The Misrule of Law: Freethinking and the Rule of Law

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22nd November 2021

Introduction

Good evening. I am delighted to be standing here in Barnard's Inn Hall talking to a live as well as to a remote audience. My last lecture series was given from this podium to an empty room. It is so much nicer to see actual faces. Thank you for coming.

My first series of lectures was entitled the Politics of the Courtroom. I now turn to the "Misrule of Law." In this series of three lectures, I will explore the concept of the "rule of law" and its limits and derogations. I will investigate how the law is not necessarily an engine of progress but can be a vehicle for repression and state-control.

What is the "Rule of Law"?

Let me first explain my terms. The phrase "rule of law" may seem, at first sight, a woolly and perhaps unexciting one. It may seem but one step removed from the "rule of lawyers"; and any idea of lawyers being in charge can excite murderous thoughts –you may recall Jack Cade's famous battle-cry as recorded by Shakespeare in *Henry VI, Part II* "First thing we'll do, let's kill all the lawyers."[1]

Yet, like the air we breathe, and the water we drink, we may not think about it very much, but the "rule of law" is vital to our existence. Or more accurately, the type of human existence which we in this country have come to take for granted as essential to our ability to live happy, free and fulfilled lives. The rule of law is not something inherent in the nature of the British way of life; it has been achieved over the centuries through graft, courage, sometimes self-sacrifice, and vigilance.

The concept of the rule of law has been around for centuries in different forms of expression but it is often said that its modern articulation starts with the great constitutional lawyer and the Vinerian Professor of English Law A. V. Dicey, writing about the British Constitution in the 1880s. Dicey saw that Constitution as founded on the concept of the rule of law, to which he ascribed two primary meanings.

The first was as follows: "We mean, in the first place, that no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land."[2] Now, putting aside the slightly archaic language, this proposition remains as vital now as it did in the nineteenth century. A fundamental tenet of English law – which, with some justification, likes to think of itself as one of the supreme manifestations of the rule of law - is that individuals can do whatever they like except insofar as their behaviour conflicts with the law as clearly and prospectively

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[1] Act 4, Sc.2.

[2] *Introduction to the Study of the Law of the Constitution* (1885). See now *Dicey on the Law of the Constitution*, 10th ed. (1959), pp. 193-194.

established by Parliament or the judge-made common law. The government or prosecution authorities cannot simply order the arrest, detention and punishment of people it does not approve of.

Let me give a vivid example from over 300 years ago. In 1708 the Russian Ambassador in London was forcibly removed from his coach and arrested for a debt of £50 which he had incurred. The Ambassador was quickly released but the Czar of Russia, Peter the Great, took personal affront at this breach of diplomatic privilege. He demanded that the Sheriff of Middlesex, who had effected the arrest be punished with instant death. Queen Anne responded by her secretary, who wrote that Her Majesty "could inflict no punishment upon any, even the meanest of her subjects, unless warranted by the law of the land: and she therefore trusted that His Imperial Majesty would not insist upon impossibilities."[3] This is to be contrasted to the experience of the French writer and philosopher Voltaire just a few years later. When he offended through his satirical writings an aristocrat with much influence at the French court he was arrested and imprisoned in the Bastille without trial simply on the say-so of the aristocrat.

Peter the Great's misconception of how English law works, and what the rule of law entails, is not stranded in the long-distance past. There are regular instances up to the present day of foreign rulers demanding of the British government that it extradites or locks up some perceived troublemaker who is in dis-favour with the foreign power, seemingly unaware that these are matters solely for the courts.

A further aspect of this first rule is that a person's behaviour should not be criminalized after the event. Retrospective legislation or law-making is seen to be contrary to the rule of law. Let me give famous example where many thought the House of Lords, as the then final court of appeal, acted contrary to that rule. In the 1950s a highly entrepreneurial individual named Shaw persuaded the prostitutes of Soho to pay for advertising in a brochure which he published called "the Ladies' Directory". Clients were provided with the names, phone numbers and the various more or less exotic services offered by each of the advertisers. The judges took the view that this conduct should be criminal even if no known crime, then covered it. So, they decided to fill the gap and invent a new crime. And so, Shaw was convicted of an offence, then unknown to the English law, of "conspiracy to pervert public morals."[4] There was one dissent, by one of the greatest of twentieth century judges, Lord Reid, who warned: "Where Parliament fears to tread it is not for the courts to rush in." One of the great judicial sentences. What Reid thought of what his colleagues were doing is revealed by the line from Alexander Pope which he was drawing on: "Fools rush in where angels fear to tread." It is Lord Reid's view which has subsequently prevailed.

