

ONLINE COURTS AND PRIVATE AND PUBLIC ASPECTS OF OPEN JUSTICE: ENHANCING ACCESS TO COURT OR VIOLATING THE RIGHT TO PRIVACY?

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Abstract: As the technological revolution takes over the world, the justice system is also susceptible to change. The Online Court of England and Wales ('OC') is an example of such a step taken in that direction. However, some argue that this has vast implications on access to justice for the 'digitally excluded' or the Litigant-in-Persons (LIP). While this argument is warranted, it fails to address the two essential implications of Online Courts: First, the potential of online courts to enhance access to justice by legally empowering LIPs along with enhancing access to court for them (Private Aspect of open justice). Further, such access to court is enhanced for the general public and the media (Public Aspect of open justice) alike. Secondly, the threat of uncontrolled access to online proceedings facilitated by modern avenues like 'live-streaming' and 'live-tweeting', turning justice into a disruptive one. This article argues that OC is better placed at improving access to justice issues than physical courts, by enhancing both the private and public aspects of open justice. However, enhancing the public aspect also poses major threats to the Right to Privacy of individuals. Further, this article argues that a more nuanced approach towards a future technology-focused justice system needs to balance the public aspect of the open justice principle with the Right to privacy. Hence, this article suggests that regulative and accountability measures like 'penalty point systems' should be placed right from the outset to prevent any leakage of sensitive data prompted by uncontrolled access to online courts.

Keywords: Online Court of England and Wales, open justice, right to privacy, uncontrolled access, digital exclusion.

INTRODUCTION

Developing on the digitisation reforms (England and Wales) in 2015, the Civil Courts Structure Review (CCSR) proposed Online Civil Court ('OC') aimed at not only reducing the cost of justice but also improving access to justice by making it Litigant-in-Persons (LIPs) -centred (Sorabji, 2017). It was intended to adopt a three-stage process: first, 'Triage' or the automated process providing guidance and online assessment of the disputes; second, a mix of conciliation and case management by case officers and; third, adjudication. The final stage of adjudication consists of the determination of cases by judges either on documents, on the telephone, by video or at the face-to-face hearing, but 'no default assumption that there must be a traditional trial' (Briggs J, 2016). According to Susskind, OC can be understood as a three-tier structure which is based on three components of access to justice namely: Dispute resolution (Tier 3), Dispute containment (Tier 2) and Dispute avoidance (Tier 1)(Susskind, 2020). He categorises Tier 1 and Tier 2 as extended courts, and Tier 3 as 'Online judging'. Here Tier 1 or the 'Triage' stage offers

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some sort of guidance and online assessment of the dispute so that disputes can be avoided altogether. This is particularly relevant for the self-represented litigants as they often enter the court unequipped. Further, Tier 2 or the mix of conciliation or case management stage will help the self-represented litigants to assess whether they have justiciable grievances and when they learn that there is little prospect of success, they might decide to not proceed with escalating the dispute. Alternatively, if they decide to proceed, the case officers will facilitate them to settle the dispute without involving judges. However, with the option of involving judicial attention if case officers deem fit for resolution of a given dispute. This is not an alternative to the court system but an integral part of the system itself and offers an 'extended court' service by offering various forms of non-judicial settlement within the same system (Susskind,2020). More precisely, 'extended courts' aim to extend the court services and reach of courts for those unfamiliar with the law. Lastly, if disputes are not disposed of at Tier 1 or Tier 2, then parties will progress to the third stage of 'Online Judging'. Online judging involves judges and focuses on the determination of disputes based on written material, in an asynchronous proceeding² with no compulsion (although an option) of a public hearing. Hence, he argues that in comparison to other methods of dispute resolution, OC is best placed to enhance each of the three elements of access to justice (Susskind, 2020, p118). In this context, the CCSR report concludes that issues of open justice related to an OC are more technical than substantive, which can be overcome with a robust IT system, subject to sufficient funding by the HMCTS (Briggs J, 2016).

Susskind categorises open justice as one of the principles of access to justice and argues that online courts (as a hybrid of extended courts and online judging)³ stand to enhance the principle of open justice through (A)the empowerment of 'non-lawyers' through guidance and (B) enhancing 'information transparency'. He argues that 'information transparency' does not always translate into the 'gathering of parties or the public in a physical court' and can mean that courtroom proceedings are under public scrutiny irrespective of their physical presence before the judge (Susskind, 2020).

In the context of OC, European Convention on Human Rights (ECHR) is a relevant instrument (Scott v. Scott, 1913) ⁴as the open justice principle embedded within Art 6 of the Human Rights Act (1998) has been ultimately taken from the ECHR and forms part of the 'Convention Rights'. Moreover, reference to ECHR will allow a broader exploration of the open justice principle under Art 6 (ECHR), which consists of two aspects namely private and public. Both aspects cover similar intricacies of open justice as described by Susskind in the form of: (A) right of private litigants to have civil proceedings in an open court and (B) publicity principle which provides access and reporting rights to the media

² Where parties are not all present at the same time like in an adversarial setting. See, Ayelet Sela, 'Streamlining Justice: How Online courts Can resolve the challenges of Pro Se Litigation' (2016) Pg 30

³ Online judging where there is a determination of dispute solely on the basis of a written document and not synchronous which requires all parties to be present at the same time. While extended court allows synchronous proceedings and is a virtual manifestation of an adversarial trial.

⁴ See, N.A Radin 'The Right to a Public Trial'[1932] Temple L.Q 381

and the public. From a wider perspective, access to court remains an essential element common to both aspects of open justice (Ryder, 2018). Hazel Genn (2017) argues that online courts violate the right to access the court for the LIPs due to ‘digital exclusion’. Further, she argues that online court processes lack transparency in procedure and prevent media participation. Similarly, Sharon Rodrick (2017) points out that the use of technology in the justice system poses threat to open justice as it takes place on an unobserved platform devoid of public scrutiny. However, such a view fails to acknowledge the issue of uncontrolled access prompted by such online courts and its implications on the Right to Privacy. In this context, I argue that, on one hand, OC enhance open justice and can potentially overcome digital exclusion. On the other hand, it poses risks of violation of the Right to Privacy in a technology-focused justice system of the future.

