

Open Justice v/s In Camera Indian Scenario

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'The law belongs to the people. Access to the legal system is a basic right and a public good'

Chief Justice of Canada, The Rt Hon Beverley McLachlin

Abstract

Open justice is a justice delivering system in public after hearing both the parties of the suit and after adducing evidence. The system ensures fairness in trial. This system protects the principles of a democratic government which rests on the Constitution. Indian Constitution talks about fundamental rights which are the backbone of the socialistic pattern of society. Under this system ensuring fair and non biased trial is a must. The fundamental right of freedom of speech and expression gives right to people who are citizens of India to express their opinion. This is also freedom of press to publish reports on matters concerned with state and people. But every rule as an exception and to the rule of open justice, is conducting proceedings of the court 'in-camera'. This exception should be used sparingly and judiciously. The author in this article has tried to put light on the matter to acknowledge the two different aspect of justice that is open justice and the in-camera.

Key Words

Open Justice, In-Camera, Natural Justice, Constitution, Rights.

I Introduction

It is evident that justice should not only be done, but seem to be done. Open Justice enables the public to see how justice is administered and by subjecting it to public and press scrutiny, safeguards the fairness of the trial. The rule is that the trial should be conducted in open court where the public can view, media can report to the world or people who could not make it and the parties and witnesses to the suit shall watch the justice done. The imperative need for public justice was emphatically stressed by Jeremy

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Bentham when he said, ‘Publicity is the very soul of justice. It keeps the judge, while trying, under trial.’¹

Under common law greater weight is given to the trial to be conducted in open court to ensure fair trial and build public confidence. Long before in *Scott v. Scott*,² Lord Shaw said that publicity in the administration of justice was “one of the surest guarantees of our liberties.” It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially.³ This rule equally applied to all courts, tribunals and boards.⁴ It is immaterial whether the public were present at the hearing or not but the trial should be conducted in open court.⁵

As stated by the U.S. Supreme Court in *Offutt v. United States*,⁶ “to work effectively, it is important that society’s criminal process satisfy the appearance of justice.” To put in the words of J. William Brennan “Open trials are bulwarks of our free and democratic government. Public access to court proceedings is one of the numerous ‘checks and balances’ of our system, because contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.”⁷ Closed trials have serious costs. They breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law.⁸ People will also know how the system works. The judgment can be reported by print media and internet, but visual cameras are still not allowed.

Indian constitution guarantees freedom of speech and expression with certain restriction.⁹ Freedom of speech includes freedom of press. Also that the trial should be heard by the public, the accused has the right to know for what he is tried for. It should be in the language known and understood by the public and the accused. It ensures that the trial was conducted by judge is fair and the judge is not biased.

¹ J. Bentham, ‘*Rationale of Judicial Evidence*’, in J Bowring (ed.), ‘*The Works of Jeremy Bentham*’, vol. VI, (1843), p. 355.

² [1913] AC 476.

³ *Terry v Persons Unknown* [2010] EWHC 119 (QB).

⁴ *Storer v. British Gas Plc* [2000] 2 All ER 440.

⁵ *McPherson v. McPherson* [1936] AC 177.

⁶ 1954,348 U.S. 11.

⁷ *Richmond Newspapers v. Virginia*, 1980, 448 U.S. 555

⁸ *Ibid.*

⁹ *Romesh Thapar v. State of Madras*, AIR 1950 SC 124.

Every rule as an exception and to the principle of open court also the exception is conducting trial in-camera. At times, the trial cannot be conducted in open court or in public. In case of criminal trial except in exceptional situations the trial is conducted in open court but in civil cases the matters is always decided in the open court.