Dicey's second meaning was as follows: "when we speak of the 'rule of law' as a characteristic of our country, [we mean] not only that with us no man is above the law, but (which is a different thing) that here, every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."

Where the rule of law prevails, if a pauper sues a lord, then their rights and obligations will be determined by the courts entirely regardless of their stations in life. The law is above them both and treats them as equal before it. The law cares not for birth, wealth or influence. One of the great examples of this was the case of *M v Home Office*. M was a Zairian national who sought political asylum in the UK. After his application was unsuccessful, he was deported but the court then ordered the Home Secretary, Mr Kenneth Baker, to procure his return to the UK. The Home Secretary, on advice, ignored the order. The House of Lords decided, on M's application, that he was in contempt of court.[5] One of the Law Lords invoked the long arc of history:

> *"My Lords, the argument that there is no power to enforce the law by injunction or contempt proceedings against a minister in his official capacity would, if upheld, establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War."*

[3] This example comes from Sir Sydney Kentridge QC's lecture *The Rule of Law: Ideals and Realities*, collected in Free *Country: Selected Lectures and Talks* (2012, Hart), at pp 149-150.
[4] *Shaw v DPP* [1962] AC 220.
[5] [1994] AC 377.

You may respond that that these are trite statements simply describing the natural order of things in this country. But for most of human history and in most countries – including our own - birth, wealth and influence have counted for an awful lot in the administration of justice. Yet the rule of law, as manifested in this country, means that they count for nothing (other than the ability to pay for expensive lawyers). Don't take this for granted. In many countries today judges do the bidding of the state. There is nothing inherent in the British climate or character which means that it is immutable.

The rule of law has many other manifestations. Many books have been written on the subject. Lord Bingham, one of our greatest judges, has written perhaps the most famous of them.[6] In it he gives his own short version of the Rule of Law – quoted in the slide – and sets out some other indicia of the rule of law. Let me list a few of them:

- *The law must be accessible, and so far, as possible intelligible, clear and predictable*. As a citizen of a country, you need to know precisely what your rights and obligations are. Before committing yourself to a course of action the citizen needs to know in advance precisely what the legal consequences which flow from it will be, whether in the civil or criminal realms. The antithesis of this principle was described by Franz Kafka in his novel *The Trial*. You will recall that in that case the protagonist, Josef K, was arrested, prosecuted and eventually executed for a crime which was never identified. In Kafka's nightmare world hearings take place in courts which are impossible to find at times not explained to the defendant. Kafka's novel might be described as the greatest fictional plea in favour of the rule of law. I should say that what Kafka imagined is not completely removed from real life. In his account of the trial of Nelson Mandela and the other Rivonia defendants in 1964 their attorney, Joel Joffe, explains that he learnt through the legal grapevine that there might be a hearing in the case the next day. He telephoned the prosecutor, the appalling Dr Percy Yutar, who confirmed that indeed there would be court appearance in Pretoria. So, the next morning Joffe and his counsel all drove from Johannesburg, only to be met with blank faces amongst the court staff. When Joffe phoned Yutar again he was told that in fact the case would start the day after, but Yutar would not tell him who would be charged and with what offences.[7]
- *Means must be provided for resolving without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve*. If you own a buy-to-let flat and your tenant stops paying rent, you want your claim to take back possession of the property from the tenant will be heard quickly so that you can let it to a new tenant who will pay. In some countries the resolution of civil proceedings can take literally years: the phrase "justice delayed is justice denied" is a part of the rule of law. In a well-known Supreme Court decision a few years ago the Supreme Court decided that new rules introduced requiring people suing in employment tribunals for unfair dismissal and discrimination to pay a prohibitive court fee were contrary to the rule of law.[8] "The constitutional right of access to the courts is inherent in the rule of law."
- *Adjudicative procedure provided by the state should be fair*. Again, do not be put off by the abstruse language. If your employer dismisses you and you wish to sue it for unfair dismissal you want the judges who hear your case to be entirely independent. Similarly, if you are being prosecuted for a criminal offence you want to make the jury who hears your case to be randomly selected.
- *The law must provide adequate protection of fundamental human rights*. I will come back to that.