First, I argue that the OC enhances open justice in both its private and public aspects which ultimately enhances access to justice. The private aspect requires better access to court and empowerment of LIPs which is enhanced by improving their participative experience as per the ‘Ladder of Participation Model’ (McKeever, 2013). The public aspect is enhanced by the enhancement of ‘information transparency’ prompted by modern avenues that allow direct/easy access to court proceedings/court materials for the press and the members of the public.

Second, I argue that HMCTS and the government can collectively and gradually overcome the issue of digital exclusion through a multi-channel approach (including face-to-face help, design and technology) (GTF and HMCT, 2017-22).

Third, I argue that modern avenues like live tweeting and live streaming pose privacy threats in the form of personal data/information leaks due to enhanced uncontrolled access to the public during online proceedings (Puddister and Small, 2019).

Finally, I conclude, that a more nuanced approach is to open the doors of the court, but not too much, by striking a balance between the public aspect of the open justice principle and the Right to Privacy through regulative and accountability measures while allowing access to court proceedings for the general public.

1. ACCESS TO JUSTICE AND OPEN JUSTICE PRINCIPLE

Susskind has argued that ‘Access to justice’ is just not limited to access to a quicker, cheaper and less combative mechanism for resolving disputes. According to him, access to justice also means deep empowerment of all members of society including non-lawyers or the general public (Susskind, 2020). Hence, he argues that access to justice needs to embrace four different elements: namely, *dispute resolution*, *dispute containment*, *dispute avoidance* and *legal health promotion* (Susskind, 2008). He explains that while *dispute resolution* is the central service of any court, there is also a need for better methods of *dispute containment* whereby the justice system needs to avoid any escalation. Hence, efforts need to be made to encourage resolution informally and pragmatically. Further, he takes inspiration from medicine to make a case for *dispute avoidance*, whereby ‘prevention is better than cure’. Hence, he suggests that even non-lawyers be equipped with

legal guidance and training to avoid legal obstacles, just like lawyers. Lastly, he suggests that the law can be used as a tool for promoting general well-being. He argues that *legal health promotion* is aimed at helping people in a timely way, knowing about and acting upon the benefits, improvements and advantages conferred by law. Further, from a legal lens, he describes justice as a combination of the following principles: namely, Substantive Justice, Procedural Justice, Open Justice, Distributive Justice, Proportionate Justice, Enforceable Justice and Sustainable Justice. Hence, according to him each of these principles need to contain the four elements of access to justice as discussed. This article does not expand on each of these principles but only aims to analyse how access to justice is enhanced through the open justice principle in the case of the OC of England and Wales.

Susskind categorises open justice as one of the principles of access to justice and argues that online courts stand to enhance the principle of open justice through the empowerment of ‘non-lawyers’ and enhancing ‘information transparency’. He explains that open justice as a part of the access to justice principle is understood in terms of the legal enablement of LIPs to navigate the system on their own through legal guidance and not mere access to physical court buildings (Susskind, 2020). Further, according to him, information transparency means ‘visibility over the court processes, procedures and operations along with public access to advance notice of hearings, to some kind of record of proceedings and to information about the parties and procedure involved, the nature of the dispute and to some detail about the case management decisions, the substance of the determination itself and an explanation of the finding’ (Susskind, 2020).

In the context of OC, ECHR is a relevant instrument for tracking the wider legal and constitutional essence of the open justice principle.⁵ Significantly, as the Human Rights Act is based on the ECHR itself in the form of Convention Rights. The open justice principle embedded within Art 6 of the European Convention of Human Rights consists of two aspects namely private and public. Both aspects cover similar intricacies of open justice as described by Susskind to understand the comprehensive underpinning of this principle. Additionally, Art 6 of the ECHR, also describes the public aspect of open justice as a Publicity Principle (consisting of open court, access to judgments and the right to publicise as part of Art 10, ECHR). From a wider perspective, this means that the open justice principle consists of three interrelated principles namely: equal access to courts, open court or public hearing for scrutiny (by public and media) and finally, accessibility to written public judgments (Ryder, 2018). What remains at the heart of open justice is its relationship with equal access to courts (Ryder, 2018). Hence, the open justice principle entails access to court as one of the essential elements common to both the private aspect

⁵ As ECHR is a regional human rights instrument for the whole of Europe and the UK though no longer a part of EU is still committed to ECHR to a certain extent following the Political Declaration of 2019 and the EU-UK Trade Agreement read together. See, THE EU-UK Trade and Cooperation Agreement (30 Decemeber, 2020) <https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en>; Also See, Political Declaration setting out the framework for the future relationship between the European Union and United Kingdom, Official Journal of the European Union (2019/C 3841/02) <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/DCL\(01\)&from=PT](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/DCL(01)&from=PT)>

and public aspects of the open justice principle. Therefore, the private aspect is about enhancing access to court for LIPs along with their empowerment as a non-lawyer and, the public aspect is about enhancing access to the public and media for utmost transparency of court proceedings. This section discusses the principle of open justice in this context, by analysing how the OC is better placed at enhancing both aspects of open justice in comparison to the physical courts.

