THE OXFORD LECTURE – 2018
The Rule of Law and Open Justice

(A lecture delivered by Deemster David Doyle at the Oxford Union on Thursday 28 June 2018 as part of the Small Countries Financial Management Programme)

Opening comments

First of all, I must come clean. Some of you may already know, my family certainly does, that I have had, and continue to have, a lifelong love affair with the rule of law.

So, you will not be surprised, and I hope you will not be disappointed with me speaking on this subject, again this year.

Very few of you had the dubious pleasure of being in my first audience in this wonderful venue. I would like to risk repetition for those unfortunates who did and tell you my lecture on that occasion focused on 'the vital role of the rule of law in global economic growth'.

In the intervening years I have also covered 'the separation of powers between the legislature, the executive, the judiciary and its support staff', as well as 'judicial independence and accountability'.

Last year I introduced 'the role of a judge in a small common law democratic country'.

When will the excitement stop, I hear you ask. Well in short, not yet.

When speaking at an event I always try to mention 'www.courts.im' because it is the place where all my lectures can be found, and I would direct newcomers to this event to the site, if you would like to catch up on the excitement of previous years. However, this URL 'www.courts.im' is also where further information about the courts, and most importantly court judgments, can be found.

The significance of a resource such as this, that is openly available to everyone at no cost, brings me to my subject today.

The rule of law and the importance of open justice.

The rule of law

Lest you forget, the rule of law must deliver just laws which:

- Apply to everyone equally (except where different treatment is objectively justified)
- Are enforced openly
- Provide for fundamental human rights and responsibilities
- Provide timely and cost-effective access to justice
- Ensure that countries comply with their international obligations
- Are clear, certain, predictable and most importantly accessible to all.

Of course, these elements must exist alongside an independent, adequately resourced, trustworthy and incorruptible judiciary. Empowered to review governmental action, the activities of a judiciary with all of these qualities must also be transparent.

For at least the past 20 years transparency has been a key concept in international governmental circles, and rightly so. Transparency and open justice walk hand in hand. I realise 'Open Justice' sounds self-explanatory, but please indulge me while I make sure we all understand what it means in practical terms and the benefits it brings.

First let me give you the big picture, extremely well framed at the highest level in the United Kingdom by Lord Reed – the recently appointed Deputy President of the Supreme Court of the United Kingdom who is due to join us on Tynwald Day this year – in (*R(Unison) v Lord Chancellor* [2017] UKSC 51 at paragraph 68):

> "Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law.
>
> In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other."

I believe Lord Reed's words should be revisited every time a minister or government official is unwilling to increase, or is tempted to reduce, the funding of the courts when weighing competing claims on limited resources.

The need to adequately fund the legal system to give every citizen unimpeded access to the courts is fundamental to the function of a democratic country that truly values all citizens.

For open justice to exist the public must have access to both the court proceedings and subsequent judgments, written in understandable language.

When these elements are in place justice can be seen to be done and both businesses and individuals will be reassured that the rule of law is a stable platform for commercial and personal growth.

On seeing the legal system working, citizens and communities are more likely to believe that the law will uphold their rights. In turn the trust generated will encourage the use of the law to ensure fairness in their lives which will ultimately make every citizen feel more secure and therefore happier.

So, justice must be done and must be seen to be done. Deemster Farrant in a judgment delivered on 31 October 1947 in *Myers* 1921-51 MLR 331 at page 337 stressed in the context of apparent bias that:

> "… justice must not only be done but must be seen to be done."

These days perception is often just as important as reality.

The importance of the media

But the practical reality is that people work, care for others and have things they must do, so it is not always easy for members of the public to find the time or the proactive motivation to attend court and observe the law openly in action.

Therefore, in modern democracies every channel of the media performs an extremely important role in keeping the public informed and keeping judges on their toes.

Lord Sumption captured the importance of the media in *Khuja v Times Newspapers Ltd* [2017] UKSC 49 when he stated at paragraph 16:

> "… It has been recognised for many years that press reporting of legal proceedings is an extension of the concept of open justice, and is inseparable from it. In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so …"

Social media, broadcast and the traditional press are the communication conduits that feed public perception, and when open justice is working properly the judicial system will, and should, be scrutinised, hopefully on an informed and objective basis.

Judges must however be prepared for ill-informed or irresponsible comment. Lord Justice Hoffmann (as he then was) in *R v Central Independent Television plc* [1994] Fam 192 at 203 stated:

> "… a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute."