The Misrule of Law

That then is a thumbnail sketch of what we mean by the rule of law. It will be self-evident that the rule of law and democracy walk hand in hand. But they are not joined at the hip. The law of law is not simply the unalloyed manifestation of the will of the people through its elected representatives. It involves the upholding ideals that are at risk of being legislated away, whether or not by popular acclaim. South Africa in the

[6] *The Rule of Law* (Penguin, 2011).
[7] *The State vs Nelson Mandela* (2007, OneWorld), pp 21-23.
[8] *UNISON, R (on the application of) v Lord Chancellor* [2017] UKSC 51.

apartheid years was a form of democracy; albeit a bastardized version where more than three quarters of the population were denied a vote on account of the colour of their skin. The legislature of that country enacted in 1967 the Terrorism Act, one of the most repressive measures of the latter part of the twentieth century, which gave the authorities the right to arrest and detain a person entirely incommunicado for an indefinite period of time. Democratic legislatures in the southern states of the United States enacted racist legislation for decades into the twentieth century.

Similarly, the rule of law is not to be equated simply with legalism, by which I mean strict adherence to the legal procedures laid down in a given country. During the Nazi regime the lawmakers were scrupulous in the drafting of detailed statutes and regulations and the emanations of the state were likewise scrupulous in their adherence to the laws so enacted. In her book *Eichmann in Jerusalem* Hannah Arendt explains that what damned Adolf Eichmann in the eyes of the judges more than anything else was the moral imperative he felt to punctiliously adhere and promote those laws. He apparently experienced profound mental disorientation when, as the end of the war approached, he discovered that his colleagues had started taking pragmatic decisions in the knowledge of Germany's impending defeat which involved a breach of those laws.[9] Eichmann would have said that in his work for the Third Reich he had adhered to the rule of law.

In a lecture he gave some years ago Lord Steyn, a Law Lord, provided the chilling example of Jews in Germany who, having been sentenced to terms of imprisonment before the Second World War broke out, were left to complete their prison sentences. The Gestapo did not touch them. But when they had served those sentences, the Gestapo were waiting for them at the gate. They were then taken to the death camps where they died. Steyn concluded: "So the formal rule of law was observed."[10]

This allows us to return to the fourth of Lord Bingham's tenets of the rule of law: the law must provide adequate protection of fundamental human rights. This is the element of the rule of law that engages substantive rather than procedural questions. It holds that there are a set of immutable or core values which a society and its legal system must uphold. Those values are set out in a number of international instruments. The one we know most about in this country is the European Convention on Human Rights, which was incorporated into UK law by the Human Rights Act. Without those values at its heart the concept of the rule of law can in fact become an engine of oppression rather than a vehicle for liberation. And that is reflected by the Preamble to the Convention itself, which was drafted in post-war Europe, and which reads as follows: "Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration" – being a reference to the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations in 1948.

It is the use of the law to repress rather than promote human aspiration and freedom - what I describe as the Misrule of Law - that I want to consider in this lecture series. The aspect of the misrule of law which I wish to speak about today is the use of the law to suppress two of the core values embraced by the Universal Declaration and the European Convention: freedom of thought and expression. The circumstances which led to the upholding of those rights in the immediate post-war period were perhaps historically unique in the efficiency and ferocity with which they had been infringed. Yet we see throughout human history the use of the law, and the trial process, as a device for the imposition of uniformity of thought and the suppression of dissenters. Let me offer you some I hope vivid examples.

