THE LORD BURNETT OF MALDON, LORD CHIEF JUSTICE

OPEN JUSTICE TODAY

COMMONWEALTH JUDGES AND MAGISTRATES CONFERENCE 2023

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(1) Introduction

1. This year's conference marks the 25th anniversary of what started life as The Latimer House Guidelines for the Commonwealth on Good Practice Governing Relations between the Executive, Parliament and the Judiciary. By 2003, and then again in 2008, the Guidelines were revised, updated and reborn as the Commonwealth Principles on the Relationship between the three Branches of Government: the Latimer House Principles, for short.[1] As recognised by the Commonwealth Heads of Government both in 2003 and 2018, they form an '*integral part of the Commonwealth's fundamental political values*'.[2] The foreword to The Principles is, however, telling. The point is made that '*The "Separation of Powers"*' – the essence of The Principles – '*may look well on paper and sound well in speeches.*'[3] That point echoes Justice Learned Hand's famous statement that '*Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help. While it lies there, it needs no constitution, no law, no court to save it*.'[4]

2. The question though is how to ensure that The Latimer House Principles – as much as Liberty itself – continue to lie in the hearts and minds of all. More specifically, how we may continue to ensure that an independent, impartial, honest and competent judiciary commands public confidence, that it is able to dispense justice and – most importantly of

[1] K. Brewer & P Slinn, *The Commonwealth Principles (Latimer House) on the Relationship between the Three Branches of Government: Twenty Years On*, Denning Law Journal 2018, Vol. 30, Special Issue, 101.
[2] Noted at K. Brewer & P. Slinn (2018) at 107.
[3] *The Commonwealth Principles (Latimer House) on the Relationship between the Three Branches of Government* at 3.
[4] Justice Learned Hand, *The Spirit of Liberty,* (1944).

all – helps secure the rule of law, as is required by Principle IV. How do we keep that principle in the hearts and minds of each Commonwealth nation? Open justice is at least part of the answer.

3. In this morning's paper I would like to consider how we can maintain open justice. I also want to look at how we may go further – how we can *open up* justice today. What can we do to make justice more open and more accessible? The longstanding constitutional principle was forged in a time before the use of any technology and little reporting. It adapted to the advent of the printing press and is stumbling towards an accommodation with fast developing technology. In looking at this, I will paint a picture of a brief history of open justice, and the rationales that underpin it. I then want to consider how its delivery is changing today in the light of modern technology.

(2) Open Justice – a Brief History

4. Open justice, publicity, is in Bentham's well-known phrase '*the very soul of justice*.'[5] It is an old soul, whose origins can be traced back at least to Ancient Greece. Socrates was tried in public in 399 BC before a jury of 501 Athenians and '*a crowd of spectators on a hill in ancient Athens*'.[6] Both Plato and Xenaphon were there and wrote about the trial which, of course, did not end well for Socrates. More recently, it can be traced in England to the pre-Norman common law. It is recorded that at that time, where criminal proceedings were concerned, public attendance by freemen before moot courts, local courts or the county court, was compulsory. What started as compulsory public attendance became permissive on the part of the public as the criminal jury trial evolved. By 1565, it was established in England beyond doubt that while criminal indictments were put in writing, all else was to be conducted in public. As Sir Thomas Smith put it in 1583, apart from indictments:

> 'All the rest is doone openlie in the presence of the Judges, the Justices, the enquest, the prisoner, and so manie as will or can come so neare as to heare it, and all depositions and witnesses given aloude, that all men

[5] J. Bentham, *Draught for the Organization of Judicial Establishment*, in The Works of Jeremy Bentham (ed. Bowring) (1843) (William Tait, Edinburgh) Vol. 4 at 316.
[6] A. Harvey, *Public Hearings in Investor-State Treaty Arbitration: Revisiting the Principle*, (Unpublished PhD thesis, University of Luxembourg, 2020) at 16.