Long gone are the days when citizens could have their ears cut off if they wrongly criticised or defamed the Deemsters and other chief officers of the Isle of Man. The Customary Laws of 1601 were repealed in 1876 otherwise, as Judge of Appeal Hytner once said (*Barr* 1990-92 MLR 398 at 410), "any self-respecting journalist today would doubtless regard the possession of both ears as a badge of shame".

Lady Justice with sword and scales is often depicted wearing a blindfold. The blindfold represents objectivity and impartiality, in that justice is, or should, be meted out objectively, without fear or favour, regardless of identity, money, power, or weakness. Blind justice therefore means objective judgments.

This level of objectivity can only truly be possible in a formal and appropriately controlled environment where evidence and submissions are checked, and everyone is accountable for their words and actions.

When open justice opens the door to court proceedings and judgments, the judiciary must brace itself to be judged by individuals using social media and journalists in mainstream media.

Professional journalists have a commercial need to make their stories eye catching. Individuals will make understandably empathetic and potentially more subjective assessments. These influences can generate alternative, out of court, judgments by the general public that do not necessarily reflect the true situation and thereby wrongly undermine confidence in the administration of justice.

In the online community knee-jerk judgments are made in a heartbeat in an environment that could not be further from the objective and regulated environment of a courtroom.

Trial by Twitter is virtually instantaneous and is frequently fuelled by faceless trolls who make unsubstantiated and abusive claims egged on by their digital reach and anonymity.

Because of this, social media abuse rightly continues to raise many concerns amongst the judiciary and law makers.

But despite all these concerns we must all remember that freedom of the press and freedom of speech are vital freedoms in a democracy.

As Jeremy Bentham put it all those years ago now:

> "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge, while trying, under trial."

(John Bowling (ed), *Works of Jeremy Bentham* (1843) vol 4, 316 – 317).

Kemy Bokhary, in his inspirational book on *Human Rights Source, Content and Enforcement* (Sweet & Maxwell 2015), also put it well when at paragraph 22.042 he stated the following under the heading "Open justice in the presence of the media":

> "There are situations in which proceedings or a part of the proceedings should take place in closed session. But normally proceedings, especially criminal proceedings, should be open to the general public and the representatives of the media. Openness is one of the surest safeguards against anything incompatible with fairness."

So, what can be done in respect of the potential abuse of social media? 24:7 news and lightening quick online channels of communication should drive the judiciary to provide clear information and wherever possible promote a greater understanding of the rule of law and the functioning of the legal system.

In a modern democracy which respects the rule of law we must help as much as we can to ensure all those expressing opinions on judgments and the legal process have the information and understanding to do the best job possible. It may be naïve to think that people will do so, but we still must try to provide the media and the public with the necessary information.

The media is of crucial importance in ensuring that open justice is a reality. Judiciaries and court administration teams in small jurisdictions should do everything they reasonably and legitimately can to assist the media in fulfilling their important role.

In my experience the way to ensure accurate media coverage is to help the media in their task. If this is done properly and responsibly it will enhance confidence in the rule of law and the judiciary, which in turn will help us all to have a more civilised existence.

Open justice is not always an easy or popular road to travel, especially in countries with a relatively small naturally interconnected population.

For example, there may, in some countries, be inappropriate moves to suppress names or hold proceedings in private to spare the blushes of prominent individuals or companies, which in the spirit of open justice must be refused.

However, the proliferation of digital media has in practical terms enabled individuals to be interconnected in a way that can make large countries behave like small local communities. In doing so the pressures on the judiciary more often associated with smaller countries are now felt by all countries in the 'global' community.

Public, accessible and clear justice

Though I do not condone the use of violence, I hope that by now you have started to join me in the understanding that if open justice is to exist, the activities and output of a court system must pack a powerful judicial punch in support of public, accessible and clear justice.

Public justice

By public I mean court doors must be open for the public to observe the proceedings. This applies from the magistrate's court to the court of final appeal, except when there are established exceptions to be dealt with such as cases involving children or without notice asset freezing injunctions.

A court should normally only sit in private where it is strictly necessary in order to secure the proper administration of justice and where privacy considerations legitimately override the important principle of open justice.

The public nature of open justice is very well established in Manx law. In volume 1 of the Statutes of the Isle of Man 1417-1824 at page 217 Statute Laws 1737 VI(3) there is reference to:

> "… the Partys may have an Opportunity to be present, to make their Objections, if they have any, in <u>open Court</u> …" (my emphasis)

In the 1700s proceedings before the Deemsters were held within the heart of the community in places with public access. Indeed, Attorney General Busk noted in 1792 that:

> "The Courts were sometimes held in ale houses amid crowds of fishermen and farmers."