II Open Justice

Open justice works with its own ideals such as adequate facility for public and press to sit, report the proceedings to the public, for the public to inspect the pleadings, for the accused to know the trial and to be tried before him and the last the accused to confront his accuser. Openness, while being of general importance to the conduct of trials, takes on heightened importance in the case of criminal proceedings.¹⁰ This is based on natural justice principles and doctrines such as *audi alteram partem*¹¹ and *nemo judex in causa sua*.¹² There is one more reason why the trial should be conducted in open court is that the public shall either criticize that the law has been misapplied or that the law itself needs amendment.

Open justice also ensures that public may produce additional witness. The repercussion may also be that the public criticism shall send a message to the courts that the justice was not properly delivered.¹³ In case of criminal trial human rights is the highest order that needs to be followed. The commission of crime is against whole community, which therefore has a legitimate interest in observing the event at which the question whether a transgression has taken place is determined authoritatively. The guilty should be 'publicly condemned', the innocent 'publicly acquitted' and 'freed from suspicion'.¹⁴ In the words of Jeremy Bentham, 'by publicity, the temple of justice is converted into a school of the first order, where the most important branches of morality are enforced, the most

¹⁰ Joseph Jaconelli, 'Open Justice', Oxford University Press, New York, 2002, p. 5.

¹¹ Right to hearing.

¹² Rule against bias.

¹³ See in *Tukaram vs. State of Maharashtra*, AIR 1979 SC 185, (popularly known as Mathura's case), where the character of the victim was questioned public raised their eyebrow to criticize that the trial was of rape and character of the accused was not to be questioned. Only matter to be decided was the rape was committed in police station by public servants and in the said matter, to decide the responsibility of the government servants.

¹⁴ *Supra* note 11 at 46.

impressive means...'¹⁵ In essence, then, the open conduct of trials furnishes a means of instruction as are embodied in the criminal law.

As J. Woolf wrote, an open justice means 'A principle of the common law that proceedings ought to be open to the public, including the contents of court files and public viewing of trials'.¹⁶ A trial is required to be held in 'open court'. The words open court means, 'a court which the public have a right to be admitted'.¹⁷ Article 6(1) of the European Convention on Human Rights provides that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Open justice is delivered in a 'court'¹⁸. It is at this juncture very difficult to state what court is. Reason is at times cases are conducted by tribunals designated by the law, by boards having a chairperson and members and at times the witness is taken at the place where the witness is residing.¹⁹ The time of open trial is also fixed. Where the matter is of public importance the matter shall be tried in open court and at the time designated.

Indian Constitution 'that the judgments of the Supreme Court of India shall be delivered only in open court'.²⁰ The stress to open justice can be seen in order 18 Rule 4 of *Civil Procedure Code*,²¹ 1908 which proves thus, "The evidence of the witnesses in attendance shall be taken orally in open court in the presence and under the personal

¹⁵ J. Bentham, 'Draught of a Code for the Organization of the Judicial Establishment in France', in John. Bowring (ed.), *The Works of Jeremy Bentham*, Edinburgh, U.K. vol. IV, 1843, p. 317.

¹⁶ In *R v Legal Aid*, [1999], QB 966.

¹⁷ *R v. Lewes Prison (Governor), ex p Doyle*, [1917]2 KB 254.

¹⁸ *Brajnandan Sinha v. Jyoti Narain*, AIR 1956 SC 66, in which it was held that 'a body or forum must have power to give a decision or a definitive judgment which has finality and authoritativeness which are essential tests of a judicial pronouncement, if it has to be treated as a 'Court'.

¹⁹ Under this situation, a person is temporarily disabled or if the person cannot come to court to give evidence. This is done with the permission of the court and before the competent magistrate who shall record the same.

²⁰ Article 143(4), Constitution of India, 1950.

²¹ Act No. 5 of 1908.

direction and superintendence of the judge." Section 153B of *Civil Procedure Code*²², 1976, 'The place in which any Civil Court is held for the purpose of trying any suit shall be deemed to be an open Court, to which the public generally may have access so far as the same can conveniently contain them.'²³ The same principle stressed in criminal law also.²⁴

In *Naresh vs. State of Maharashtra*,²⁵ J. Bachawat elaborated on open justice as follows-

Long ago Plato observed in his laws that the citizen should attend and listen attentively to the trials. Hegel in his Philosophy of Right maintained that judicial proceedings must be public since the aim of the Court is justice, which is a universal belonging to all save in exceptional cases, the proceedings of a Court of justice should be opened to the public.

