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Forum on contempt of court and media publicity

Report

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POLIS Report
Forum on Contempt of Court and Media Publicity
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On October 24th POLIS, the BBC College of Journalism and the LSE Law Department jointly held an expert seminar discussing the practice of contempt law. Over twenty-five participants, representing the legal profession, journalism and academia, were in attendance. Joshua Rozenberg, legal affairs editor for the *Daily Telegraph*, chaired the event.

The issue

The panel's main concern was to discuss the extent to which prejudicial media content affects the outcome of court cases tried by jury. There is concern within the legal profession that media coverage of trials directly influences the beliefs and opinions of jurors regarding evidence or the person standing trial. If and when this truly occurs, the media is guilty of being in contempt of the court because its publicity introduces bias into a process that ought to be fundamentally impartial. In theory, jurors must decide the outcome of trials on the basis of courtroom evidence alone. Otherwise, they jeopardize the fairness of trials and violate the integrity of judicial proceedings. Journalists claim that contempt law interferes with freedom of the press and the media's right (and indeed duty) to keep its audience informed on matters of public importance. In light of these two positions, the relationship between contempt law and media publicity is particularly thorny because it discloses a critical tension between two firmly-held democratic ideals: the right to a fair trial and the freedom of the press.

Questioning the evidence

It was pointed out that there has been very little empirical research that investigates jury behaviour and whether verdicts are actually influenced by adverse media coverage. This is due largely to the fact that juries are sequestered during their deliberation, which makes it nearly impossible to measure the true impact of media publicity on their decisions. In the UK it is not allowed to interview jurors after a trial. Nevertheless, the panellists seemed to agree that there is sufficient evidence to suggest a correlation between the two variables. By way of example, they referred to the Taylor Sisters' murder trial, which rendered a guilty verdict that was later appealed and overturned on account (in part) of falsely reported evidence in the media. Supposedly, there was a perceived *risk* that the media had skewed the jury's deliberative process and, by extension, the verdict of the trial. Most participants agreed that confusion over current application of the law and the risk of media excess was sufficient to prompt reconsideration of current contempt law.

Current enforcement of contempt law

It was clearly a contentious issue whether there is currently appropriate enforcement of the law of contempt, outlined in the 1981 Contempt of Court Act. Some panellists argued

that the law is not being enforced as stringently as it should, but that this does not matter because of the “fade factor”. The latter suggests that the greater the gap between the time at which prejudicial media content is published and the time at which the trial begins the weaker the effect of adverse publicity on the jury’s verdict. Given the fade factor, some panellists claimed that media coverage was mostly insignificant to the outcome of trials, and that the media should therefore be free to report what they wish.

Another view was that the current law of contempt is being applied loosely to favour the media and that this matters greatly because it is severely undermining the integrity of the jury system and public trust in the courts and justice. Proponents of this view argued that the real problem is not media coverage per se, but that media coverage of court cases is so often inaccurate and prejudicial towards the individual being charged. What is more, such negative coverage usually occurs *before* the trial, which means that there is a risk that jurors develop opinions regarding the guilt or innocence of the accused before trial even begins. It was claimed by some panellists that, in these circumstances, the Attorney General’s Office is far too inactive in prosecuting contemptuous media organizations. However, it was also pointed out that the Attorney General’s office often acts in an informal way to correct media behaviour.

Further problems

Perhaps the only consensus that arose out of the disagreement was that contempt law is incredibly difficult to enforce. The reason for this is that judges can do little, short of quarantining the jury, to ensure that jurors remain isolated from inadmissible evidence in provenance of the media. The question then, according to the discussants, is when the law of contempt should be enforced. In other words, when should the proverbial shutters fall on media coverage of court cases: at the time of the arrest, the time when charges are laid, once pre-trial proceedings begin or once the trial itself begins? At what point does adverse publicity from the media become a problem? Panellists agreed that these questions need to be further investigated and imperial evidence sought.