Socrates

The trial of Socrates in Athens in 399BC for impiety and the corruption of youth represents one of the earliest examples of the utilization of the law to suppress free-thinking. The form of corruption of which Socrates was accused was supposedly preaching atheism and teaching the youth of Athens to question everything and treat nothing as sacrosanct. As we all know he was sentenced to death; one reason for the harsh sentence

[9] *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963, The Viking Press), p.138.
[10] Johann Steyn, *Democracy Through Law: Selected Speeches, and Judgments* (2004, Routledge), p.133.

imposed on him may be that, according to Plato's account, Socrates ran a defence designed to antagonize those who sat in judgment on him. He asks the jurors who were to decide his fate:

> *"Do not interrupt, Athenians, but keep that promise which I asked of you - not to interrupt, no matter what I say, but to listen; for I think that you will gain by listening….You may be very sure that if you put to death such an one as I, you will not injure me more than your own selves….For if you kill me you will not readily find another such as I, who am…fastened upon the state by God like some gadfly upon a powerful, high-bred horse that has become sluggish by reason of his very size and needs to be aroused. As such as gadfly does God seem to have fastened me upon the state; wherefore, besetting you everywhere the whole day long, I arouse and stir up and reproach each one of you."*

That was a brave, one might say foolhardy, way to conduct your defense. Socrates was executed because he challenged the received thinking of the Athenian state, no doubt in a way which annoyed and offended – and that very challenge is manifest in his own defense. David's famous painting is the iconic image of the free-thinking dying for his ideals.

Translating and Printing the Bible

It is an astonishing thought now that for centuries various emanations of the Christian Church acted vigorously to prevent the Bible from getting into the hands of the laity. The Bible was to be the sole preserve of the clergy. The people could only know the Word of God mediated through the preaching of the priesthood. So after John Wycliffe translated the Bible into English in the late fourteenth century Parliament responded by passing a law – *De Heretico Comburendo* – literally "Regarding the Burning of Heretics" directed against Wycliffe's adherents, known as Lollards. Let me read out to you some of its provisions:

> *"divers false and perverse people of a certain new sect ... make and write books, they do wickedly instruct and inform people ... and commit subversion of the said catholic faith…that this wicked sect, preachings, doctrines, and opinions, should from henceforth cease and be utterly destroyed…that all and singular having such books or any writings of such wicked doctrine and opinions, shall deliver or cause to be delivered all such books and writings to the diocesan of the same place within forty days from the time of the proclamation of this ordinance and statute."*

And if they failed to abjure their heretical beliefs, or relapsed after an initial abjuration, or failed to deliver up their books, they would:

> *"be burnt, that such punishment may strike fear into the minds of others, whereby, no such wicked doctrine and heretical and erroneous opinions, nor their authors and fautors [i.e. patrons], in the said realm and dominions, against the Catholic faith, Christian law, and determination of the holy church, which God prohibit, be sustained or in any way suffered."*

John Wycliffe managed to die peacefully in his own bed. But more than 40 years after his death his remains were exhumed from their grave to be ritually burnt. William Tyndale, who lived more than 100 years later, was not so lucky. He lifetime's work was also to translate the Bible into English. For his pains he was tried for heresy and burnt at the stake. His crime? To wish to diffuse religious knowledge to the people, to promulgate learning beyond the few.

Heresy

Nations across Europe routinely suppressed dissenting views in the early modern period and indeed well into the modern age. We all remember the trial of Galileo and the requirement of his judges that he renounce his heliocentrism – the belief that the sun is the centre of the universe – as if a court could order a person to change his private thoughts. But perhaps the low point was the less well-known trial of Giordano Bruno at the end of the sixteenth century. Bruno was a Dominican Friar and philosopher who proposed that the earth circled the motionless sun; and that the stars in the night sky were in fact distant suns surrounding by their

own planets in an infinite, centre-less, universe. It was – is even today - a profoundly disturbing philosophy. His trial for heresy in Rome lasted seven years. When he heard the penalty of death which had been imposed on him by the judges he famously replied:

> *"Perhaps you pronounce this sentence against me with greater fear than I receive it."*

Here is also Bruno's statute in the Campo de'Fiori, the place of his execution. Bruno has gone on to become one of the great symbols of free-thinking. He died for speaking the truth. He was offered the opportunity to recant, and thereby save his life, and refused to do so. So, he sacrificed his life for the principle of intellectual honesty; as Socrates had done almost two millennia before. And here at is another remarkable recent statute of Bruno, in Potsdamer Platz in Berlin, referencing the fact that before he was immolated, he was hung naked upside down from a scaffold. So horrified were the religious authorities at what Bruno proposed that they had to humiliate and belittle him. This statue succeeds I think in creating dignity out of outrageous indignity. I think it is worth pausing to think that if it was not for people like Galileo and Bruno we would still live in a world where it was heretical to believe that the earth was not the still centre of the universe.