The object behind the hearing in open court has been to provide legal assistance readily available to a person facing trial and it is in consonance with Article 21 of the Constitution.

III Exception to the Rule of Open Justice

The first challenge to the open court principle in the 21st century has been an increasing emphasis on privacy rights. The right to privacy is the handmaid to several interests worth protecting. In certain criminal cases it is worth protection the right to privacy especially in sexual abuse case and case where a child is a victim or accused. Right to privacy is also emphasized in Convention on Human Rights, which states, everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. When courts recognize

²² Act No. 104 of 1976.

²³ Section 153B of Civil Procedure Code, 1908.

²⁴ Section 327, Code of Criminal Procedure, 1973.

²⁵ AIR 1967 SC 1.

reporters' rights to attend proceedings or review court documents, the rights are rarely absolute. Instead, the courts usually apply a balancing test to determine whether the interest in disclosure outweighs any asserted counterbalancing interest in confidentiality. The standard the courts use in striking that balance depends on the source of the right.

The general principle is that an exception can only be justified if it is necessary in the interests of the proper administration of justice. In exceptional situations the proceedings are carried in-camera. In the words of House of Lords²⁶ –

the exceptions are themselves the outcome of a yet more fundamental principle that the chief objective of courts of justice must be to secure that justice is done...As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace this application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration...I think that to justify an order for a hearing in camera it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made.

Sir Jack Jacob recognized two prevailing exceptions to the open public system of conducting civil proceedings, namely, (1) the hearing of pre-trial proceedings “in chambers”, at which only the parties and their advisers are entitled to be present and from which the public and the press are excluded, and (2) the hearing of proceedings or the trial or part thereof “in camera”, where the court or the trial judge orders that the court should be closed be cleared and the public and press excluded.²⁷

At times the presence of the public and the press at the trial will often result in increased stress for the accused, the invasion of his privacy, and damage to his reputation. The accused under such circumstances does not wish the trial to be conducted in open court. And among the exception to open justice, a witness may be ordered to withdraw lest he may trim the evidence by hearing the evidence of others.

Sarkar J. speaking about the power of High Court to conduct the trial in camera stated, “The High Court has inherent power to prevent publication of the proceedings of a trial. The power to prevent publication of proceedings is a facet of the power to hold,

²⁶ *Supra* note 2 at pp. 437-439.

²⁷ Sir Jack I. H. Jacob, *The Fabric of English Civil Justice*, Eastern Law House Private Ltd., New Delhi, 1987, p. 22.

a trial in camera The Code of Civil Procedure contains no express provision authorizing the to hold its proceedings in camera, but if 745 excessive publicity itself operates as an instrument of injustice, the Court has inherent jurisdiction to pass an order excluding the public when the nature of the case necessitates such a course to be adopted An order made by a court in the course of a proceeding which it has jurisdiction to entertain- whether the order relates to the substance of the dispute between the parties or to the procedure, or to the rights of other persons, is not without jurisdiction, merely because it is erroneous.”²⁸

Substantiating in-camera proceedings, it was held in *Ujjam Bai v. State of U.P.*²⁹ that ‘The power to prohibit publication of proceedings is essentially the same as the power to hold a trial in camera and the law empowering a trial in camera is a valid law and does not violate the fundamental right in regard to liberty of speech.’ Further, it was held that, Cases may occur where the requirement of the administration of justice itself may make it necessary for the court to hold a trial in camera. While emphasizing the importance of public trial, we cannot overlook the fact that the primary function of the Judiciary is to do justice between the parties who bring their causes before it.³⁰

In cases where young offenders are involved, in-camera proceedings are common. Under Juvenile Justice (Care and Protection) Act³¹, 2000 young offenders are tried in before Juvenile Board.³² It cannot be tried before normal courts. The Board consists of a chairperson who is designated Chief Judicial Magistrate of the normal courts and two social workers are members. Hence, though the law does not state the proceedings are to be in-camera, the gist of the law suggests that it should not be tried in normal courts. When we watch the proceedings, the board rooms are small and cannot accommodate people from public.

