

The Use and Misuse of Law and Lawyers

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I have been asked to talk about lawyers, your profession rather than mine and I therefore do so with great humility. A few years back I was asked to serve on the Calcutt Committee, which was looking into the question of the law of privacy and the press. I was greatly amused by the fact that I had recently been covering, as a journalist, the whole question of the future of the legal profession and the great battle lawyers were undertaking at the time against the Lord Chancellor against new forms of regulation perceived by some of them as being a draconian government's imposition of socialist, even communist, controls. I then went in to bat on the Calcutt Committee, well stacked with lawyers. The enthusiasm with which the lawyers on the Calcutt Committee proposed draconian controls on the press was almost as impressive as my determination to resist such controls in precisely the same terms as those with which lawyers were resisting external regulations for themselves. There were, as you can imagine, many lively discussions.

However, what I thought I would do today, is not talk so much about lawyers or the law, abuse or misuse thereof, but tell you something about how journalists work, how journalists operate and the extent to which our work is impinged on by the law. I am slightly better qualified to talk about my own profession than about yours.

The great battle, and I think it is fair to say of every profession at the moment, be they doctors, accountants, lawyers or civil servants, or for that matter Lloyd's underwriters, is between self-regulation and external regulation. Wherever two or three professionals are gathered together, the

conversation turns to this subject. Apart from the natural resistance of all journalists to any form of regulation, the press suffers already from a very substantial code of regulation, and it's called the law. Journalists do acknowledge the existence of laws which govern our activities. These laws are regulators and to that extent, lawyers are the regulatory agents. The fell phrase "If you do that, you will get a solicitor's letter" means something to a journalist. It has the same meaning as "You'll get a message from Oftel" does to a British Telecom executive or "You'll get a message from Ofwat" does to a water executive. The equivalent body for journalists is the law. Our relationship with the law is, as a result, intensive, extensive and frequently robust. The laws which we have to grapple with from one day to another are many and varied.

The Obscene Publications Act seldom causes problems for The Times (and nor for that matter, does the Race Relations Act, I am glad to say, though there are more occasions when it might). More perplexing laws are those on contempt and official secrets. I regard the Official Secrets Acts as they have evolved over the decades, as a relatively minor pinprick. I regard the laws of contempt as a complete ass and draw a firm distinction between these two areas that impinge on our life. The Official Secrets Acts, recently amended, fall into the category of "nuisances" that governments put up to try and protect their own secrets. They have, I think, been overdone as constraints on good journalism. In my experience, the most effective way of discovering what government is up to is to put a good journalist on to it. A bad journalist is one

who says "I can't do that story because there is an Official Secrets Act".

I have never felt the Official Secrets Act is a severe constraint, although you will certainly come across plenty of cases, of which "Spycatcher" is the classic one, where government has behaved outrageously. It became a *cause celebre*, not least among many lawyers. I never quite felt that the publication of "Spycatcher" would lead to a great strengthening of the British Constitution, or for that matter, its concealment to any great undermining of the British Constitution. It never seemed to me that it was either the beginning or the end of the freedom of the press. The same, I think, applies to "freedom of information", which has now been adopted by this Government as a "buzz word" rather than as a reform. Whether we are going to see anything dramatic in that respect remains to be seen. The publication of lists of Cabinet Committees has to rank among the most boring of all secrets ever revealed to the public. I found it hard enough to publish the complete list in The Times myself, and was certainly surprised to see one or two other papers doing so, although clearly with a heavy heart. (The information was printed in a very small typeface which made it almost unreadable). But the extent to which Government does open up to journalistic enquiry (or to less than assiduous journalistic enquiry) is, on the whole, a good thing. To that extent the relaxing of the Official Secrets Act that has taken place is to be welcomed.

The law of contempt is much more difficult for a number of reasons. One is its uncertainty, the second is its reliance on judges in its interpretation and the third is that it is extremely difficult to chart your way through each day's news schedule and not fall foul of it: much of the news that newspapers want to print takes place in courts. What happens in a court room is usually good "bad news". It is frequently salacious and/or sensational, offering accessible and cheap copy to put into a newspaper, particularly a popular newspaper. But it has to be reported properly to be protected under privilege.