A. Online Court and The private aspect of open justice: Access to court and Legal empowerment for LIPs

As discussed before, Susskind has listed four essentials for ensuring access to justice which is more than dispute resolution and is aimed at legally empowering all sections of society (Susskind, 2020). As the open justice principle is one of the principles of access to justice, it needs to prompt legal empowerment for the LIPs along with ensuring access to the court. This aspect of open justice is embedded under Art 6 of ECHR as private open justice, which guarantees the private rights of litigants to insist that civil proceedings be held in an open court (Zuckerman, 2021). It includes the rights of the parties to participate, observe and access the outcome of the proceedings (McKeever, 2022). One of the most important aspects of access to court is the effective participation of the Litigants-in-Persons (LIPs) in the proceedings (McKeever, 2022). Effective participation in this context means that LIPs are enabled to make a case for themselves without any help from a lawyer, which is easily understandable by the court to make a decision., However, due to a ‘lawyerish’ culture and the current structure of the civil court system of England and Wales, they are hit with complex civil court procedures and laws that they are expected to navigate themselves (Barton v. Wright Hassall LLP, 2018) . This is mainly prompted by a lack of guidance for the LIPs in an adversarial setting. Hence, LIPs have difficulty understanding the norms of the court which blocks their effective participation in such a setting (McKeever, 2013). Moreover, their lack of cooperation and [in]ability to assist the courts leads to further delays (McKeever, 2013). Though there is no precise definition of effective participation, however, in the context of procedure, it finds its basis in procedural justice (Tyler, 2000; Solum, 2004). While the concept of procedural justice is too broad to be contained here, McKeever’s model of the ‘Ladder of participation’ which draws from the literature on procedural justice is of relevance (McKeever et al., 2022). Through this model, McKeever argues that legal participation can have different forms and covers a range of experiences. Depending on the number of participation barriers for the LIPs, their participative experience can be defined into three broad categories (McKeever, 2013; McKeever, 2020): non-participative, tokenistic or participative. Non-participative experiences involve feelings of isolation, exclusion, and inability or unwillingness to participate in legal proceedings. Tokenistic experiences are defined as obstruction, caused by delays or lack of adequate information or guidance or ineffective support during the legal proceedings. Participative experiences include the engagement of the user to an extent where they navigate the process, communicate with the other actors (parties, judges etc.), feel supported in the process and have opportunities to collaborate (McKeever, 2013). This model which is based on a two-year empirical study on LIPs and court actors in the civil and family justice system has found that when the feeling of participative experiences is increased for the LIPs, it reduces the risk of breach of Art 6 of ECHR for them (McKeever

et al, 2018). Hence, this model suggests that participative experience needs to be increased through processes that can make them feel enabled ('where they are made to feel supported and equipped to engage in the process'), allows collaboration ('where individuals are supported in their journey through the process') and provides engagement ('where users can navigate the process and communicate with the other actors') (McKeever, 2013). This in turn lays the foundation for future reform initiatives to further develop certain processes whereby access to court can be enhanced effectively for the LIPs in alignment with the open justice principle as embedded with Art 6 of ECHR.

a. How does OC enhance the private aspect of open justice?

The HMCTS Reform Programme aimed at digitising the whole of the processes of the court needs to be tested on 'effective participation' as far as its ambition of modernisation, efficiency and improved access are concerned. The current reform programme identifies two ways of achieving the set goals⁶: First, by simply replicating the current practices of the court digitally; second, by radically using the new IT for designing new processes and procedures that are not capable of being carried out on paper. Building upon the latter is the OC proposed under the CCSR report (Briggs J, 2016). It intends to adopt a three-stage structure namely: Stage 1: 'Triage' or the automated process; Stage 2: Mix of conciliation with case management by the case officer and, Stage 3: 'Determination of disputes by the judge either on documents, by video or face to face hearings with no default assumption that there must be a traditional trial.'

A close analysis shows that these stages mirror the participation experiences enlisted under McKeever's Ladder of Participation as discussed before (McKeever, 2013). For example, through user-focused Stage 1, parties are enabled to identify their grievance and a legal document is produced which is easily understandable for both the parties and the court. Subsequently, all the documents with essential details (of parties, evidence etc.) are placed before the court. These are always accessible to the parties along with the judges during the proceedings right from the start. Then, Stage 2 adopts conciliation as a cultural norm. It is showcased as the next step instead of a purely optional process, and not compulsory. It is built upon the current small claims mediation service by inviting parties to collaborate and engage in an appropriate form of conciliation (Briggs J., 2016). Finally, Stage 3 adopts adjudication that radically departs from the traditional practice and adopts resolution based on written communication as a primary practice. If parties reach this stage, then case officers become facilitators who produce case files ready for trials. This allows effective engagement with the judge and the opposite parties. Since the case file is prepared through case officers, it is understandable to the judge, so that he/she can make a fair decision. Further, if a decision cannot be made based on written communication,

⁶ Joint Statement of Lord Chief Justice, Senior President of Tribunals and the Lord Chancellor, Reforming HM Courts and Tribunals Service (25 July 2013) https://www.google.com/url?sa=i&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0CAMQw7AJahcKEwiItMeVzv36AhUAAAAAHQAAAAAQAw&url=https%3A%2F%2Fwww.gov.uk%2Fgovernment%2Fpublications%2Ftransforming-our-justice-system-joint-statement&psig=AOvVaw0IbdxRmmC_T49tSIp63k5v&ust=1666863928927909

then the options of telephone or video conference are explored with no assumption of compulsory face-to-face hearing. Moreover, such modes are preferred for their effectiveness in such cases. This is also supported by the CJC -Rapid review report that during Covid-19, the majority of respondents felt that audio hearings (61.3%) and video hearings (68.37%) were more effective in allowing both parties to participate than a physical hearing (CJC,2020). The respondents felt that such modes of hearing were especially effective for non-contentious, non-complex and routine matters (CJC, 2020, Para 5.28). However, the report also highlights the challenges posed by remote hearings (for the LIPs) due to a lack of guidance or support to access such hearings. Additionally, some other technical issues like lack of voice clarity, video clarity and interruptions, were also found commonplace.

b. How does OC stand to overcome the challenges of an adversarial setting for the LIPs?

Adversarial Setting mainly poses two kinds of challenges for the LIPs: 1. Lack of guidance which makes the self-navigation of the civil system difficult and frustrating. 2. Feelings of Non-participation or tokenistic participation which is a consequence of the absence of guidance and support in the present adversarial setting (McKeever, 2013).

As far as the challenges of lack of guidance are concerned, they potentially stand rectified through Stage 1('Triage') and case management support in Stage 2 of the OC. The 'technical guidance' and 'legal support' in-built into the software aims to provide guidance to the LIPs from start to finish of the OC process. This is evidenced by the successful model of the Civil Resolution Tribunal (CRT) that is currently implemented in Canada (Salter & Thompson, 2017). The CRT takes a four-step end-to-end design instead of an add-on approach. It begins with *self-help* or the Solution explorer which assists a user in understanding and resolving their dispute (Luger & Chakrabarti, 2009). It is accessible to all users without any cost and is structured in a computer-readable format. The further stages of *negotiation* and *facilitation* are designed to encourage collaborative resolution for better outcomes for the users at less cost. Additionally, the facilitator is equipped to identify other barriers like language or disability and adopt interpretation services to overcome such barriers (McKeever, 2013).