Britain

Let me move closer to the present. Since the Seventeenth Century Britain has prided itself, with some justification, on being a haven for freethinkers and a place where radical political views could be expressed, and published, without state interference or sanction. It was in London that Voltaire sought refuge after his imprisonment without trial in the Bastille in the 1720s. In the next century England was the place of safety for dissenters as diverse as Marx, many of the Parisian Communards, Zola and Lenin. Late nineteenth century London was a hotbed of European anarchists and communists.

Yet at the same time that Britain was offering refuge for political freethinkers the law was being used to suppress other forms of thinking and expression. It is of course a cliché that the British, possibly more accurately, the English, have historically been queasy about sex. It is surely a great paradox that in the same decade that an English language version of *The Communist Manifesto* was published in London - without any official reaction at all - Parliament enacted the first Obscene Publications Act. A few years later it was an English judge – and not Parliament - who devised the test of obscenity – and so criminal liability - which would prevail in this country for the next century:

> *"I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."*[11]

This ruling, as later interpreted by other mutton-chop whiskered judges sitting in the cold Gothic courts of the Royal Courts of Justice in the Strand, had three important features which were designed to ensure that the law as far as possible could be used to control indecorous expression. First, the test of obscenity was objective. The subjective intention of the writer was neither here nor there. The question was whether in fact the tendency of the work was to deprave and corrupt. Secondly, the concept of depraving and corrupting related to any person; so, the law could judge obscenity not by reference to the likely readership of the relevant book, but by reference to any person who *might* read it – a favourite example of prosecutors being the hypothetical fourteen-year-old school-girl. Thirdly, the test did not require the work in question to be judged as a whole, or in context. Any passage which failed the test was looked at in isolation and could lead to the condemnation of the entire work. There was no available defence of literary or social merit.

Here then was judge-made law carefully crafted to provide the legal weaponry to ensure the regulation of discussion of sex and sexuality. The English law of obscenity was overtly utilized by the ruling classes – in the incarnation of prosecutors and judges – to dictate what the masses could read and write. And this desire for control extended far wider than bog-standard pornography. The consequence of the application of this

[11] *R v Hicklin* (1868)

text was that over the course of a century, until the 1960s, a vast array of what we would today consider wholly innocuous books were banned. It is a list which may astonish you: Dr Havelock Ellis's learned work *Studies in the Psychology of Sex* - even though it was unlikely to deprave or corrupt the natural readership of that box being fellow medical professionals; Marie Stopes's *Married Love*, Defoe's *Moll Flanders*, *The Decameron*, Flaubert's *Madame Bovary,* Radcliffe Hall's *Well of Loneliness*, and various novels by Balzac.

In practice the law of obscenity often operated a double standard. If the relevant book was published in a sufficiently expensive edition, and so deemed to be out of the financial reach of the working classes, then it was likely to remain immune from prosecution. Hence the great crime of Penguin Books when it made preparations to publish *Lady Chatterley's Lover* in 1960 was that the proposed edition would be a cheap paperback, price at 3 and 6, available to all. That double-standard was exposed in the saga that followed the publication of James Joyce's novel *Ulysses*. It is a saga which also provides a vivid insight into the British attitude to the use of the law to suppress what the public can read or know.

Ulysses was published in Paris in 1922. There was a great deal of interest in reading it in England. The Director of Public Prosecutions gave his opinion that the book was obscene and for 15 years various imported copies were confiscated, and booksellers decided that confrontation with the authorities was unwise. So, apart from an underground trade, what is often thought of as the greatest novel of the century was essentially unavailable to read in this country. What seems to have offended the DPP, Sir Archibald Bodkin, most was Molly Bloom's soliloquy at the end of the novel in which she recalls various sexual experiences with her husband and others. He wrote as follows:

> *"As might be supposed I have not had the time, nor may I add the inclination to read through this book. I have however read pages 690-732. I am entirely unable to appreciate how those pages are relevant to the rest of the book or indeed what the book itself is about. I can discover no story. There is no introduction which give a key to its purpose and the pages above mentioned, written as they are as if composed by a more or less illiterate vulgar woman, form an entirely detached part of the production. In my opinion there is more, and a great deal more than mere vulgarity or coarseness, there is a great deal of unmitigated filth and obscenity….It is conceivable that there will be criticism of this attitude towards publication of a well-known writer; the answer will be that it is filthy and filthy books are not allows to be imported into this country."*

The idea of the erotic daydreams of a working-class woman being expressed in a work of literature was terrifying. Fortunately, the law was there to stop it.