This often involves reading the mind of a particular judge. I, myself, was bruised by this many, many years ago when I was editing the London Evening Standard and published an article which I thought blameless, advocating the stamping out of corruption in the Metropolitan Police. I was summoned before a judge to be told that this article was in grave contempt of a case concerning corrupt policemen that was before his court at that particular moment and could have severely prejudiced the jury against one of the defendants in the case. I thought his objection absurd. What piqued me was that the manner in which I was advised by his office to "purge" my contempt: to hire a stupefyingly expensive solicitor to indicate the depth of my remorse, to hire an even more expensive barrister and to appear personally in the court with both of them to apologise! Only then did the judge feel justice had been done and I could go back to my job. It was a good illustration of the contempt laws at their worst.

Another illustration is the use of the gagging writ by people who are intending to pursue libel actions against newspapers but are not expeditiously doing so as the matter concerns time sensitive news which they wish to keep quiet for a particular period. The famous example was the thalidomide case. By persuading judges to injunct material pending a putative trial at some distant date, you can effectively censor a newspaper. This area of law is under re-examination by the judiciary and I think that journalists hope for great things.

Which brings me to the laws of libel. These laws are popularly used by journalists, as is the Official Secrets Act, as an excuse for not being able to pursue a story. You will have seen much reference in the Maxwell case to "Oh, we couldn't pursue him because of the laws of libel". Maxwell certainly made full use of gagging writs and contempt of court rules but there were people who pursued him despite the laws of libel. Newspapers can often be wealthy and they can even, occasionally, be brave. One of the reasons why Maxwell wasn't pursued is that many people didn't realise quite how villainous he actually was and weren't assiduous enough

in pursuing all the lines of enquiry that they could have pursued. It was certainly expensive and dangerous to pursue Maxwell and the law helped him greatly, but that's not an excuse for much cowardly journalism that bowed before Maxwell's bullyings.

Indeed, I used to think that the laws of libel in Britain were rather good. Among the various defences that people had against a venal press, was the requirement that a newspaper should be able to prove that what it said about them was true. This is hardly an onerous restriction on press freedoms and compared with the laws in America, where there are all sorts of defences for journalistic misbehaviour, it seems to me that the British law is simple, straightforward, clear and a reasonable defence of personal liberty against an overweening press. I am not so sure I think that any more. In recent years the burden of proof in libel cases has moved excessively in the direction of the defendant. The burden of proof in a fast running story is frequently onerous and very costly. The willingness of people to come forward to give evidence is not the same as their willingness to answer a question on the telephone. Their willingness to sign an affidavit is not the same as their apparent statements in the street or at a meeting. Certainly, I think, newspapers have found it progressively more difficult to prove to their in-house lawyers that a story ought to be pursued in the face of strong recommendations that it might be difficult to make it stand up in court.

To that has been added the delay involved in hearing libel cases: delay costs newspapers money, as it does individuals. More to the point, juries nowadays almost invariably come down against newspapers and in favour of plaintiffs. The last phenomenon is, without any doubt, the most stringent on journalistic freedom. If the in-house lawyer tells you "Listen, you are never going to win this one if it comes to a jury" and if the plaintiff's solicitor is telling him the same thing, you are on a hiding to nothing. At the moment, the laws of libel as a constraint on press freedom are much more severe than used to be the case. Even

as "reputable" a newspaper as my own finds itself bombarded with letters from people whom we have, in some sense or another, slighted - not surprisingly since almost everything in a newspaper is likely to be unwelcome to someone. One of the reasons we buy newspapers is because we find a certain amusement in the misfortunes of others: it would be a dull paper which didn't cause someone some discomfort). It is rumoured that many newspaper houses at the moment have a rule which says that, provided a libel claim is not for more than £10,000, then "pay up". The inclination of anyone who is referred to in an uncomplimentary manner is to send a lawyer's letter, saying "I would like £10,000 please, plus costs". The inclination to misbehave on the part of the public, if I can put it as strongly as that, is quite strong. Certainly, the number of what I call "gold digging" letters has gone up dramatically, largely as a result of the celebrated Elton John case, when he got £1,000,000 out of the Sun. Here it is not the formal constraints that limit press freedom. It is a shift in the balance of argument or advantage before courts in the direction of plaintiffs and against newspapers. A journalist starts thinking "I will not carry that story, just in case". The other day we had a distinguished public figure who was, I had to admit, treated most unfairly in what amounted to a review. The custom and practice governing reviews, as you can imagine, are difficult. If you review a play unflatteringly, it can cause immense distress and financial damage - damage being a criterion in libel. The defence is that artists put themselves forward for criticism by staging a play and inviting a critic. If they didn't invite a critic, where stands your defence? We were extremely uncomplimentary about someone, who thought it went much too far and sent a preliminary letter prior to a writ for damages. We felt that we were not going to win this in court, even though we thought we were right, because this person was likely to incur great public sympathy and the press rarely incurs any such sympathy. Although defamation, I felt strongly, was not an issue, the inclination of the lawyer was that we should pay up. I was reluctant to do so because a large amount of money was