Further, Non-participative or tokenistic experiences are reduced for the LIPs through all stages due to inherent features allowing collaboration and engagement with the legal process. Significantly, the stage of *adjudication*, which, unlike the traditional trial process is a hybrid of the adversarial and inquisitorial processes. This offers 'effective participation' to the LIPs through direct engagement with the other party and the judge (McKeever, 2013). It practically implements the reform standards based on the 'Ladder of Participation' model, designed to encompass enablement, collaboration, and engagement of the user, with the entire process (McKeever, 2013). Therefore, unlike an adversarial system, it allows early resolution through mutual agreement between the parties (Salter & Thompson, 2017). Further, if the question of audio/video hearings arises, OC would ensure greater participation by the parties (LIPs) in comparison to a physical court due to ease of access online (Briggs J., 2016). Indeed, the challenges of voice clarity etc. could still arise in such cases that can impact user engagement with the process. This can be essentially

detrimental in cases whereby significant explanations are required from the defendant to determine the outcome in a fair manner (R Howard League v. vice Chancellor, 2017). However, the OC would accommodate oral hearings when such a case demands, even if it is not the general rule. This way it enhances the effective participation of the LIPs by overcoming the challenges of access to a physical court in a pure adversarial setting.

B. Online Court and the public aspect of open justice

As discussed before, Susskind argues that ‘information transparency’ is an important element required for enhancing the open justice principle and hence general public along with the media needs to have access to court, court proceedings and court materials/decisions (Susskind, 2020). According to him, information transparency means ‘visibility over the court processes, procedures and operations along with public access to advance notice of hearings, to some kind of record of proceedings and to information about the parties and procedure involved, the nature of the dispute and to some detail about the case management decisions, the substance of the determination itself and an explanation of the finding’ (Susskind, 2020). This public aspect of the open justice principle is embedded under Art 6 (ECHR) which relates to the right of the media and the members of the public (Zuckerman, 2021). It also contains the account of open justice as an open court that allows media and the public to observe the proceedings, access the documents and judgments, and publicise/report it under Art 10 of ECHR as a matter of Freedom of speech and expression (Ryder, 2018). Bentham describes it as the ‘soul of justice’ that *exposes the* ‘judicial process to the public gaze and constitutes an important safeguard against bias, unfairness and incompetence’ (Twining, 1985). While the general rule is that the hearing must be in public, however, it is not an absolute rule. Hence, Art 6 adds that:

The press and public can be excluded from all or part of the trial in the interest of morals, public order or national security, for the protection of the interest of juveniles or private life, to the extent strictly necessary in the opinion of the court in special circumstances (ECHR).

Further, it is also subject to certain practical limitations like the availability of physical space and good order in the courtroom (Re Guardian News, 2010). Additionally, access to court can be limited in a case that does not involve the determination of rights and obligations (Gearty, 2001). Similarly, when parties decide to go for alternative resolution mechanisms like mediation or conciliation, there is no right for the public or the media to access it (Genn, 2009). Nevertheless, the prohibition of the press is subject to ‘strict necessity’ and is not a general rule (Scott v. Scott, 1913). For example, even during Covid-19, a threat to public hearings was realised. Hence, a Protocol was issued by the Lord Chief Justice on 20th March 2020, stating that: ‘remote hearings so far as possible should be public hearings’ (Protocol, 2020). It provided three ways of achieving this, namely: by conducting a hearing from an open court (not possible during covid 19), allowing accredited journalists to log in (as a partial solution) and finally, by live streaming. Although a likely restrictionism showcased by the English court towards live streaming, during Covid, as seen from legal prohibitions (Law Commission of England & Wales, 2014) and saving it

for exceptional cases⁷, this option was, nevertheless, explored in cases like the *National Bank of Kazakhstan* (2020). Here, Teare J directed a completely open Livestream allowing anyone clicking on the link to directly access it on YouTube without any warnings or conditions under which the court materials would be made available. In this case, the hearing was uncertain following the outbreak of Covid-19 leading to travel restrictions and social distancing. Thomas Sprange (for the defendants) argued that a short adjournment should be granted as he was not confident about the video conferencing facilities in such a complex case involving overseas witnesses in diverse geographical locations. However, Teare J emphasized that ‘if at all, possible arrangements should be made for the case to go ahead using remote facilities’ (National Bank of Kazakhstan, 2020). He added that in the current circumstances, it is important to ‘use the technology and allow the court business to run as normal’. Further, the court highlighted that ‘courts exist to resolve disputes and the default position is that all jurisdictions should conduct hearings with one, more than one or all participants remotely’. This is ultimately underpinned under the Court of Appeal YouTube ‘live streaming pilot’ that finds legal backing Court of Appeal (Recording and Broadcasting) order (2013), that allows live broadcasting of court proceedings. Indeed, the judgment doesn’t make a negative proposition in regard to adjournment, however, lays the importance of holding public hearings whenever possible using remote facilities (irrespective of the outbreak) as an innovative solution (Stewarts, 2020). Thus, indicating that open justice remains a ‘vigorous manifestation’ of the principle of Freedom of Expression under Art 10, ECHR (*R v. Secretary of State for Foreign and Commonwealth Affairs*, 2011).

a. How do modern developments in public hearings pose challenges to the open justice principle?

