of open justice necessarily entails legal rights such as the right to observe and report judicial proceedings. If so, what is the basis and whose right? Following the discussion in Chapter 2, I demonstrated in Chapter 3 that there was a sufficient basis to grant both litigants and members of the public the right to open justice. It was another testament that the latter are not just bystanders, overseers and observers. They were rather participants in the judicial process whose interest may sometimes trump the litigants' interest.

I relied on the Interest theory, which has been widely used in the legal right discourse, as a basis of discussion to prove the following two interests can become the grounds to grant members of the public the right to open justice: (i) the interest of knowing the law as a source of guidance and (ii) the interest of maintaining one's confidence in the administration of justice. Considering the centrality of courts in a modern legal system, I argued that these two interests are not negligible interests that can be summarily set aside even when there is a conflict with other competing interests, such as the litigants' interest in privacy.

Chapter 3 would serve a few purposes in the context of my thesis. Firstly, it reinforced the need for public participation in court adjudication, which was recognised and enforced through the open justice principle and the language of the right. While the right to a public trial was typically discussed as a right of the litigants, I argued that it should be extended to members of the public as well, making them integral to the judicial process.

Secondly, it reaffirmed the need for public participation in the judicial process, which was not driven by concern for the litigants' well-being and interests only. Given that the open justice principle had a public dimension, judges owed the duty to hold open judicial proceedings to members of the public, too.[642] One of the practical implications of this aspect could be seen in the limited application of the doctrine of waiver of a legal right. While litigants may opt to waive their right to a public trial, for example, it does not follow that the court should subsequently hold the trial behind a closed door because a waiver of a right would not necessarily create a new claim of right and generate new waves of duty, i.e. the right to a private trial and the obligation to hold proceedings behind closed doors. The effect of a waiver of the right to a public trial is limited to the fact that the court cannot be taken to task in the future by the litigants if, indeed, there is a breach of a particular duty owed to them. This limited application of the doctrine of waiver of the right to a public trial further highlighted that members of the public have an equal share of interest in participating in the judicial process.

Thirdly, it underscored that the interest of the litigants in having a fair trial was partly contingent upon participation by members of the public in the judicial process. The contingency claim here was remarkable because members of the public who claimed access to court documents and proceedings, for instance, were potentially seen as busybodies wanting to meddle in the personal and private affairs of others. To say that the interest of the litigants was, to an extent, advanced by

[642] *Lilly Icos Ltd v Pfizer Ltd*[2002] EWCA Civ 02

public participation would help allay the misconception again that members of the public played a minor role in court adjudication.

Chapter 4 (**The Scope of Exceptions to the Open Justice Principle**) was my attempt to investigate the extent to which the metaphor of balancing used by the court can manage the competing demands of open justice with other interests. While conflicting interests are not easy to resolve, and my Inclusivity thesis may not provide a clear way out in all scenarios, understanding the connection between members of the public and the judicial processes would provide a more robust understanding of the enduring tension. If there were valid reasons to allow exceptions, it must be recognised that the exceptions involve sacrificing something significant in the administration of justice.

C. Direction for Future Work

The Scope of Limitation: The discussion presented in Chapter 4 leaves a promising direction for future research in the scope of limitation. It would be interesting to investigate the extent to which the open justice principle would be applicable in other areas of exceptions, such as the protection of national security. I believe that additional investigations would help better understand the differences between exceptions and the conditions under which each exception best applies.

A Potential New Area of Study: The discussion presented in Chapters 2 and 3 culminated in the conclusion that the long-standing practice of holding judicial proceedings publicly because members of the public have a unique status and role to play in court adjudication and excluding them from the judicial process would go

against the public interest. In the future, it may be interesting to explore whether a similar proposition (with necessary modifications) can be considered for arbitration.

There have been intermittent calls for greater transparency in arbitration. Lord Neuberger, for example, calls for greater transparency in the arbitration process because unnecessary privacy is a real concern. He emphasised that without transparency, 'many arbitrators will feel relatively free to do what they want rather than to give effect to the law. This is a particularly great temptation now that it is so difficult to appeal an arbitration award.'[643] Perhaps a specific study can be done to investigate the connection and role of members of the public in Investor-State arbitral proceedings because now there is a general rule of publicity for Investor-State arbitration. Rule 6 (1) of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration reads, 'subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument ("hearings") shall be public.'

Rule 6 (3) further provides, 'the arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organising attendance through video links or such other means as it deems appropriate).' The publicity rule for Investor-State arbitration is a positive development that recognises the importance of transparency in the arbitral process.

(81,500 words)

[643] Neuberger, 'Arbitration and the Rule of Law', [23] [24].

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