requested by a particularly grasping solicitor and I proposed that instead we reach a deal. Newspapers now find themselves entering into deals all the time with potential plaintiffs. The basis is essentially unethical: they get some publicity, they get a favourable mention or a flattering profile. The contents of newspapers and magazines are distorted or perverted by this peculiar justice.

Many libel cases are now, I believe, proxies for complaints of intrusion on privacy. This is the area to which I want to devote the rest of what I intend to say. Some of the more celebrated cases that have come before the libel courts over the past ten years have been about what a jury might be expected to regard as an unwarranted intrusion into someone's private life, rather than about a defamatory inaccuracy told about them. There have been many cases where every journalist knows that a particular revelation was true but because the plaintiff thought the newspaper could not prove it in court, it was worth suing and appealing to a jury's sense of what amounted to fair play. Truth has thus been presented to a jury as a lie and, in my view, great injustice has been the result. I think this is the thing that has most perverted the laws of libel and led, three or four years ago, to politicians saying that we need to look again at the laws of privacy to see whether we shouldn't be disentangling these two areas of the law, defamation and privacy.

Whether or not what The Sun said of Elton John was true, it was certainly a gross intrusion on his private life. The jury awarded £1,000,000, to someone who barely needed £1,000,000. They were effectively saying that irrespective of whether the story was true, this was the sort of story that should never appear in a newspaper about anybody and the newspaper concerned should be punished. There was a similar reaction to the deathbed photographs of Russell Harty and to the intrusion on the sickbed of the actor, Gordon Kaye. In all these cases journalists behaved in a way that was not illegal but which offended grossly against public taste. The libel laws were the only laws available for the courts or the

plaintiff to get redress.

It was because of this that the Government decided to set up the Calcutt Committee three years ago. The spirit that motivated the Committee was curiously diffuse. Labour politicians felt there ought to be a stop to too many Right Wing newspapers. Others felt there ought to be a right of reply to articles that attacked them in newspapers and this right of reply ought to be statutorily enshrined. Others wanted laws on the ownership of newspapers to ensure a fair balance of proprietorship. But most comment was centred on intrusion into privacy and it was to privacy the Calcutt Committee was asked to address its remarks.

I said at the beginning that I was intrigued when I joined the Calcutt Committee to find that I was the only working journalist on it; the Committee included three lawyers. It looked packed to me, and packed with the enemy. However, the evidence was even more packed with hostility. It was mostly from complainants against newspapers. I thought I had been in Fleet Street long enough not to be surprised by anything, but reading night after night, these great folders full of cases, I did begin to think there was something that "needed to be done" by way of redress, even if I couldn't put my finger on what it should be. Newspapers behave appallingly quite often, and that "quite often" is often one time too many for the person who has been offended. There is absolutely no way you can get away from that. This sense that something must be done infused the deliberations of Calcutt and has infused all discussion of press misbehaviour ever since. The Calcutt raw material included the Younger Report on privacy which had reported twenty years before. I can recommend the Younger Report to anyone interested in this subject. When I first read Younger I thought, "Right, that's it. No point in going to any more meetings of Calcutt". Younger, I thought, put the case overwhelmingly against a law of privacy. We had more evidence from laws of privacy abroad, all of which seemed to suggest that they were inadequate in important respects. Privacy was an area of personal activity, personal experience, in which the law was

peculiarly inappropriate. Everybody who studies this subject tends to come along with a predisposition that there should be laws of privacy and leaves it with an equal predisposition that there shouldn't.

