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Media Ethics Essay

Explore the difficulties faced by English Law in balancing the rights of the individual with the freedom of the press.

There are many different statutes and pieces of common law which limit the activities of the British journalist, more so than in most countries of the democratic world (Belsey and Chadwick [1992]). These include those of official secrets (Acts of 1991 and 1989), obscenity, blasphemy and unrest. Thatcherism produced several acts limiting the press (David Burnet [1992]) but not a freedom of information law.

However probably the most common problem for the journalist is the law concerning Contempt of Court. Any laws restricting the press could be viewed as compromising its 'freedom.' Belsey and Chadwick argue that *'…legal restriction on the press, in the absence of a constitutional guarantee of press freedom…is a one-sided detraction, preventing the press from fulfilling a proper democratic role'* (p.8) and point out that *'a free and vigorous press…[is among]…the essential ingredients of a healthy democracy'* (p.5).

But what exactly *is* press freedom? The freedom of editors? The freedom of journalists to *'…offer fact or fiction without fear of sanction or persecution? Or is it the freedom of ordinary people to receive full and fair information…?'* (ibid.). According to Bruce Hanlin (1992) *'…the [British] concept of "press freedom" has a chequered past and an ambiguous present, and remains fundamentally a right to publish…attached to ownership'* (p.38).

The law faces a tough task in balancing this undefined 'freedom' with individuals. Whilst acknowledging press freedom, the rights of an individual must not be undermined.

The law of contempt *'…preserve[s] the integrity of the legal process'* (Welsh and Greenwood [1997]) stopping interference with justice. In 1981 the Contempt of Court Act was introduced but before this contempt was an offence under (common) case law under 'strict liability' where you are held liable regardless of intention and defence.

The 1981 Act states that journalists can commit contempt in three ways. The first is where they might cause prejudice to a trial, perhaps by divulging information about its participants, the second when they breach an injunction ('stopping motion') and the third is through their personal conduct (including 'chequebook journalism'; paying high sums for exclusives). Proceedings under the 1981 Act occur in the Crown Court (or higher) under the Attorney General's authority. Magistrates cannot apply contempt by publication but can impose a fine of up to £2,500 on anybody who insults them or intervenes in court proceedings.

The Act states that you are now only liable for contempt if two things are satisfied; that publication creates a **substantial** risk of interference with a case and also that the proceedings are currently active. The importance of 'substantial' is paramount. In Mr Justice Lindsay's summing up of *MGN Pension Trustees v Bank of*

America National Trust and Savings Association and Credit Suisse (1994) he said *'…that a risk of prejudice which could not be described as substantial had to be tolerated as the price of an open press' (ibid.).* Then Mr Justice Lindsay also quoted Lord Taylor, Lord Chief Justice from 1993 in the Court of Appeal as saying that:

> *In determining whether publication of matter would cause a substantial risk of prejudice to a future trial, a court should credit the jury with the will and ability to abide by the judge's direction to decide the case only on the evidence before them. The court should also bear in mind that the staying power and detail of publicity, even in cases of notoriety, are limited and that the nature of a trial is to focus the jury's minds on the evidence put before them rather than on matters outside the courtroom.*
>
> *Ex p.The Telegraph (1993) 1 WLR 987*

As stated, the other prerequisite for prosecution is that the case impinged upon must be active. There are several ways in which it can be; when an arrest is made, a warrant is issued for an arrest, a summons is issued or finally if an oral charge has been made. A case becomes inactive if no charge is made (unless bailed), no arrest has been made within 12 months of a warrant being issued, the case has been discontinued or when the defendant is acquitted or sentenced.

Clearly the press benefits from these basic provisions of the Contempt of Court Act Furthermore *'…most judges in England and Wales have accepted that pre-trial publicity which is merely prejudicial rather than meeting the higher test of a substantial risk of serious prejudice, is not to be treated as a contempt…'* (ibid. p.113) and that '...the Court of Appeal has acknowledged that there is an insubstantial risk of prejudice of a jury by media reports of the day's proceedings' (*R v Horsham Justices, ex p Farquharson* [1982] QB 762).

However, contempt is possible even if proceedings are at an early stage and even if the material is published in a location distant from the trial or months before it. The journalist must be very careful, meaning that stories may be less likely to be published, or perhaps published but with caution. In that respect the media is restricted; the lesser likelihood of publication favours the individual. Couple this with the many ways in which contempt can be committed and it is clear that the journalist has to navigate a minefield. Their one consolation is that, since the act, it is much harder to be prosecutions of contempt to progress.

In 1981 before the Act took effect the Guardian reported on a trial of two men, recalling that one of them had previously escaped from custody. The case was currently before a jury unknowing of the escape. They were fined £5,000 and the trial was abandoned causing great expense to the public (ibid. p.114). Therefore the under Section 4 (S.4) of the Act provided that a court could rule that reporting on a sensitive trial should be postponed for a time called a S.4 order.

Such an order has two competing elements; the ensuring of a fair trial (by preventing publication) juxtaposed to the open justice system. The law dictates that the chance of substantial injustice is the paramount consideration over press freedom *'where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings, pending or imminent….'.* However judges have made some concessions to the press. Welsh and Greenwood mention Lord Justice Farquharson (from *R v Beck, ex p Daily Telegraph*, Court of Appeal, 1991): *'...if a judge's intention to make a S.4 order was announced*

suddenly, the press was not generally in a position to make any representations…. The best course was for the judge to make a limited order under S.4 for say, two days, and thus give the press time...' This obviously is in the best interests of those who the order would be against.