Secondly, in matters concerning Arbitration and Conciliation escapes the norm of open court and publication. The matter is settled through Arbitration and Conciliation is a

²⁸ *Naresh Shridhar Mirajkar And Ors v. State Of Maharashtra And Anr*, AIR 1967 SC 1.

²⁹ [1963] 1 S.C.R. 778.

³⁰ *Superintendent & Remembrancer Of ... v. Satyen Bhowmick And Ors*, AIR1981 SC 917.

³¹ No. 56 of 2000.

³² Section 4 of Juvenile Justice (Care and Protection) Act.

civil matter and is based on contract between the disputing parties. However, on certain matters the reference can be made to court.³³

In matrimonial cases there are instances where the trial is carried in-camera as the matters that are referred concern judicial separation, restitution of conjugal rights and divorce. The common grounds pleaded are cruelty, desertion, impotency, adultery, virulent and incurable form of leprosy, communicable form of venereal disease etc. Section 2 of *Dissolution of Muslim Marriages Act*³⁴ 1939 and other like Acts recognize the said grounds in matrimonial disputes. They are directly linked with the reputation of the party in proceeding. In such cases evidence is likely to be of revolting character and may injure the finer instinct of the party and may affect such reputation directly in the eye of general public. It may deter the aggrieved to seek relief in courts.³⁵ And also that it exposes the secrets of marital life. It also discourages the weaker section to tell the truth for fear of being propagated and misunderstood in society.

Section 11 of the *Family Courts Act*³⁶, 1984, states "In every suit or proceedings to which this Act applies the proceedings may be held in-camera³⁷ if the family court so desires and shall be so held if either party so desires." So also giving exception to section 153B of *Civil Procedure Code*³⁸, 1976 which states, 'Provided that the presiding Judge may, if he thinks fit, order at any stage of any inquiry into or trial of any particular case, that the public generally or any particular person, shall not have access to, or be or remain in, the room or building used by Court.' The exception by its very nature requires exercise of due care and caution before the court directs trial of a suit out of the public gaze.³⁹

The exercise to conduct or not to conduct the matrimonial cases in-camera continued for a long time till the *Marriage Laws Amendment Act*⁴⁰, 1976 was introduced. Section

³³ On the matters concerning interim orders, arbitrators fees, etc.

³⁴ Act No. 8 of 1939.

³⁵ Azizur Rahman, "Proceedings-in-Camera", *Judicial Training & Research Institute Journal*, December 2012.

³⁶ Act No. 66 of 1984.

³⁷ In camera proceedings means the public is not allowed to view the proceedings. In legal term it means 'in private.'

³⁸ *Supra* note 22.

³⁹ *Janaki Ballav v. Bennet Coleman and Co. Ltd*, AIR 1989 Orissa 225.

⁴⁰ Act 68 of 1976.

22(1) of the legislation states, "Every proceeding under this Act shall be conducted in-Camera and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court." The law provides sanction to enforce its implementation.⁴¹

In case of criminal cases the rule is the trial should be conducted in open court, but at times it is excused. Under Indian law Section 327(3) *Criminal Procedure Code*,⁴² 1973 provides as follows, 'Where any proceedings are held under Sub-section (2) it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court.'⁴³ The breach of the provision in criminal cases has been made punishable U/S-228 of the *Indian Penal Code*⁴⁴, 1860 which states, 'disclosure of identity of the victim of certain offences viz; rape, or printing or publication of a proceeding without prior permission of the Court has been made punishable with Imprisonment for two years and fine U/S-228- A of the Indian Penal Code.