The concensus on Calcutt was that Younger stood. There were, however, areas in which the law should be extended. There should, for instance, be a criminal law of trespass to cover intrusion onto private property other than for the purpose of an existing criminal offence such as burglary. There should also be an extension of the criminal law to embrace the use of bugging devices and photographic intrusion. The Committee was left with the problem that although it had proposed some minor extensions of the law, these did not satisfy "red in tooth and claw" politicians, who wanted to see someone seriously cracking down on the press.

We looked, at great length, at other forms of external regulation. We discussed whether you could enforce a code of practice to prevent intrusion on privacy by statutory means. We discussed whether you could set up a Tribunal (and there are various models for this in the advertising industry and elsewhere) that would have the force of law. If a newspaper committed an intrusion outside a code of practice, then it could be dragged before this Tribunal operating under rules of contempt; it could be fined, ultimately it could be imprisoned, it could be forced to publish retractions or whatever. Great difficulties surrounded even this idea. The problem is with any statutory code: the more you introduce the law into what I regard as "grey areas" of professional judgement, the more specific the law has got to be to be enforceable in a Court. Any Tribunal ruling on privacy and with sanctions would effectively be a Court. The more specific you make the code, the more difficult, even ludicrous, it becomes: which member of the Royal Family is entitled to how much privacy, how far down the line of succession do you go until the photographer is not to be allowed to photograph someone when they are "off duty"? These are not matters of truth or falsity, or even of provable damage. We came to the view in the end that the best thing to do was not to

do very much but to pretend that we had done a lot. We recommended that the Press Council should not continue in existence but be replaced by a body with a different name and Chairman, but with much the same powers and obligations that it had before.

The question of privacy and intrusion was addressed by a voluntary code. This code led to much debate, indeed at one point I believe there were five different codes roaming Fleet Street untamed. There was the Press Complaints Commission Code, there was the former Press Council Code, there was the Newspapers Proprietors' Association Editors Committee Code, there was certainly a Times Code and I think almost every other newspaper organisation had a code of its own; many of them bearing no resemblance whatsoever one to another. However, the codes did try and address the central issue that concerned everybody who is battling away at this frontier between journalism and the law, the question of what is the "public interest".

Public interest is a wonderful phrase - it can mean two things. There is no doubt at all that to a "quality" newspaper editor the public interest is very specific: is this something that is of concern to people who are interested in current affairs, politics, public life. Public interest has a sonorous ring to it. In America there are public interest lawyers. To a tabloid newspaper editor, however, the public interest is terribly straightforward, it is anything he or she thinks will interest readers. "They wouldn't buy as many copies of my paper if my paper wasn't of interest to them, would they?" This wretched word "interest", which does not appear in the Calcutt draft code, is open to so many interpretations, as to be, I think, quite useless as a means of guiding journalists or lawyers or, for that matter, plaintiffs, in how they should write their stories or protest about them when written. If you look at the Code of Practice published by the Press Complaints Commission, you will find that public interest is mentioned frequently but every time it is followed by a vain attempt to define it - usually invoking the word "including". The word "including", which I think no lawyer would have used,

means that it can "include" other things as well as those things listed. It is defined as including, under public interest, any journalism designed to scout out any law breaking or serious misdemeanour, any anti-social activity, any threat to public health or security, most interestingly, any danger that the public might be misled by statements by public figures. All these categories were clearly drafted, I thought, to embrace almost anything that any newspaper wanted to publish. There was a celebrated case of a Sunday newspaper that sent an agent provocateur to answer advertisements in a newspaper for wife-swapping. Two reporters duly arrived at a house where a hapless couple thought they were going to have a much better time than they duly had. When challenged on the matter, the paper explained that it was exposing a seriously anti-social activity, in the terms of the Calcutt Committee's law or code of practice on intrusion. But at what point does wife-swapping become a serious anti-social activity? The paper excuses its blatantly prurient story on the argument "Would you like it going on next door to your house?". Likewise the sexual misdemeanours of professional people are regarded as fair game because "higher standards" are expected of them. The absurdity of such codes knows no bounds. It was interesting that when the defence of uncovering law breaking or serious crime was proposed, someone said "Yes, but you don't know its going to be a crime until you've committed the intrusion". "All right", said the drafters of the code, "let's put possible misdemeanour in". I'm not a lawyer and I don't know what the difference between a crime and a misdemeanour is, but I'm sure there is one. But I sense that it's the coach and horses phrase, that enables any editor to get away with anything he chooses to do on the grounds that he's gone into the house, maybe even of the Royal Family, in the anticipation of revealing anti-social behaviour or misdemeanour. Most of the codes rejected a feature I was keen on, a cardinal point in American privacy laws, which was that there should be different protections enjoyed by those in public life from those in private life. If you run for public office, your right to privacy is to an