Some panellists claimed that these new questions were red herrings given the rise of new information technologies like the Internet. They argued that the Internet makes it virtually impossible to constrain the free flow of information. Under these circumstances, they proposed, it is best to assume that jurors will have access to outside information regarding trials. Yet, this assumption undermines the very premise of contempt law: that the conditions for fair trials can be created by denying the jury access to certain types of information.

Faith in the jury system

In light of the difficulties outlined above, the panellists agreed on a number of points. First, the best judges can do in their endeavour to isolate jurors from outside information is to continue to warn them that it is impermissible to inform themselves during a trial. However, it was added that judges ought to also *explain* to jurors why doing so is not permitted. They should express how seriously it undermines fairness in justice and public

confidence in the courts, as well as stress that the consequences of misbehaviour are dismissal from the jury.

Second, and perhaps most significantly, the panel appeared to agree that in the current environment, characterised by information saturation, the only option is to have faith in the jury system. We must trust the common-sense and responsibility of jurors to act in accordance with the law. We must also have faith that jurors are discerning individuals with a fundamental belief in the fair proceedings of justice. As such, we should be confident about their capacity to recognize prejudicial information and disregard it.

It was said that academic research tends to testify to the success of the jury system. It shows that juries consistently perform well, reaching reasonable verdicts and discerning between admissible and inadmissible information. Furthermore, the research suggests that the jury system's inherently self-policing structure successfully creates internal pressure to promote integrity: the twelve jurors function as checks on each other, blowing the whistle on any attempts to introduce outside information into the jury room.

The U.S. comparison: signs of hope?

Although the predominant focus of the seminar was on UK law, the panellists did discuss the issue with the help of an American perspective. The discussion seemed to highlight that balancing the right to fair trial and freedom of the press was uncomplicated in the U.S. One panellist pointed out that the need to balance two fundamental freedoms does not imply that they necessarily conflict. In fact, the U.S. gives both freedoms equal constitutional weight. And, despite the U.S. media's total and unfettered freedom to report on trials by jury, it is rarely, if ever, found to be complicit in determining the verdict of trials.

The media's role seems to be more positively, and less sceptically, viewed in the U.S. where historical mistrust of government spawned a long tradition of media oversight. Accordingly, the U.S model includes a strong role for media in watching over the workings of government and informing the public of their successes and failures. It was argued that this method of "policing the polices" has often promoted accountability without contemptuous consequences. In the tremendously mediatised O.J. Simpson trial, the press supposedly played this role to the letter: it never misinformed the public and, thanks to its unfettered freedom, it disclosed corruption in the police and gross inadequacies in the court system. Above all, despite the media frenzy, O.J. Simpson was acquitted. What this allegedly shows is that the media needs to be present in order to prove that the political system works and to build confidence in the institutions of democracy, including the judiciary. In the U.S., the media seems to fulfil that mandate without infringing the fair trial proceedings. Although several panellists remained suspicious of an unrestrained media, the American model appeared to temper the panel's overwhelming concern about the media's adverse coverage in the UK.

Where to go from here

It was agreed upon that the status quo in the UK is unacceptable. The current law of contempt must be better enforced, which seems to be a daunting task, or it must be changed. It was proposed that law reform be instigated to ban the publication of content relating to trials that are under way. However, given that cyberspace encompasses endless informal media channels, it is unlikely that such reform would succeed in preventing curious jurors from informing themselves. The reality remains that contempt law is not enforced entirely because it *cannot be*. What is left, for now, is to liberalize the enforcement of contempt law. This means placing faith in the jurors' sense of responsibility and the judge's authority and wisdom in guiding the jury. The mood at the conclusion of the seminar seemed to be that, if the jury system is to survive - and the agreement was that it must - then it will have to be accepted in these less than optimal conditions. Unless complete approval of the "unrestrained" American model emerges in the UK, it is likely that belief in the integrity of the jury will continue to be tested by scepticism in the integrity of the media.

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