Traditionally, in the English system, a public hearing was understood as a normative oral hearing, where public access to the court meant people could attend the court process and observe the proceedings from start to finish, which was completely oral (Zuckerman, 2021). Therefore, the public could hear the entire proceedings and easily understand them. However, due to modern developments in the procedures, oral hearings have been replaced with written communications, (as seen in continental Europe) (Zuckerman, 2021). This means that a public hearing can be entirely oral or can have limited orality with an examination of written documents, and in some circumstances, it can be based on the determination of written documents only (*SmithKline Beecham v. Cannaught Laboratories*, 1999). From a conservative lens, proceedings that are based on only written materials would not allow public hearings as such and might deter the principle of open justice centred around the idea of an open court. Susskind argues that it is disproportionate to expect a physical gathering of parties in a physical court every time even if the case involves a low-value dispute (Susskind, 2020). Moreover, he argues that ‘physical courts are not the epitome of open justice and only provide limited real-time transparency’ where even if the public is in the audience of the judge, they cannot know the approach followed by the judge to reach that judgment. Hence, it is not be assumed that when the public can observe the judge

⁷ 26TH March Protocol, *Making live streaming completely discretionary. Subject to conditions of section 85A to D courts Act 2003*, <https://www.judiciary.uk/you-and-the-judiciary/going-to-court/court-of-appeal-home/the-court-of-appeal-civil-division-live-streaming-of-court-hearings/>

while he is making a decision, it leads to the utmost form of transparency as the mindset or decision-making process of the judge is still hidden from public knowledge (Susskind, 2020). In such a scenario, fixating on a physical hearing can prove very costly, complicated and time-consuming for the resolution of such disputes. Hence, what becomes important is a sensible mechanism that can allow scrutiny of the court materials/decision and provide ample information to the public about the case. Due to this shift from public hearings towards written documents, gaining access to court materials is of paramount importance for open justice (Bosland & Townend, 2018). Under art 6(1) of ECHR, it is required that the judgments be made public, even if not pronounced publicly (Zuckerman, 2021). However, case statements/ court documents are generally prepared by lawyers and contain legal jargon that is not easily understandable for non-lawyers and non-judges. This makes it difficult for the public to comprehend the trial, let alone report or publicise it (Zuckerman, 2021). Similarly, the legal language used in the judgments or orders is not easily comprehensible (English v. Emery & Strick Ltd, 2002). Moreover, there is per se, no right to access documents by a non-party. In the Cape intermediaries case (2019) it was held that ‘the default position is that the public should be allowed access, however, a non-party still has to explain why he/she seeks such access and how is it advancing the open justice principle’. Therefore, in such a scenario the ‘practise and proportionality’ will continue to stay relevant to such a request (Cape Intermediaries, 2019). Given the limitations, the role of media becomes even more important to inform and empower the non-parties or the general public. However, due to administrative difficulties and practical impossibility in the face of scarcity of space and difficulty of maintaining good order, media is cut off from the proceedings, if not deliberately, consequentially (Bosland & Townend, 2018). Journalist in the UK has since long raised complaints about difficulty in accessing court documents and exhibits (Bosland & Gill, 2014). Amongst other issues are unreliable and inconsistent access to daily court lists and information about the court orders requiring a physical visit to the courts (Law Commission of England and Wales, 2014).

b. How does OC overcome the challenges of access to a physical court and enhance open justice?

The third stage of OC finds compatibility in existing rules that allow the determination of disputes based on written communications with no compulsion of the oral hearing (Briggs, 2016). As far as the challenges of accessing court documents are concerned, they stand potentially rectified through OC as they can be accessed with ease, online, as against requesting hard copies of such documents by physically visiting the court. For example, currently, the Australian federal e-courtroom, allows the public to access the transcript of the electronic messages between the judicial officer and the parties on request and subject to the usual rules of CPR.⁸ Similarly, under the CRT framework, the members of the public can request soft copies of the submissions and evidence provided during the decision process.⁹

⁸ Federal Court of Australia, *Access to Court Documents*, <https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/court-documents>

⁹ Civil Resolution Tribunal, *Information, Access and Privacy Policy* <https://civilresolutionbc.ca/resources/information-accessprivacy-policy/>

Moreover, if there comes a question of determination through remote hearings/ video conferences, media and the public can easily access it through online logins or modern avenues like live streaming without facing any geographical constraints (Law Commission of England & Wales, 2014). In the light of video conferences and remote hearings during Covid-19, the Rapid Review Report has found that journalists and reporters who responded to the survey have affirmed that they were able to attend the hearings remotely for most parts during covid and nowhere access was refused. Further, they have also stated that the ability to attend hearings online has positively impacted the number of hearings they could cover due to a lack of geographical constraints that exist in a physical court (Civil Justice Council, 2020). However, the report has also highlighted the failures to attend remote hearings due to administrative issues like deficiencies in the arrangements for requesting access to court documents and delays in processing access requests for remote hearings. Moreover, such hearings could still require a subject access request and can potentially pose risks of delays. However, this is still relatively practical to overcome in comparison to the substantive challenges of a physical court as discussed before. Alternatively, this is more technical in nature and is subject to robust IT and necessary infrastructure with constant review and revision. Hence, online courts stand to effectively enhance public and media participation by overcoming the limitations of a physical court.

2. ADDRESSING THE THREAT OF ACCESS TO ONLINE COURT FOR THE ‘DIGITALLY EXCLUDED’

The first section discussed the principle of open justice and how online courts stand to enhance both private and public aspects of the open justice principle as embedded within Art 6 of ECHR. In this section, the article will address the criticism of digital exclusion that undermines access to the online court. Further, it will discuss the various steps that are currently being taken along with the future steps that can be taken to overcome the challenges of digital exclusion for the LIPs and enhance the private aspect of the open justice principle.

A. The digitally excluded, access to justice issues and current steps towards ‘digital inclusion’

Charitydoteveryone has noted that:

The internet is the defining technology of our age. Connectivity and information are utilities that like electricity or water that touch and influence necessary aspects of our life (The Digital Attitudes Report, 2018)

However, statistics suggest that almost 5 million people in the UK have never used the internet, of whom most were older than 75. Additionally, over 11 million adults lack basic digital skills such as being able to complete a form online or re-locate websites (ONS, 2017). Further, the White paper has recognised that 70% of the UK population is either ‘digital with assistance’ or ‘digitally excluded’ (MOJ, 2016). Significantly, the research from the Legal Education Foundation found that LIPs are likely to be more digitally excluded than the general population as ‘access to the internet does not mean

effective accesses' (Bach Commission, 2016). In this context, Hazel Genn argues that online justice poses accessibility challenges for those who are digitally excluded. This is so, because, for the online court to be accessible; people need to be digitally capable (Genn, 2009). Additionally, they need to own devices that connect to the internet. Further, Shannon Salter argues that without free access to case laws and authoritative legal commentary, it is unreasonable to expect that people would be able to present their cases before the tribunal. Further, she adds that the current format of judgments published online is a non-machine-readable unstructured format, thereby depriving the publicity/reporting rights (Rodrick, 2017).