The de facto ban on *Ulysses* became more difficult to maintain when, after the death of the Lord Chancellor and later Secretary of State for India. F E Smith, the First Earl of Birkenhead, a copy of the novel was found in his library. In the Home Office records there is to modern eyes farcical correspondence with the auctioneers tasked with selling that library, asking that the book be removed from sale, lest there be "adverse comment in the press."

What I might describe as the Bodkin attitude of mind persisted well into the 1960s. We are all familiar with the infamous words of the prosecutor in the *Lady Chatterley* trial when he asked the jury this question: "ask yourselves the question when you read it through: would you approve of your young sons, young daughters – because girls can read as well as boys – reading this book? Is it a book that you would even wish you wife or your servants to read?" Another of his rhetorical questions, posed in an earlier trial was as follows; "When Christmas comes, would you go out and buy copies of this book and hand them round as presents to the girls in the office – and if not, why not? The answer is because it is not the type of book they ought to read."

The Modern Day

There is I think a common thread which runs through all these examples, ranging over many centuries. Societies are fearful of dissenters, people who tell unpalatable truths or offer uncomfortable versions of human experience. They are willing to deploy the law to suppress what they fear. And I think if is fear which

provides the common factor which actuated the prosecutors in each of the cases I have described above. Fear at having your assumptions challenged and your prejudices threatened.

We have come a long way since then. We have entered an age of liberalism. I think in this sense we can define one aspect of liberalism as willingness to have those assumptions challenged. It is the ability to suppress your fear and expose yourself to challenge. I mentioned earlier the European Convention on Human Rights:

- Article 9 provides: "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance….
- Article 10 provides that "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
  Further, section 12(3) of the Human Rights Act entrenches further the right to freedom of expression. It in terms provides that the court shall not granted an interim injunction so as to restrain publication before trial "unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

The recent tendency of the English law has been to pay rigorous respect to Article 10 rights. This is subject to two caveats. First, the law of contempt of court rightly accords primacy to the safety of criminal trials so that it is absolutely impermissible for instance to publish material about a person charged with an offence which might prejudice their defence. Secondly, freedom of expression does not trump the law of privacy and confidentiality. The law here is nuanced and sophisticated. But I think we can leave those two areas to one side. They rarely engage important questions of principle in terms of the free exchange of ideas.

In order to demonstrate this tendency, I wanted to refer to two remarkable recent judgments of the English court which I think contain welcome restatements of the primacy of freedom of expression as understood by the English law. But they also show that other tendencies remain alive and well in England.

OPO v Rhodes

The first involved the well-known concert pianist and author James Rhodes. Rhodes wished to publish a book he had written which depicted in graphic terms sexual abuse he had experienced when he was a child. The mother of his young son brought proceedings against him seeking on behalf of the child, an injunction to stop publication on the basis that the knowledge of what the father had suffered earlier in his life would inflict emotional harm on the son, who had been diagnosed with Asperger's Syndrome and other conditions. This argument was mounted on the basis that English law recognizes a tort of intentional infliction of harm – what the courts have described – in a prescient echo of current discourses – as the "right to personal safety."

It was argued by the boy's mother that publishing a book knowing its likely harmful effect on a particular person – even if that was not intended - would be a legal wrong which the court should intervene to prevent. So here was a perfect example of two rights coming into conflict and the court having to adjudicate on how to balance them. And, although the facts were extreme and I do not wish to trivialize them, it provided an instance of a wider controversy which has been the subject of a lot of attention recently: the right to express controversial, even upsetting, views and the contrary right not to be offended.