In the case of *R v Rosemary West* (1995) a reporting restriction was imposed by Mr Justice Mantell on 3rd October in Winchester Crown Court pursuant to S.4(2):

> *'In order to avoid a substantial risk of prejudice to the administration of justice in connection with the trial upon indictment of John West…there shall be no reference in any report of these proceedings whether by name or otherwise to John West the brother of Fredrick West.*

This serves to help ensure that the trials of John West remains as unconnected as possible from that of his serial murderer brother.

If a journalist reported on matters taking place without a jury then *'...a judge might hold him in contempt on the ground that he had not acted in good faith as required by the act'* (Welsh and Greenwood). You can report in a general way that the jury was excluded but you cannot report anything that is said until the case finishes.

Can you report that a S.4 order has been made? Lord Justice Mann thinks so, saying in 1992 in the Queen's Bench Divisional Court (QBD) that as they prevented public knowledge of proceedings in a public court then they should be *'...made public in such a way that it was crystal clear what the press could or could not do'* (ibid.) In 1982 he Lord Chief Justice had said that a S.4 order *'...must state the precise scope, the time at which it ceased to have effect, and [its] specific purpose'* (Welsh and Greenwood, p.84).

It is obvious that a S.4 order is more in the interests of an individual rather than in those of press freedom. However they are only issued in *substantial* circumstances. After all such a circumstance creates the possibility of a serious miscarriage of justice, maybe even contravening the common belief of innocence until proven guilty.

Section 11 of the Act allows a Court to ban a name or other matter from publication. (In *R v Arundel Justices, ex p Westminster Press* [1985], ibid, p.85) it was ruled that a court **had** to withhold a name from public proceedings before a S.11 order could be made.) This is clearly not in the best interests of the press. However, there is another, bigger issue here if, for example, the order is to protect National Security. Whilst the press may say revealing of such information is in the public interest it could be argued that, by not revealing these potentially harmful facts to the public, the Court is actually acting much more in the public interest.

In *R v Evesham Justices, ex p McDonagh* ([1988] 1 All ER 371, 384, QBD) it was said that a S.11 order could not be issued *'...preventing the publication of a defendant's address where the administration of justice did not require such confidentiality'* (ibid. p.84). Obviously this is in the interests of a free press, and indeed, in the interests of open justice too.

Some S.4 and S.11 orders have been issued without rightful justification. In one case Mr Justice (later Lord Chief Justice) Taylor was wrong to issue a S.4 as it *banned*, not *postponed*, publication. The QBD decided in 1992 that any court could hear from the press when a S.4 was being considered, taking the view (ibid. p.83) that *'the media were best qualified to represent the public interest…'* (after *R v*

Clerkenwell Metropolitan Stipendiary Magazines, ex p The Telegraph plc [1993] 2 WLR 233) (ibid.).

Indeed an article could be exempt from accusations of contempt under Section 5 of the Act. In 1974 The Sunday Times wanted to publicise circumstances surrounding the marketing of the drug 'thalidomide' whilst civil actions were pending against its manufacturers, Distillers Company (Biochemicals) Ltd. on behalf of children affected by it before birth. The House of Lords ruled (on appeal) that contempt would be committed because *'...the public interest in the proper administration of justice outweighed the public interest in discussion of the matters raised…'* (ibid. p.123). The Government appointed Phillimore Committee disagreed, adding that a public interest debate ought not to halt because of legal processes. The European Court of Human Rights judged (1979) that the Lords decision breached Article 10 of the European Convention on Human Rights asserting the right to freedom of expression. Indeed relatively recently in the House of Lords (Hansard [November 1996]) Lord Lester asked the Government to '…*put arguments to the courts in favour of interpreting the Contempt of Court Act 1981 consistently with…Article 10 of the European Convention on Human Rights.'* So under S.5 of the 1981 Act discussion of public affairs 'in good faith' is not in Contempt provided the risk of prejudice is unrelated to the debate.

Section 3 of the Act deals with the defence when contempt is committed but the publisher took 'all reasonable care' to establish the status of proceedings but believed that the case was inactive when it was not.

An action for common law contempt can be brought outside of the 1981 Act (inactive proceedings) but it must be proved that prejudice was intended- it could be argued that the journalist should be able to think of the consequences of their actions. In 1987 The Sunday Times and the Independent were found guilty after they published material from 'Spycatcher' by Peter Wright when injunctions were in force against the Observer and the Guardian. The case was inactive as it was not set down for trial.

Belsey (1998) thinks that the press is already too restricted by the law. The 1981 Act itself appears to favour the individual all too often. Still, it has to be said that it does make the offence of Contempt far more defined and simultaneously far harder to prosecute under it. Welsh and Greenwood (p.128) conclude by saying that *'today a newspaper may be more likely to be sued for defamation by a judge whose good faith is questioned than it is to be prosecuted for Contempt of Court.'*

The Act has made a major triumph however, by ensuring that *'it [is] an essential part of British Justice that cases should be tried in public…[and that]…this consideration had to outweigh…individual interests,'* (*R v Central Criminal Court, ex p Crook* [1985] ibid. p.84). Yet the statute does manage to achieve some kind of balance. Press reporting can not be in contempt whilst proceedings are inactive, yet the 1981 act makes sure that when it is and a substantial risk of contempt exists, it does not interfere with the justice system taking its true course.

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