Currently, the HMCTS under the reform programme provides technical support with all new digital services through the 'Assisted Digital project' (GTF, 2017-2021). The Prevention of Digital exclusion report suggests that the 'Assisted Digital project' is aimed at identifying people who are at high risk (like people with disabilities, older people, LIPs, people in rural areas etc.) of digital exclusion and then minimise the exclusion through multi-approach channels (like face-to-face, telephone, webchat assistance along with access to paper channels for those in need), design and technology (JUSTICE, 2018). This effectively suggests that technology needs to be combined with face-to-face help. Also, technology needs to be used to design justice services that even the 'computer challenged' find easy to use. This way digital inclusion can always be kept at the forefront. Presently, some free self-help resources provide digital training at low costs. Additionally, GTF (Good Things Foundation) provides an online learning platform for free, as part of an approach combining face-to-face support and digital learning (GTF, 2017). Such combined support is particularly relevant as HMCT's Assisted Digital Service will not provide comprehensive digital skill training but will provide digital help. Moreover, the CCSR review report has acknowledged that the self-help at Stage 1 cannot be of much assistance if it cannot be accessed in the first place. (Briggs, 2016) Hence, for those who are completely unaware of how to use the computer or access the internet, the most effective approach is to, first, provide face-to-face training on how to use a computer/access the internet, and then provide digital help all through the OC process (Briggs, 2016). This would allow them to enjoy and appreciate the benefits of technology. For example, AgeUK has reported that due to 'network support such as drop-out sessions, classes and peer support programmes', older people felt that 'life was more convenient and enjoyable due to the internet' (Age UK, 2015). Further, in terms of providing digital help, lessons can be learnt from the Traffic Penalty Tribunal. Here, the 'proxy users' complete the online forms for those who are offline or those who post the forms in.¹⁰

B. What more can be done towards digital inclusion?

The *Prevention of Digital exclusion report* highlights that some users will simply want reassurance or reminders on how to use certain features after they are trained to use the computer or access the internet. Hence, it suggests that online courts should cater to the most affordable and ubiquitous modes of digital interaction. For example, the web

¹⁰ Traffic Penalty Tribunal, <https://www.trafficpenaltytribunal.gov.uk/want-to-appeal/>.

chat can pop up automatically to help the users re-engage when they get stuck (JUSTICE, 2018). Further, the report concludes that HMCTS should utilise technology to design justice services such that, they facilitate ‘saving, editing, returning to forms, making it easy to change fonts, allowing users to see progress along with providing lots of white space, removing unnecessary information avoiding repetitions of address and providing inbuilt customisable features that can work with even cheaper or older devices’.¹¹ Moreover, Byrom has recommended that to maximize the utility of the technology for those without legal skills, judgments must be published in an XML/machine-readable format, a standard developed by the Publications Office of the European Union (Byrom, 2019). Hence, the report concludes that extensive use of technology can potentially outweigh the abovementioned concerns related to accessibility. In this context, the OC allows remedying most problems that would exist even if the courts were entirely physical (JUSTICE, 2018). In addition to the physical barriers, there are also barriers to language and understanding (Pleasant & Balmer, 2015). These issues can also be better addressed through the OC than in a physical setting, as stage 1 software can be updated to include language translation options (CJC, 2020). Further, it can produce all legal documents in a machine-readable format and enhance comprehension. Hence, accessibility issues arising due to digital exclusion can be overcome with first, robust IT and funding; second, implementation of the conclusions of the Prevention of Digital exclusion report and third, subject to collaborated efforts of the HMCTS and the government (JUSTICE, 2018).

3. ADDRESSING THE THREAT OF ‘UNCONTROLLED ACCESS’ TO ONLINE COURTS

In the previous section, this article concluded that digital inclusion is achievable through a multi-channel approach that includes face-to-face help, design and technology. Further, I discussed the various recommendations of *The Prevention of Digital Exclusion Report*, to better exploit the potential of technology and utilise the online courts towards the complete attainment of the private aspect of open justice and subsequently, access to justice (JUSTICE, 2018). This section discusses the emerging challenges of enhanced access to online courts for the public. I discuss how modern avenues like live-streaming and live-tweeting stand to breach the Right to Privacy due to easy and uncontrolled access by all to online proceedings.

A. How do modern avenues enhance the public aspect of open justice through online courts and pose privacy threats?

Puddister and Small (2019) have argued that the overreaching potential of technology has changed the whole nature of court reporting. They argue that media persons are no longer required to take notes in the courtroom, as they can disseminate the information in real-time from the court to outside the courtroom. Similarly, the public only needs internet access to publicise the court proceedings. Further, Sway has argued that digital technologies link the public directly with the court, which are the sources of information, and allow greater transparency. This has further enhanced the educative function of the media, by

¹¹ For example, see the website of DNA WEBSITE, <https://www.dnamatters.co.uk>

allowing the communication of how trial processes work in real-time (Sway, 2016). However, modern avenues like live-tweeting¹² live-streaming, online communication between stakeholders, and audio/video conferences, allow more discretion in the hands of the media about reporting without scrutiny. Consequently, the coverage is often less comprehensive and balanced than in a traditional media format (Warren, 2014). Additionally, it has opened the gates of public reporting via new media platforms for ‘citizen journalists’¹³ that apply less balanced forms of freedom of expression.¹⁴ Unlike, professional journalists, citizen journalists are not subjected to any editorial scrutiny (Barrett, 2011). Hence, sensitive data gets reported through social media which is then difficult to retract (Synodinou, 2012). Moreover, the upcoming avenues like live tweeting from a live-streamed court proceeding can be concerning, for the tweets appear as text messages without context. Moreover, the number of characters in the tweets is limited which makes it impossible to contextualize the tweets in their entirety or explain the complexity of the case (Winnick, 2014). This can present a misleading picture of the trial and can undermine the process of administration of justice (Sossin & Meredith, 2013). This way a conservative view of ‘opening the courts for all’, though enhances complete transparency in the court proceedings, poses threats to the open justice principle by turning into a ‘disruptive’ one (Puddister and Small, 2019).