(Feltham's Tour 1798).

In the 21st century Deemster Kerruish, sitting in court number 1 at Douglas courthouse, in *Byrne* 2005-06 MLR N14 (30 March 2006) at paragraph [14] put it succinctly when he said:

> "The general rule is that all hearings ought to be in public."

Open justice is unsurprisingly also well established in English, Welsh and Scottish law. Lord Reed in *A v British Broadcasting Corp (Secretary of State for the Home Department*

intervening) [2014] UKSC 25 referring back to the Court of Sessions Act 1693 at paragraph 23 stated:

> "It is a general principle of our constitutional law that justice is administered by the courts in public and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy … Who is to guard the guardians? In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny."

A couple of years later, Lady Hale (now the progressive President of the Supreme Court of the United Kingdom) in *R(C) v Secretary of State for Justice* [2016] UKSC 2 at paragraph 1 stated in crystal clear terms that:

> "The principle of open justice is one of the most precious in our law. It is there to reassure the public and the parties that our courts are indeed doing justice according to law. In fact, there are two aspects to this principle. The first is that justice should be done in open court, so that the people interested in the case, the wider public and the media can know what is going on. The court should not hear and take into account evidence and arguments that they have not heard or seen. The second is that the names of the people whose cases are being decided, and others involved in the hearing, should be public knowledge …
>
> There is a long-standing practice that certain classes of people, principally children and mental patients, should not be named in proceedings about their care, treatment and property …"

In *Lime Petroleum plc (in liquidation)* I stressed at paragraph 25 of a judgment delivered on 13 April 2017 the "importance of open justice and the principle that what is filed with the court should normally be seen by all other parties". See also *Parton* 2009 MLR 370 at paragraphs 120, 122 and 123.

Geoffrey Ma (the Chief Justice of Hong Kong) in his robust speech at the Ceremonial Opening of the Legal Year 2018 spoke of the importance of the transparency of Hong Kong's common law system. He reminded us that "almost all of the proceedings in Hong Kong's courts are open to the public to observe" and of the importance of giving reasons for decisions which are publicly available in order that any member of the public may "scrutinise every judgment of the courts".

Accessible justice

This brings me to the second most important aspect of open justice which is that judgments should generally be public documents which are easily accessible. Of course, before we get accessible judgments every citizen must have access to the courts (as so eloquently stressed by Lord Reed in the *Unison* case) but once such access is obtained the next fundamental requirement is accessible judgments.

These can be conventionally published in hard copy and made freely available on the internet, as indeed the vast majority of Manx judgments are. Please look up www.courts.im and select 'View all judgments' and they are there.

Forgive me while I commit, yet again, the sin (perhaps inevitable in small countries) of self-citation. In *Harding v Officeholder* 2013 MLR 293 I reviewed some of the authorities and

stressed the importance of open justice when considered alongside other apparent competing interests. The law is frequently about balancing competing interests. Accessibility to public judgments may compete with privacy. The Appeal Division in the Isle of Man (*Taylor and Neale* 2012 MLR 199 at paragraph 97), in the context of court proceedings, referred to "the overriding requirement for open justice and transparency". In *Attorney General v Kelly* (24 November 2017) the Appeal Division at paragraph 12 stated:

> "The principle of open justice is an important principle in this jurisdiction … The publication of judgments in respect of appeals in open court is an important aspect of that principle."

In its first judgment of 2018 the Supreme Court of the United Kingdom in *R(Haralambous) v Crown Court of St Albans* [2018] UKSC 1 stressed at paragraph 61 that:

> "As a matter of principle, open justice should prevail to the maximum extent possible …"

The conflict between openness and transparency versus privacy and confidentiality, and freedom of information and accessibility verses data protection and their respective boundaries, will no doubt continue into the future. I endeavour to make that point good by referring to three relatively recent examples.

Firstly, there is a real tension between openness and privacy in private trust matters, especially in offshore jurisdictions. See my judgment in *A* (24 January 2017) and Chief Justice Kawaley's judgment in *G Trusts* [2017] SC (Bda) 98 Civ (15 November 2017). At paragraph 11 Chief Justice Kawaley, having confirmed a confidentiality order in respect of trust proceedings stated:

> "The present proceedings concern the internal administration of a private trust into which the general public have no right to pry."