> may heare from the mouth of the depositors and witnesses what is saide.'[7]

5. Similarly, in 1829, Bayley J in *Daubney v Cooper* said,

> '. . . 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.'[8]

6. That right to be present on the part of the public is now well-established in our law as a constitutional right. It was recognised as such in *Scott v Scott*, where Lord Shaw identified it as forming '*a sound and very sacred part of the constitution of the country and the administration of justice*'.[9] Its centrality to the proper administration of justice is recognised in the sixth amendment to the US Constitution, article 6 of the European Convention of Human Rights and the Article 14 of the International Covenant on Civil and Political Rights. It is widely adopted in the Commonwealth, for instance, in article 21 of the Constitution of India, article 50 of the Constitution of Kenya and article 36 of the Constitution of Nigeria. [10]

7. It is of real importance, but has always been subject to limited exceptions when it must yield to other competing public interests.[11] It may be necessary to limit public access to hearings, to information or to some identities to promote the administration of justice itself. [12] As Bayley J's dictum indicated, it may validly be subject to limits where the presence of members of the public at a hearing is disruptive. It may also yield where openness would undermine the purpose of proceedings. Obvious examples include where

[7] De Republica Angolorum
[8] *Daubney v Cooper* (1829) 109 ER 438; 10 B & C 237 at 240.
[9] *Scott v Scott* [1913] AC 417 at 473.
[10] *Tripathi v Supreme Court of India* (Supreme Court of India, 26 September 2018) at [2].
[11] *Scott v Scott* [1913] AC 417 at 437; *A-G v Leveller Magazine Ltd* [1979] AC 440 at 450.
[12] *Khuja v Times Newspapers Ltd* [2017] UKSC 49, [2017] 3 WLR 351 at [29-[30].

openness would undermine the purpose of an application for search warrants, whether criminal or civil, freezing injunctions and the like. And it may need to yield where it runs up against other substantive rights or principles, such as the right to privacy and the interests of children, the safety of individuals or national security. There is a lively debate about the circumstances in which the open justice principle should give way to private interests of litigants or witnesses because, undeniably, exposure to public scrutiny in high profile criminal and civil litigation can, for many, be extremely stressful. [13] But where such a balance needs to be struck care must be taken to ensure that any limitations imposed on the principle are no more than strictly necessary to protect the other public interest.[14]

8. Proceedings may remain open and be reported even when there is anonymisation of parties or witnesses. Anonymisation is a large subject in itself. There is a developing chasm between the common law and civilian world in the approach to anonymisation. The common law dislikes it because it erodes open justice but the routine anonymisation of parties and witnesses is becoming more commonplace in Europe.[15] That is a topic for another day.

(3) The nature of, and rationales underpinning, Open Justice

9. What then does open justice require? In the Common Law world there are, I think, four core elements.

10. First, that there must be provision for the public to attend civil and criminal trials while they are taking place. In England and Wales that includes provision to attend interim or other procedural hearings.[16] In this jurisdiction, until about 25 years ago, those procedural hearings were usually conducted in chambers and it is certainly open to argument whether the principle of open justice really requires such an expansive interpretation. Today it is a happenchance whether procedural matters are dealt with in a hearing, often by telephone, or on paper.

[13] see, e.g. Coleen Davis: The Injustice of Open Justice 8JCULR 92
[14] *R v Chief Registrar of Friendly Societies, ex parte New Cross Building Society* [1984] QB 227 at 235.
[15] Research Note, *anonymity of the parties on the publication of court decisions*, (March 2017) curia.europa.eu
[16] *Ntuli v Donald* [2010] EWCA Civ 1276 at [50].

11. Even in respect of full criminal or civil trials, realistically, it is rare for members of the public to attend hearings beyond those with a close interest. Provision for the public must therefore necessarily include adequate provision for media access. The media act on behalf of the public; scrutinising and reporting what goes on in court on their behalf.

12. Secondly, openness requires those present at a hearing to be able to discuss, to debate, and to criticise what was said and done by the parties and the judge, and even the judgment.[17] As the Privy Council put it pithily in 1936, if in in archaic language, in *Ambard v Attorney General for Trinidad and Tobago*,

> 'Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.'[18]

Here we see the link back to the media acting on behalf of the public. That forms part of the inextricable link that open justice has with the media's general freedom to report matters; a point stressed by Lord Reed in the Supreme Court of the United Kingdom when he explained the importance of the open justice principle and its emphasis in Scotland in the constitutional legislation enacted under William and Mary at the end of the 17th century. That legislation specifically established that criminal proceedings must be conducted '*with Open Doors*'.[19]

13. Thirdly, documents submitted to the court and which are used within proceedings should, presumptively, be available to the public and press. This flows inexorably from the first two elements. If courts and hearings in them are open to the public, what takes place in them judicially is also open to the public. One important consequence of this is that what is made public in this way may be republished.[20] Given the increased use of written evidence and submissions, including electronic documents, without this requirement,

[17] *Al-Rawi v The Security Services* [2011] UKSC 34; [2012] 1 AC 531 at 543, 572.
[18] *Ambard v Attorney General for Trinidad and Tobago* [1936] AC 322 at 335.
[19] *A v British Broadcasting Corporation (Scotland)* [2014] UKSC 25; [2015] AC 588 at [23]-[26].
[20] *Richardson v Wilson* (1879) 7 R 237 at 241 cited with approval in *A v British Broadcasting Corporation (Scotland)* [2014] UKSC 25; [2015] AC 588 at [25].

attendance at a hearing might well be of limited practical utility and reporting very difficult.