B. The increasing tension between the Right to Privacy and the Public aspect of the Open Justice Principle?

Historically, the jurisprudence of the ECtHR has sided with the Publicity Principle or public aspect of the open justice principle and has taken a restricted approach towards reporting restrictions or anonymity orders. For example, in *R v. Sarker* (2018) the trial judge imposed a blanket restriction on reporting rights of the media on grounds that the potential internet publications would create links with previous stories containing damaging information about the party. Similarly, in the *ex parte* British Broadcasting Corporation (2015), the trial judge imposed a blanket ban on reporting rights of media about any details of a high-profile murder case due to the risk of damaging commentary. Though in both cases the error was corrected in favour of the publicity principle at the higher courts, it had implications for the Right to Privacy and the ‘Right to be forgotten’ embedded within Art 8 of ECHR under which ‘everyone has a right to the protection of personal data concerning him or her’ (Google Spain v. AEPD, 2014). The ECtHR has always tried to uphold the right of the public to know something in the public interest and simultaneously, preserve the privacy of an individual in some sensitive cases. Hence, while access is not always denied, orders pertaining to the non-revelation of the identity of victims or witnesses may be given in some cases like those involving child victims (Children & Young Persons Act, S 44). Significantly, the court places reliance on the ‘welfare of children and young people’ in deciding whether reporting restrictions are required or not (Children & Young Persons Act, s. 44). However, the restrictions do not necessarily also restrict access to court proceedings. Moreover, the restriction on the press is limited to reporting

¹² Twitter is an online microblogging service that distributes short messages or blogs of no more than 280 characters called tweets and is influential in shaping politics and culture. <<https://www.britannica.com/topic/Twitter>>

¹³ Citizens with no professional qualifications acting as journalists, without scrutiny and checks.

¹⁴ For example, *Scott v. Scott*, (1913) AC 417, 463

the identity of the child or details that lead to his/her identification. As such there are no restrictions on the reporting of the proceedings per se (The Children and Young Persons Act, s 49). For example, in McKerry case (2000) and Damien Pearl case (2005), it was held that in the interest of the public, the reporting restrictions be partially lifted. Hence, the court said that for the public interest, it is enough to publish the name of the child defendant who was involved in the driving offence. However, his photograph, address or school name should remain restricted from publication to protect his welfare and privacy.

One more way the publicity principle is being preserved in a democratic society is by way of expanding the scope of the definition of media from 'traditional' media to include bloggers as well as 'citizen journalists' Some commentators argue that even 'A-list' bloggers can be termed as professionals as they 'bear the hallmark of the best of legacy news media (Singer, 2007, p.80). This promotes a more egalitarian model of journalism that treats citizens as equally equipped to gather and disseminate news as the professional media (Ugland and Henderson,2007). Building on the blurred lines between the professional media and citizen journalists, since 2011 the United Kingdom's Supreme Court (the UK's Highest court of appeal) has allowed the use of Live text-based communications in the courtroom under a policy that makes no distinction between who can or cannot live text from the court, thereby siding with the right of the public to know (Luft, 2011).

However, this has implications and requires caution. Some commentators like Sonja West have noted that professional media serves as gatekeeping by making editorial decisions regarding what is or not is noteworthy and makes sure to communicate the information in a timely manner. They devote time to an investigation, and give attention to). Hence, she argued that journalists should be set apart from others who are occasional public commentators. Similarly, during the early developments of Live Text-based communication from the courtroom, in England and Wales, in opening consultations. the Chief Justice of England and Wales noted that 'Non accredited commentators cannot be presumed to be accredited media representatives set out by the Press Complaints Commission's (Judge 2011). Further, he suggested that reporting without any self-restraint by the non-accredited media persons might lead to a great likelihood of prejudicial reporting' (Judge, 2010). This is also reflected in the 2011 Guidance (Judge, 2011) whereby a distinction is drawn between traditional journalists and non-traditional journalists without explicitly using the terms bloggers or citizen journalists. The Guidance simply states that only lawyers and 'representatives of the media' are automatically allowed to communicate from the courtroom (in the form of text, blog or tweet). The guidance defines 'representative of media' as one having a level of knowledge of the 'ground rules of traditional court reporting in a fair and accurate manner such that it does not cause any interference with the administration of justice (Judge, 2011). The members of the public though allowed will be needed to seek permission from the court to do the same. Hence, presently while media can automatically access and report on court proceedings including live text-based communication from the courtroom, the public needs to seek permission for reporting from the courtroom.

However, putting a 'permission clause' for the general public does not necessarily fulfil the void created due to the lack of professional training amongst non-traditional media persons. Hence, it does not guarantee the protection of privacy and sensitive information. This challenge gets intensified in a setting like OC, given it naturally enhances

access more than a physical court through options of Live streaming as seen in the Kazakhstan Case (2020). This opens the door for the media as well the public to access proceedings and use Live text-based communication from the courtroom (Live-tweets, texts and blogs) without much scrutiny. In such a scenario members of the public would be placed in a position, where they can report sensitive information like identity including the photographs, due to a lack of professional training or complete understanding of the press norms. Moreover, it would be very difficult to hold them accountable for breaching such reporting restrictions as, presently, the law around reporting restrictions states that:

‘It is unlawful to print or publish or cause or procure to be printed or published . . . in relation to any judicial proceedings, any indecent matter or indecent medical, surgical or physiological details being matters or details the publication of which would be calculated to injure public morals’ (Judicial Proceedings Act, s 1).