Secondly, the Chief Justice of the Cayman Islands, Anthony Smellie, in *AHAB v Maan Al Sanea and others* (Grand Court of the Cayman Islands Financial Services Division) in a judgment delivered on 28 November 2017 dealt with the question as to what are the appropriate limits to the ambit of disclosure of documentation on a court file under the right of access pursuant to the open justice principle. This was in the context of seeking documentation, not for monitoring or understanding the functions of the court, but for "the very different purpose of third party discovery for use in other litigation" (paragraph 91 of the judgment). The learned Chief Justice had to strike an appropriate balance and determine the proper ambit of access under the open justice principle (see especially paragraphs 210 – 234). At paragraph 227 Chief Justice Smellie referred to the need to "strike an appropriate balance to allow such access as comports with the purpose of the rules and the purpose of the open justice principle whilst not imposing an undue burden either on the court Registry staff or on any party". I understand that an appeal has been filed in respect of this judgment but such appeal has not yet been determined.

Thirdly, the debate on the so-called "right to be forgotten".

In May 2014, the European Court of Justice held that European citizens have a right to request that those providing internet search engines that process personal data remove links to private information when the information is no longer relevant. Commentators have described this case as establishing a "right to be forgotten". It should be noted that the

European judgment in the *Google Spain* case related to the "links" to information and not the information itself. As Lord Neuberger said in *Technology and the Law* (21 April 2016) at paragraph 27:

> "Quite how far this decision, which nowhere considers freedom of expression, goes remains to be seen."

A partial answer to that question may have been provided by Mr Justice Warby in *NT1 and NT2 v Google LLC* [2018] EWHC 799 (QB) on 13 April 2018. NT1 failed to make out his claim for delisting but the court upheld NT2's delisting claim. No compensation or damages were awarded. Watch out for any appeals.

The Transparency Report (26 February 2018) from Google indicates that they have received approximately 2.4 million "right to be forgotten" requests since 2014 and 89 percent of the requests came from private individuals.

General searches of a person's name will find links from high traffic websites that have high Google ratings because the primary function of these sites is to be found.

It may be that there is no direct conflict between the right to be forgotten and open justice primarily because, if you know where to look such as www.courts.im, you will find the judgment you are looking for but the court website is not optimised to be found.

How the so-called "right to be forgotten" fits in with freedom of expression and open justice, including the accessibility of judgments, remains to be seen.

Clear justice

The third aspect of open justice is the clarity of the judgments because if they cannot be readily understood there is little point in publishing them.

Where possible judgments should be kept concise and be in straightforward easily understandable language.

With some of the more lengthy and complicated judgments in the Isle of Man we provide judgment summaries for ease of reference.

To write with clarity for a lay reader in mind when confronted by the magnetically attractive complexities of the law, can be tricky, even for those whose life is the law, or maybe especially for those whose life is the law.

As Einstein reportedly said "If you can't explain it to a six-year-old, you don't understand it yourself". Clearly, he was not a lawyer or a judge.

So, where there is open justice there must be clarity, supported by readily available and easily understood information.

This should include clear and succinct guidance that enables those who come in contact with the law to understand judgments, the law and how the justice system operates.

Promote understanding of the rule of law

The more open judges are about their work, the more likely it is that people will understand and appreciate what they do. This in turn will assist in maintaining and even enhancing confidence in the administration of justice.

I have since my appointment as a Deemster in 2003 endeavoured, in my own small way, to promote an understanding of the importance of the rule of law and the role of judges. This has often been by exploiting the opportunity to speak to unsuspecting and defenceless audiences who would otherwise be enjoying a well-deserved evening refreshment. In fact, rather like this evening.

But I will continue to do this because of my enduring love for, and belief in, the rule of law that I shared with you at the beginning of this lecture.

Lord Neuberger (the former President of the Supreme Court of the United Kingdom) in *The Future of the Bar* (lecture 20 June 2014) at paragraph 5 captured well the role of the lawyer in the context of the rule of law when he stated:

> "... Lawyers have a special position in society not because they are loved or because they are particularly admirable people, but because they are responsible for the rule of law ... laws are valueless unless they are also a practical reality, and therefore the rule of law also requires that all citizens have access to justice, and by that I mean effective access to competent legal advice and effective access to competent legal representation."

I agree that the legal profession and in particular advocates have a special duty to protect and enhance the rule of law, but perhaps that topic is best left for a future lecture.