14. Fourthly, the participants' details must be made public. As a general rule, the parties' identity must be known. It is impermissible for a party to litigate, for instance, without disclosing their identity to the court and the other parties.[21] Generally, their identity must also be made available to the public. Exceptions can be made where party or witness anonymity requires it. Importantly, in the common law tradition the judge's identity must be known; those who exercise the judicial power of the state should not do so in secret. That aspect of the principle was the subject of debate in this jurisdiction last year following a without notice order to the British Government from the European Court of Human Rights in Strasbourg prohibiting the removal of an asylum seeker. The identity of the judge who made the order was not revealed at the time nor has it been since, something that is alien to the common law tradition.

15. The most important rationale that underpins the principle is that it ensures that the judiciary are accountable for what we do.[22] Exercising the judicial power of the state in private would increase risk of arbitrary conduct, or laziness, sloppy work and even enhance the possibilities for corruption.

16. That courts are open and that reasoned judgments must be made public helps ensure that judges are always on trial while trying.[23] It thereby has a disciplinary function where judges are concerned, one that helps stop judicial abuse and misuse of power, while spurring them to act with probity, to treat parties fairly and secure justice according to law. It is for this reason that open justice was described in *Scott v Scott* as

[21] *SMO (A Child) v Tiktok Inc* [2020] EWHC 3589 (QB); [2021] 2 FLR 917 at [8]; *Wright v The person or persons unknown responsible for the operation and publication of the website www.bitcoin.org* [2022] EWHC 2982 (SCCO).
[22] *Al-Rawi v The Security Services* [2011] UKSC 34; [2012] 1 AC 531 at 543.
[23] *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65; [2011] QB 218 at [38].

> 'on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.'[24]

17. That it is, is all the more important where litigation is conducted against the State. A judiciary that was hidden from public view is one that could all too easily and improperly become, in Lord Atkin's famous words, 'more executive minded, than the executive.'[25]

18. The disciplinary function has a wider role as it also applies to parties and witnesses. Public proceedings place them under scrutiny too. It thus helps to discourage false claims or dishonest or fabricated evidence.[26] Linked to this is the investigative function played by open justice. Other potential parties to the proceedings or witnesses who hear of them may come forward when they might not have done, particularly if they were held out of the public gaze.

19. Accountability through openness arises in another way. Reasoned judgments are open to public debate and discussion. How the courts interpret and apply the law and, particularly in common law jurisdictions, develop it, is a matter for public and political scrutiny. [27] Parliament can respond to judicial developments, correcting legal developments through legislative intervention. It thus ensures that the court's law-creating function is not one that stands outside the democratic process.

20. More broadly, openness plays an educative or explanatory role. Open proceedings help to inform the public about what goes on in court. It makes it clear that they are open to the public not just as spectators but also as participants. It enables them to see that no one is excluded from the courts; that access to justice is open to all. Its educative role also concerns the promotion of public understanding of the law and how it is applied. Lord Reed recently emphasised how court judgments echo widely.[28] They, along with

[24] *Scott v Scott* [1913] AC 417 at 463 and 476.
[25] *Liversidge v Anderson* [1942] AC 206 at 244.
[26] J. Bentham, *Rationale of Judicial Evidence*, in *The Works of Jeremy Bentham* (*Rationale*) (ed. Bowring) (1843) (William Tait, Edinburgh) Vol. 6 at 355.
[27] *Khuja v Times Newspapers Ltd* [2017] UKSC 49; [2017] 3 WLR 351 at [13].
[28] *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2017] 3 WLR 409 at [68]-[72].

legislation, provide the framework within which individuals order their affairs within the law. They help inform them how the courts are likely to determine claims. In consequence, they help to prevent disputes arising, while also providing the means by which parties to disputes can assess the strengths and weaknesses of their positions and therefore encourage resolution without trial.