Further, it states that no person, other than a proprietor, editor, master printer or publisher shall be liable to be convicted under this act (Judicial Proceedings Act, s 1.2) However, there is no clear guidance or case law that clarifies if the online edition of a newspaper or periodical or publication on Twitter or other social media platforms also falls within the definition of ‘publication’ and who could be a ‘publisher’ in such instances. This creates a prospect for ‘uncontrolled access for the general public with no accountability. Therefore, in sensitive cases requiring the protection of the confidentiality of victims and witnesses for their safety, uncontrolled access can lead to irreparable damages (Pudister and Small,2019)

In such a scenario, Puddister and Small (2019) argue that such threat of uncontrolled access and uncontrolled publication will eventually lead to a judicial tendency of imposing reporting restrictions requiring the media personnel to either completely anonymise the identity of the person concerned or not report at all. Thereby creating tension between the Right to Privacy and the Publicity principle. Significantly as such access allows real-time sharing, immediate publishing without scrutiny and live-tweeting without context, removing any space between the courtroom events and publication or retraction (Barrett, 2011). For example, the risks of any report being republished or becoming prominent at the time of trial, thereby jeopardising the trial, would prompt the judges to impose reporting restrictions in the future. In contemporary times, the ECtHR jurisprudence suggests that the court has more actively balanced the Right to Privacy against other competing interests, for example, matters of national security requiring mass surveillance measures.¹⁵ This is one direct evidence of the growing role of the Right to Privacy in the current scenario. Moreover, in the context of online courts, privacy issues are being taken more seriously in the UK due to their potential for significant leaks during the course of proceedings and difficulty in retracting leaked pieces of information later (Scott v. Scott, 1913). For example, it was emphasized in *Google Spain v. AEPD* (2014) that while ‘freedom of expression is vital for a democratic country, the rights of dignity and individual liberty cannot be treated as secondary either’. Following the *Google Spain*

¹⁵ For example, See, *Big Brother Watch and Others v. United Kingdom* [GC] App No 58170/13, 62322/14, 24960/15 (ECtHR, May 2021)

case, Art 17 was adopted in the General Data Protection Regulations (GDPR) statutorily as ‘Right to Erasure’ aimed at removing such private information about individuals which has the potential to cause serious damage to his/her private life. This right allows data to be removed when it is no longer relevant or is damaging or immaterial. The Right to Erasure is aimed at providing the data subject with some control over his private information which is against his private interest or has no relevance in the present.

C. The way forward: Balancing Public Aspect of Open Justice and Right to Privacy

The rising tension between the Publicity principle (allowing access and reporting rights to all media, bloggers or citizen journalists alike) and the Right to Privacy (calling for the protection of sensitive and private information) requires certain regulation measures which can determine how non-traditional media and the general public would access the court proceedings and subsequently exercise their reporting rights. This essentially requires that rules are laid down covering the grey area of contempt for the publication of any sensitive information which breaches the press norms and laws affording reporting restrictions (Judicial Proceedings Act, 1926). This means that there is not only a ‘permission clause’ for the non-traditional media persons but also some penalty point system in place to hold them accountable for breaching reporting restrictions and disrupting the court proceedings and justice delivery. The aim of the point system is to make bloggers and citizen journalists not only seek permission to report but also establish their accountability.¹⁶ Such a system would ask the bloggers/citizen journalists to reveal their identity and would allow readers to flag any errors in the content or breach of a press norm or violation of the right to privacy to a review board established within the system itself. Pursuant to this, such bloggers or citizen journalists could be asked to either revoke the content, provide an apology or could have their license cancelled for reporting false or misleading pieces of information. This is very similar to the penalty point system in place in the case of traffic enforcement laws in the UK.¹⁷ Here the court can put fine on anyone and ‘endorse’¹⁸ one’s driving record with penalty points if he/she is convicted of any motoring offence. One can also be disqualified from driving if the penalty points are built up to 12 (which is above the highest point of penalty i.e., 11) within a period of 3 years.¹⁹ Following such a mechanism during live streaming through OC would create some sort of ‘self-policing’ for the bloggers and citizen journalists who are given permission to report from the courtroom using Live Text-based communication (text or blog or tweet). Further, there can also be a ‘Blogger/Citizen Journalists Code of Ethics’ creating an obligation to adhere to certain principles of accuracy, honesty and fairness while reporting, blogging, texting or tweeting.²⁰

¹⁶ Accountability here means that bloggers and citizen journalist accept their errors, take back such frivolous blogs/tweets/texts either by themselves or whenever it is complained against.

¹⁷ <https://www.gov.uk/penalty-points-endorsements/how-to-check-your-endorsement-details>

¹⁸ Endorsement means that every offence is given a special code along with penalty points on a scale from 1 to 11. The more points the more serious the offence.

¹⁹ Penalty Points (endorsement) <<https://www.gov.uk/penalty-points-endorsements>>

²⁰ Generally based on the National Union of Journalists Ethics, <<https://www.nuj.org.uk/about-us/rules-and-guidance/ethics.html>>

CONCLUSION

In a way, digital technology empowers the media, which ultimately emboldens the public. The analysis of vast jurisprudence suggests that online courts stand to overcome the challenges of a physical court and ultimately enhance open justice. However, the modern avenues also pose major challenges to the Right to Privacy which is often overlooked by the advocates of the open justice principle. Hence, the publicity principle in a democratic society needs to be balanced with the people's individual Right to Privacy. A more conservative approach requires that the open court principle be expanded vitally with online courts such that it blurs the lines between traditional and non-traditional media. However, a more nuanced approach needs to address that allowing unregulated live text-based communications to non-traditional media would also imply increasing third-party interventions in the court proceedings by actors with no formal journalistic pieces of training or understanding. Consequently, this can turn the principle of open justice into a disruptive one. Significantly, this raises concerns about 'opening the courtroom door' way too much, such that personal data gets out of hand and privacy becomes a luxury. Hence, it is pertinent that some regulations are placed right from the outset, so far as uncontrolled access, and unscrutinised reporting of court information during online proceedings are concerned. Significantly, it requires regulations in the form of a 'penalty point system' making bloggers and citizen journalists accountable for any frivolous reporting so that any unsolicited leakage of sensitive data in sensitive cases can be curbed. Therefore, instead of opening the doors for everyone and to everything, it is to be opened only to the extent required for ensuring public scrutiny and with ample regulations creating 'accountability' in case of breach of privacy rights.

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