extent diminished. The lawyers said that you can't have rights for some people but not rights for other people, particularly legally enforceable rights. On the other hand, the essence of the code is that it is not meant to be legally enforceable. It seemed to me that there were marked differences between the sort of hounding that must be expected by a politician or entertainer, who often seek publicity and ordinary citizens who for some reason have been "famous for a day". Many of the saddest cases reported to Calcutt were of people who suffering from "fame for a day" were, for instance, photographed in extreme distress. There are matters like this which are not covered in the code but which I think should have been covered, that cause people real anguish, real anger.

On the Calcutt Committee we avoided any discussion of damages/compensation, because with intrusion into privacy it is peculiarly hard to assess what is the damage. A famous person frequently invites intrusion by inviting a journalist along for an interview. They then may not like what the journalist subsequently writes: perhaps it was indeed outrageous. But given the original invitation, a complaint on the nature of the publicity would be difficult, I would have thought, for any court or tribunal to adjudicate on.

The central problem is that privacy and intrusion remain to a large extension matters of taste, often changing taste. The editor of a tabloid newspaper told the members of the Calcutt Committee about an elected politician, who had indulged in some outrageous private practices that could disqualify him from public office. But the editor had no intention of telling the readers of his newspaper or even the Committee who it was. The Committee became frantic with curiosity and asked "Could you tell us why you won't tell us?" The editor said "Because I didn't think it was in very good taste and that is why we didn't put it in the paper".

Those running newspapers are constantly confronted with these questions of taste. They cover not just intrusion but the most

simple requests. I had a request from the headmaster of a secondary school, two of whose pupils had just been arrested and convicted for drug trafficking in the streets of South London. He said "Listen, I have been running this school for two years. It was a terrible school, I have finally got it back on the rails. I really think I've cracked it. We are doing very well, the one thing that will ruin this school is any mention of the school's identity in connection with these two boys. Could you please, please, please not mention it in the newspaper". Now, a hard-bitten newshound might have said "Oh, to hell with it. We mention everybody's identity when they come out of the court. It is part of the free judiciary that you mention people's identity when they come before a court and are convicted. Tough". But most editors would have totally accepted the request, as I did. I should think decisions like that are being made in every newspaper office a hundred times a day. They are decisions on fairness and the balance of decency and discretion and revelation. Every decision being made in a newspaper office in some sense is a decision about taste. To try and adjudicate on such decisions externally would be phenomenally difficult.

Let me end by giving you two examples which have exercised most newspapers recently. The first was the affair of Mr Ashdown's (leader of the Liberal Democrats) mistress, which caused great anguish throughout Fleet Street, not least to the quality newspapers. The story had been lying around in the preliminaries to the phony election campaign for many weeks. It was not a story that The Times would have touched, nor would The Guardian, The Independent, The Telegraph or The Financial Times. The Sun, The Daily Mail, The Daily Express, The Daily Star and The Daily Mirror may have been salivating over it, but they weren't publishing the story largely on the grounds that it was in bad taste. It was something that had happened five years before and it was clearly over. With an election coming along, it was only fair to leave the story alone. However, due to a chain of events following the burglary of the office of Mr Ashdown's solicitor, a decision was reached to issue a gagging writ. Such