21. The final rationale goes beyond open justice's role in securing the proper administration of justice. It links to an individual's right to liberty and security.[29] It is self-evident that criminal and some civil proceedings, particularly those for contempt of court, may result in individuals being punished. In civil proceedings the coercive power of the state may be used to enforce court orders. Openness enables parties at risk of sanction of any sort to have confidence that cases will be tried fairly in accordance with the law and that their outcomes can be subject to debate.

(4) Open Justice in the 21st Century

22. These rationales underpinning open justice when they manifest through open hearings and reasoned judgments help secure four key features that support the rule of law: confidence in the judiciary; the delivery of justice; judicial accountability to the public; and judicial legitimacy.

23. With this in mind, let me now turn to its application in the 21st century.

24. For centuries we secured open justice by ensuring that hearings were open to the public and later the media, with a particular focus on local people being able to see what went on in local courts. Justice became less local, even where it was delivered here via County Courts, Magistrates' Courts, Assizes and then Crown Courts. Individuals had less time to attend court, and their social networks would no longer enable dissemination across the community of views on how the court had handled a hearing. Here the role of a vibrant and independent media was all-important, particularly through specialist court reporters. In the 19th and most of the 20th centuries high-profile criminal trials would be reported at

[29] *Scott v Scott* [1913] AC 413 at 475.

length with crucial parts being reported verbatim. In the first half of the 20th century in our jurisdiction a small number of celebrity counsel were followed like film stars.[30] Local newspapers were numerous and relatively prosperous and reported on almost all criminal cases of any note and, for example, regularly listed the outcome of cases in a local Magistrates' Court. The public really did know what was going on in their courts. There was also serious reporting by legal correspondents of the national newspapers of cases in all jurisdictions of public interest.

25. In the United Kingdom, and I suspect across much of the world, local newspapers have been in decline. The way in which many people acquire their news has changed. Local reporting of court proceedings has substantially reduced. Not all national newspapers have a legal correspondent any longer nor do the broadcasters. Those who remain have a difficult job to do and the realities of life are such that many cases are reported by journalists who do not have deep familiarity with court processes or the law. The judiciary can help. Judgments can be written in clear, accessible language and kept as short as reasonably practicable. They can be structured in a way which enables a reader quickly to find the heart of the issues and the decision. In cases of public interest and of substance short case summaries may be provided by the court itself, albeit making it clear that they do not form part of the judgment. This is done here in all cases heard by the Supreme Court and Privy Council; in many cases in the Court of Appeal with a wide impact or high public interest and also in an increasing number of High Court cases, particularly those concerning controversial judicial review claims. In criminal cases of high public interest judges have routinely reduced their sentencing remarks to writing and made them available immediately at the end of the hearing. These steps assist journalists but more importantly support accurate, swift reporting and enable anyone with an interest to understand the issues in and result of a case in only a few minutes' reading.

26. But it is technology that is opening up the opportunity for public and media to see what is going on in court proceedings in a way which has accelerated, not least because of the necessity for courts to pivot to the use of video-enabled hearings during the Covid

[30] E.g. Sir Patrick Hastings KC and Sir Edmund Marshall-Hall KC

pandemic. We soon saw that such hearings not only enabled parties, witnesses and lawyers to attend hearings remotely but also for individuals, including reporters, with an interest in a case to join the hearing remotely.

27. This paper is not the place to discuss the impact of remote hearings on the administration of justice or how, across the range of different jurisdictions and types of case, the attendance of some participants in a hearing enhances or diminishes the administration of justice. But there is no doubt that the use of video-platforms has enabled properly interested individuals and media representatives, local, national and international, to attend and report on hearings. In England and Wales we labour under statutory restrictions on the broadcasting of proceedings. I shall come back to that issue in a moment but the regime, adjusted during Covid, enables remote attendance including by journalists for most cases. Our courts do not have the resources to enable that facility routinely. But in cases of public interest arrangements have been made to allow journalists to log into a hearing remotely. In some very high-profile cases scores or hundreds have done so which has resulted in more expansive and, dare I say it, more accurate reporting.

28. An empirical study of the pandemic's impact conducted by the Civil Justice Council in England and Wales noted that respondents to its questionnaire – and here I mean media respondents – reported that they found that remote hearings improved their ability to report proceedings.[31] That is perhaps obvious. There are no constraints imposed by the need to travel or to be in only one location at a time. Where attendance is possible remotely that expands the opportunities to see more cases. A greater range of proceedings can thus be covered and reported on. In appropriate cases the facility for remote attendance by journalists can be organised even when the hearing is proceeding normally in court with the participants present. Allowing people to watch proceedings online does import some risk. It is too easy now to record and then manipulate anything. But to my mind that should not lead to too cautious an approach to using the opportunities now available. In our jurisdiction the constraints are likely to be logistical and financial.