This is true where the trial is conducted in rape cases. In a case involving rape, trial "shall" be held in camera.⁴⁵ Simultaneously, it confers jurisdiction on the Court to either, on its own, or on an application of parties, allow access to any particular person of their choice. In *Estate Corporation Limited and Ors. v. Securities and Exchange Board of India and Anr*,⁴⁶ the Court was required to balance the two competing rights, that is, the right of the public to know and have access to Court trials as against right of the victim's family and that of the accused to confidentiality. In the instant case, neither the family of the victim nor the accused had sought in-camera trial, instead, in camera trial, was sought

⁴¹ Section 22(2) of the Marriage Laws Amendment Act, 1976, which states that if a person violates courts order and publish any proceeding held in-camera than he shall be punishable with fine which may extend to one thousand rupees."

⁴² Act No. 2 of 1974.

⁴³ Section 327 (2) states 'Notwithstanding anything contained in sub- section (1), he inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code shall be conducted in camera: Provided that the presiding judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court.'

⁴⁴ Act No 45 of 1860.

⁴⁵ Section 327 of the Criminal Procedure Code.

⁴⁶ (2012) 10 SCC 603.

by the State. And this was confirmed and an order was issued to the same stating the name of the accused should not be published by any media as well as by the parties.⁴⁷

The need for in-camera trial can also be seen in *Unlawful Activities (Prevention) Act*,⁴⁸ 1967. Section 44 of the Act states, ‘This section, ostensibly for the purpose of protecting witnesses, permits the court to hold proceedings in camera and take any other measures for keeping the identity and address of the witness secret, including passing an order that “all or any of the proceedings pending before such a court shall not be published in any manner”. It also makes violation of such measures or orders a criminal offence.’

VI Conclusion

Proponents of open justice assert numerous benefits. An overarching benefit is that it keeps courts behaving properly. Still, practical considerations often mean that the ideal of open justice must be weighed against other values such as privacy and cost and national security. Open justice is important for three reasons: First, it assisted in the search for truth and played an important role in informing and educating the public. Second, it enhanced accountability and deterred misconduct. Third, it had a therapeutic function, offering an assurance that justice had been done. There are other factors which sometimes must be balanced against the need for open justice especially in criminal matters and family matters.

One may naturally inquire whether the publication of proceeding may permanently be suppressed. English Courts and our Supreme Court in *Naresh v. State of Maharashtra*⁴⁹ have held that prohibition to publication of such proceeding cannot be in perpetuity. If it is so, it is violative of Article 19 (1) of the Constitution of India. A few comments about a case which has been heard and finally decided are protected U/S-5 of the Contempt of Courts Act. All the said provisions provide that the court may hold the trial behind closed doors or may forbid publication of the proceedings during the pendency of litigation but certainly not after the conclusion of the proceedings.⁵⁰ However, Section 22 of the *Hindu*

⁴⁷ This Ratio was also confirmed in *Sakshi v. Union of India and Ors*, 2004 (5) SCC 518.

⁴⁸ Act No. 37 of 1967.

⁴⁹ *Supra* note 24.

⁵⁰ As stated in *Scott v. Scott*.

*Marriage Act*⁵¹, 1955 registered a departure from the existing law; it not only prohibits the publication of the proceedings but also prohibits it in perpetuity. The provision itself is violative of Fundamental Rights and how the said provision shall claim justification has yet to be explained.

V Suggestions

1. Balance of convenience should be more towards providing justice in open court so that the accused as well as the public are aware of the facts, circumstances, evidences, etc. about the case.
2. Open justice ensures that the act is not repeated specially in criminal matters and deters the public against the punishment.
3. The court should be specific to say why it departed from the justice being given in the open court.

⁵¹ Act No. 25 of 1955.