10th anniversary of the Small Countries Financial Management Programme

My love of the law is of course one of the reasons I am so delighted to be asked to speak this year at the 10th anniversary of the programme.

As I am before you all tonight it would seem to be an opportune moment to congratulate those who gave birth to this inspirational programme, and those who have nurtured it through its first 10 years.

I am sure that you, your predecessor and successor participants, have gained from the programme and will all continue to do so in the future.

I have very much enjoyed my time with you and the other participants over the years. It has recharged my judicial and legal batteries and for that I thank you.

I wish the programme and all those involved in the delivery of it (including Alison McQuater, Mark Shimmin and Elaine Moretta) all the best for the future, and I acknowledge all the work they have done in the past to keep the programme running so smoothly for the last 10 years.

It was my great privilege and pleasure to plant a tree on 20 June 2018 in the grounds of Government House to commemorate the 10th anniversary of the programme. Long may it and the programme grow.

The funding of open justice

Given the core subject matter of the programme and the financial expertise I have sitting before me, it would be churlish of me not to have something to say about the funding of open justice.

It always appears to be relatively easy to persuade people of the importance of putting resources into the health service and education.

However, it is not so easy to persuade people of the importance of the rule of law and providing adequate resources to the judiciary.

Without the spur of direct experience, I can see how easy it is to be complacent about the rule of law. But I know that those who have suffered oppression or lived in jurisdictions that do not respect human rights put the rule of law and open justice right alongside education and health.

With this in mind I would ask you to ensure the judiciary in small countries are well supported.

The political perception may be that there are no votes to be gained from a rule of law agenda. But it is important that we all appreciate the true value of the rule of law and open justice.

Internationally, I envisage that small countries will continue to be scrutinised by larger countries and international bodies who will all have their own agendas. In the past the reviews have focused mainly on regulatory, taxation, terrorist and anti-money laundering issues. More recently interest has shifted to whether we value the rule of law and adequately resource an independent judiciary that is free from corruption. The rule of law will continue to be a hot topic.

I am certain that general interest in open justice will also increase. We should therefore strive to show our local populations and the international community that we are serious about the rule of law and open justice. This means we must take steps to ensure our judiciaries are adequately resourced so that open justice can be a practical reality.

Concluding comments

Holding that thought, I would like to conclude with some pivotal points to take away.

Conducting matters behind closed doors and secrecy does nothing to inspire confidence, it only excites suspicion.

At the core of the definition of open justice is transparency, a lack of hidden agendas, a desire to act in the best interests of the community and the sharing of all relevant information to generate trust, accountability and clarity.

Transparency, honesty and conducting legal proceedings in courts that are open to the public and the media will assist in preserving and enhancing confidence in the rule of law.

This in turn will help us all to live a civilised and happy existence in the knowledge that our rights will be protected, and justice will prevail.

Nothing erodes the spirit of the individuals more than knowing that everything they struggle and strive for could at any moment be unjustly taken from them.

Whether in business, personal activities or public office the maintenance of honesty and transparency is at the heart of successful collaboration, cooperation and the demonstration of sound values that lead to trust. This trust in an open legal process will generate greater reliance on the courts to determine legal issues and ultimately greater compliance with the rule of law.

To this end justice must be administered in open court to which the public and media should have access. This access should enable anyone who has an interest, to observe judges doing their best to deliver justice according to their judicial oaths. In doing so they can have confidence in the impartiality of the judiciary and the administration of justice.

This impartiality is uniquely described in the judicial oath of the Deemsters in the Isle of Man as, the need to execute the laws of the land as indifferently (as impartially) as "the herring backbone doth lie in the midst of the fish".

Please remember, to be sure open justice really works in your community, judicial activities need to be adequately funded so they can be held in public, deliver clear and accessible judgments and be supported by an appropriate information resource.

With that in mind I urge you all to remain resolute in the maintenance of the rule of law and open justice in the face of tight budgets, empowered digital communities and powerful individuals and businesses.

I wish you well on your journeys back to your home jurisdictions and I hope I have given you the desire to, wherever possible, take steps to support the rule of law and the spirit of open justice.

Participants of the Small Countries Financial Management Programme 2018, please do not fear open justice or the cost of it. Embrace it.

David Doyle
First Deemster and Clerk of the Rolls of the Isle of Man
28 June 2018

I would like to thank Karen Bailey and Emily Rimmer for their assistance in the preparation and presentation of this lecture.