The Court of Appeal granted an interim injunction against Rhodes and his publisher pending a full trial of the claim. The remarkable consequence of the Court's judgment was that a person was being prevented by the law from telling facts about his own life, indeed publicizing crimes perpetrated against him. The ruling was an invasion of the autonomy of the individual to communicate about him or herself. The Court of Appeal had

founded their decision on their view that Rhodes' vivid and searing descriptions were not "justified." One of the judges had said that there could be no justification for a publication if it was likely to cause psychiatric harm to the child. The Court said that any publication before the trial would have to be in a bowdlerized format. So, the Court was actually presuming to tell an author how he should express himself in relation to his own experiences. That was in my view entirely to misunderstand the concept of freedom of expression. Fortunately, the Supreme Court overturned this decision. In the Supreme Court Lady Hale said this:

> *"Freedom to report the truth is a basic right to which the law gives a very high level of protection. It is difficult to envisage any circumstances in which speech which is not deceptive, threatening or possibly abusive, could give rise to liability in tort for wilful infringement of another's right to personal safety. The right to report the truth is justification in itself… But there is no general law prohibiting the publication of facts which will cause distress to another, even if that is the person's intention."*[12]

R (Miller) v College of Policing

This takes me to my second, very recent example. A man called Harry Miller was a prolific tweeter. He tweeted views about a particular issue, which some perfectly reasonable people might well find offensive. One person, Mrs B, in fact did read these tweets and was offended and complained to the police about what Miller had written. The police treated his tweets as "non-crime hate incidents" under its policy and recorded them as such. A police officer, known as a Community Cohesion Officer, then visited Miller's place of work and spoke with him. He told Miller– according to Miller although this was disputed - that he needed to "check his thinking" and that he should stop tweeting about the particular issue. Miller was warned that if he "escalated" matters in some unspecified way then the police might take criminal action against him.

The judge started his judgment with ringing endorsements of the importance of free expression in a democratic society. He ended it with this statement from John Stuart Mill: "If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."[13] He held that the police's conduct towards Miller, were unlawful as interfering with his Article 10 rights.

> *"There was not a shred of evidence that the Claimant was at risk of committing a criminal offence. The effect of the police turning up at his place of work because of his political opinions must not be underestimated. To do so would be to undervalue a cardinal democratic freedom. In this country we have never had a Cheka, a Gestapo or a Stasi. We have never lived in an Orwellian society…Overall, given the importance of not restricting legitimate political debate, I conclude that Mrs B's upset did not justify the police's actions towards the Claimant including turning up at his workplace and then warning him about criminal prosecution, thereby interfering with his Article 10(1) rights."*[14]

Some of the sentiments expressed by Miller are not ones I myself agree with. Nor might you. But that, I suggest, is beside the point. He had the legal right to express his views, and to so in a rumbustious, even offensive, way. It was no business of the police to start communicating with him and warning him about his lawful behaviour. As that lover of English liberty Voltaire, possibly apocryphally, is said to have written to the writer of a book he disapproved of:

> *"Monsieur l'abbé, je déteste ce que vous écrivez, mais je donnerai ma vie pour que vous puissiez continuer à écrire."*
>
> *[Monsieur l'abbé, I detest what you write, but I would give my life to make it possible for you to continue to write.]*

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[12] *Rhodes v OPO & Anor* [2015] UKSC 32, at [77].
[13] *On Liberty.*
[14] *Miller, R (On the Application Of) v The College of Policing & Anor* [2020] EWHC 225 (Admin), at [238].

Conclusion

We have emerged from an age of fear into an age of liberalism. The English courts have shown themselves as admirably vigilant in the protection of the right of free expression. Very recently the Divisional Court said, in another twitter case, “free speech encompasses the right to offend, and indeed to abuse another”.[15] But recent years have shown that the threat to freedom of expression and freedom of thought comes now not from the courts or prosecutors. It comes from self-censorship. I have spoken to academics and journalists who report that there are now certain forms of thought and expression that are essentially off-limits in the universities and certain parts of the media. The fear of giving offense, and the consequences of doing so for the offend-er, can act as their own inhibition. Even as the law strenuously upholds the right to give offense and upholds the right to expression over the so-called “right to personal safety”, we read of the current orthodoxy of the university that students are to be protected from all forms of offense. Socrates, Wycliffe and Giordano Bruno were all gruff-speaking irritants who caused massive offence to the majority opinion of their day. The irritants of today are not at risk of prosecution but of moral opprobrium and career destruction. It is not quite the cup of hemlock or the pyre in the Campo de’Fiori, but it can be a form of social and commercial death. As history tells us the heresy of one epoque is the wisdom of another; the falsities of one age are the truths of another.

[15] *Scottow v Crown Prosecution Service* [2020] EWHC 3421 (Admin).