[31] N. Byrom, S. Beardon, A. Kendrick, *The Impact of Covid-19 Measures on the Civil Justice System*, (Civil Justice Council, 2020) at 71 <https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f-1.pdf>.

Alas, there are no resources presently available, financial, technical or human, to support a widespread expansion.

29. Improved access to courts can also come from broadcasting hearings. In 1925, in response to sensationalist reporting of criminal trials, and particularly the publication of photographs of individual defendants, Parliament enacted a statutory prohibition on taking photographs in court.[32] As technology evolved, that prohibition was applied to sound, television and video recording. That prohibition remains in place but there is power in England and Wales by statutory instrument to relax its application.

30. It did not apply to the Supreme Court of the United Kingdom which was created by the Constitutional Reform Act 2005. It has broadcast its proceedings since its inception in 2009. The Privy Council does so also because its proceedings were never caught by the 1925 Act. That is an important relatively recent development for the jurisdictions that retain a right of appeal to the Appellate Committee of the Privy Council as the apex court. Statutory exceptions to the 1925 Act have permitted the Civil Division of the Court of Appeal in England and Wales to livestream its hearings. Recordings remain available on the court's dedicated YouTube page. The proceedings of the Criminal Division of the Court of Appeal may also, on application, be broadcast. Appellate proceedings are widely suitable for broadcast. There are no witnesses and the issues are of law. Whilst care needs to be taken to avoid naming anyone who has the benefit of anonymity – complainants in sexual cases, children for example – our experience of such broadcasting is universally positive.

31. Many Commonwealth countries broadcast some or all of the proceedings in their highest appellate courts. This broadcasting enables members of the public to follow proceedings in which they have an interest. It also enables journalists to have a better understanding of the issues and arguments in a case before they report. In the context particularly of controversial constitutional challenges, the contemporaneous broadcasting of proceedings has been seen to enhance public understanding, support the legitimacy of the decision made by the court and the willingness of the public and politicians to accept the

[32] Criminal Justice Act 1925, s.41.

outcome. May I give two examples fresh in my mind following my visit to East and Central Africa earlier this year, although they are not the only ones from the Commonwealth. In both Kenya and Malawi in recent years there have been challenges to the results of national elections. Those constitutional challenges were broadcast and watched or listened to by huge swathes of the populations. The public had been able to follow what the challenges involved. That helped secure the acceptance, or at least acquiescence, in the results of the challenges by those who were not pleased with the outcome. In short, losers' consent which in a fevered political atmosphere might help avoid violence.

32. The question is how far the broadcasting of proceedings should go. The media appetite for clips from judicial proceedings is limitless. They increase the impact of a story and the ability to produce a compelling piece of television. We have seen the broadcasting of some criminal trials around the world become live soap opera and civil actions between celebrities showing every sign of being used to serve a wider publicity agenda. Court proceedings are not entertainment and the examples I have in mind - all listening will have their own - demonstrate the perils of allowing court proceedings to become just another form of entertainment rather than solemn proceedings.

33. Yet the wider use of broadcasting to inform in cases with a genuine public interest is with us in this jurisdiction and it is proving a success.

34. If anyone were interested to know where my natural instincts lie a little research of my earlier legal life would have delivered the answer. 25 years ago there was a serious train crash at Southall just outside London which claimed seven lives. There was a statutory public inquiry into its causes in which I was instructed as leading counsel to the inquiry. Professor John Uff QC and I decided to allow the proceedings to be filmed. The hearings themselves extended over a couple of months. The greatest concern articulated was that broadcasting would encourage lawyers to grandstand. That did not happen. The broadcasting was a success to the extent that there was any. Of course, the reality of most legal proceedings is that they are not very good TV and rather less of the proceedings were broadcast than we had hoped.

35. Wind forward to 2017 as I became Lord Chief Justice when the issue whether to broadcast sentencing remarks of judges in high profile criminal cases was under discussion. I gave my unequivocal support to the proposal. The detail took time to work out and was about to launch when Covid came along. There had to be secondary legislation. Protocols were agreed with approved media companies, the BBC, ITN and Sky. They provide the equipment. The filming is of the judge alone and nobody else in court. There is a short time delay to enable live broadcasting to be stopped in the event of disruption. To my mind, and importantly, sensationalism is avoided by ensuring that defendants are not filmed and neither are victims. For the moment only a limited range of cases, defined by the level of judge presiding, is covered by the statutory instrument.