writs are red rags to most editors and in this case were a crucial provocation. Tabloid newspapers carried the news of the gagging writ. When I heard that this was going to appear in some newspapers, I said it would not appear in The Times. Other broadsheet editors took the same view. The story was an unwarranted intrusion into a man's privacy and that of two women. The story was based on a stolen document and it was about what I call a "spent" conviction, something that happened long ago. This story was clearly a private matter, none of the parties to it had sought publicity. Our restraint was only finally broken when Mr Ashdown himself decided to give a news conference. The effect of the news conference, as I recall, did not get us entirely off the ethical hook. The "other" woman was entitled to her privacy under the code and we should not mention her name, let alone identify where she lived. But these stories develop a momentum from the behaviour of other papers and television. By now, where the other woman lived was looking much like the Normandy beaches on D-Day. At some point it is difficult to say to readers that they cannot be told of a matter that is now on everybody's lips. At each stage, ethical criteria are eroded both by rival media and ultimately by the parties in the dispute. Having said that we would not publish the name of the woman, she then announced she was going to give a press conference herself, because of persecution by the tabloid press. We were now in the situation where the whole of political London was talking about one subject and one subject alone and in all honesty we could not deprive our readers of at least the rudiments of the story. The final last bastion I was able to hold was that we wouldn't publish her picture, because that would do lasting damage to her ability to continue to lead a normal life in Bristol or wherever she was living. She then called a photo session and invited her picture to be taken. Admittedly, it was a scene in Smithfield that hardened photographers will never forget, for it was on this occasion the Smithfield porters turned on the press and pelted them with eggs. Presumably all Liberal Democrat voting Smithfield porters!

Now let me turn to the affair of the heir to the Throne, a celebrated marriage every component of which has been held up for public examination, not just for a day, but for weeks, months, years. It is absolutely inevitable that the stresses to which that marriage may be subject, would be a matter of intense public interest however you define the word "interest". In the last few days we have had all the oldest tricks wheeled out in order to get quotes that will sustain a story strung together to make a book, to make a serial, to make a newspaper sensation, to make a spoiler (for one newspaper managed to produce a book cobbled together from having seen a version of the first book) and so on and so forth. But how far does a serious newspaper go when faced with a subject which everybody is talking about and yet which clearly offends against both the letter and the spirit of the code of practice on intrusion into privacy? I think most members of the public feel that the more intimate details of someone's marriage are probably the most private thing about them. That applies to anybody, including the Royal Family. I took the view that I had no independent corroboration of anything that was in either The Daily Mail book or The Sunday Times book about the Prince and Princess of Wales, or of any of the accompanying speculation. I therefore wouldn't cover the story. However, how can you not cover a story when not just the general public but everybody you meet at lunch or dinner is talking about it, asking "Do you know anything about this? Is it true? What's going on?" Do you behave as if you are a Royal press spokesman: "My lips are sealed. There are all sorts of things in my office which I am not prepared to put in my newspaper. There are all sorts of things I am told on the telephone or on the grapevine but I am not going to give them to you because they are intrusion into someone's privacy". Last Friday night the BBC had broadcast the fact that there were going to be revelations about the princess on Sunday. I decided that we would report, in a lighthearted way, a battle between two

books and two newspapers. The hapless reporter who was writing the story not unreasonably had to ask me "What do I say about what is in the book?" We decided: "You have got to go far enough to leave the reader of the paper more or less apprised of why it is such a sensational story but you may not repeat the unsubstantiated and intrusive allegations about the marriage". I know other papers had had exactly the same conversation and reached exactly the same decision. It may seem ludicrous but my point, and the point of this illustration to my lecture is, that the only way in which you can adjudicate on matters like that is to fall back on a personal judgement of what is in good taste, and on that I would hate to see judges having to reach subsequent second guesses, or tribunal chairmen. This very afternoon the Press Complaints Commission has issued a long statement castigating newspapers for their coverage of the royal story but doing so in the most general, peremptory terms, which would never have come from a court of law. The statement is useless to a newspaper in judging how much of a story to cover in the future.

Calcutt's problem was to find hard and fast rules on what constitutes an intrusion on someone's privacy. The answer we gave was that there aren't. You are left hoping that good journalists (sensitive, sensible journalists) will exercise self-restraint, good taste, whatever it may be and will subject themselves, *in extremis*, to a tribunal of their peers who will be sufficiently experienced, sensitive and restrained to pass judgement on them. If the judgement goes against a newspaper, you hope it will print that judgement by way of self-flagellation. You can do no more and hope that where this structure fails, and fail it sometimes will, not too many people get hurt, or badly hurt. But if you set up a court, invite your (legal) profession along, pay your (lawyers) handsomely or mearily, to try to adjudicate for us on whether we exercise good taste, we will all go down the merry road to hell.