36. Sentencing is the single issue in which most members of the public have an interest. Giving public access to sentencing remarks, which by statute must explain, in language understandable by the defendant, how and why the judge has reached the sentence in question, is a powerful tool of explanation in an area where reactions to sentencing are as often as not kneejerk.

37. Since the first set of sentencing remarks was broadcast in July 2022, it has become clear that this innovation has been a success, and successful beyond our expectations. Only a few seconds from the remarks are likely to appear in a broadcast news bulletin. But the complete sentencing remarks are broadcast live on-line and are then embedded in the news reports on the broadcasters' websites. When people have the whole picture they are less likely to criticise unfairly. It has become clear that the availability of these remarks to commentators and journalists has improved the quality of reporting. If I may say so, it has also helped enhance understanding of the sentencing process amongst politicians and policy makers.

38. One aspect we did not really foresee was the impact that the broadcasting of sentencing remarks is having on public perceptions about our senior judiciary. The High Court and senior Circuit Bench (whose sentencing may be broadcast) are not monochrome, male and septuagenarian. We learned that many people were surprised to see sentencing remarks

being delivered by women, by men and women who are really still quite young or from ethnic minorities.

39. Increasing understanding of sentencing, the educative purpose of open justice, is having another important consequence. It is capable of helping to raise public confidence in the criminal justice system and the judiciary. There has been a regular drumbeat in recent years that judges were soft on sentencing. It is a myth, as informed analysis of sentencing data show.[33] But myths tend to be as durable as they can be pernicious. Such myths have a tendency to undermine public confidence in the judiciary. The beneficial effect of broadcasting sentencing remarks is playing an important role in myth-busting, thereby promoting judicial legitimacy and through that the rule of law.

40. Given the success of broadcasting sentencing remarks, as well as broadcasting appellate proceedings, there is a strong argument that we need to go further. The litmus test should be whether the broadcasting of proceedings serves the administration of justice. Open justice is an important feature of the proper administration of justice. Broadcasting and making available recordings of hearings undoubtedly provides more open justice than merely enabling members of the public and press to attend hearings, even if that attendance can be through a video platform.

41. The question when considering the livestreaming or broadcasting of additional types of case or parts of cases, in my view, should be: why not? The answer sometimes will lead to maintaining the status quo. I am personally unpersuaded that broadcasting oral evidence of witnesses is desirable but there is a serious debate ahead about other parts of some criminal trials. Anonymity and legitimate concerns about privacy or welfare might well tell against much potential broadcasting. But the sentencing remarks in a wider range of cases will inevitably be opened up in time. So too will access to judicial review challenges of government heard in the High Court where there is intense public interest. They resemble appellate proceedings dealing with points of law without oral evidence and are suitable

[33] A point I have made previously, see Lord Burnett CJ, *Sentencing: The Judge's Role*, (2020) <https://www.ucl.ac.uk/laws/sites/laws/files/sentencing_the_judges_role_lcj_ucl_speech_9_december_2020.pdf >.

for livestreaming. Many Commonwealth countries are ahead of this jurisdiction and within the United Kingdom our colleagues in Scotland have shown us the way in some respects. It will be for others to continue the journey here.

(5) Conclusion

42. Now, Louis Brandeis, US Supreme Court Justice, famously noted over a century ago now that '*Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman*.'[34] This is usually shortened to the pithier '*sunlight is the greatest disinfectant*'. Where court proceedings are concerned, he was without doubt correct. Open justice may not often be thought of as one of the most important principles that underpins fair trials and the proper administration of justice. The focus is on the right to due notice, to an adversarial process, and equality of arms. It is on the right to submit and test evidence and to participate effectively in proceedings. But the ultimate guarantee of all these principles is open justice. Without it they would not last long as meaningful principles. Nor would our courts and judiciaries maintain public confidence and legitimacy. Open justice is a necessary foundation of the rule of law. That is why we should all give very careful thought in the years to come, as technology continues to reshape our justice systems, to maintaining and, more importantly, enhancing how we give effect to open justice.

[34] L. Brandeis, *What Publicity Can Do*, Harper's Weekly (20 December 1913).