FORUM

TELEVISING COURT PROCEEDINGS

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Justice Teague's decision to allow a television camera to record the sentencing of a convicted murderer in the Victorian Supreme Court has transformed a theoretical debate about the desirability of televising court proceedings into a practical one, with real and immediate implications.

Sensational media reports of the televised sentencing have both polarised public and legal opinion and set the tone of the subsequent public debate, which is dominated by sweeping unsupported assertions and preconceived fears, ignoring the findings of existing studies and evidence from jurisdictions where televising of court proceedings is permitted. The debate needs to move beyond initial knee-jerk reactions to a structured examination of the key issues.

I. OPEN JUSTICE

The principle of open justice is central to this debate, focusing attention on the object of public administration of justice, and thereby permitting an assessment of the appropriateness and adequacy of present arrangements, and a rational evaluation of the potential risks and how they should be dealt with.

Open justice recognises that a public hearing of cases is the best way of ensuring impartial and efficient administration of justice and of winning public confidence and respect. By requiring that evidence and argument should be publicly known so that society may judge for itself the quality of justice

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administered in its name and whether the law requires modification, open justice emphasises public access and publicity, not as ends in themselves, but as means of subjecting the administration of justice to public scrutiny. It serves to maintain rule of law, which depends in large measure on public support and understanding of laws and legal processes, and on their acceptance by the public as reflecting the values of society. The importance of this function cannot be overstated in multicultural Australia.

But the principle also recognises that while warranting some costs, open justice is not to be achieved at the expense of the administration of justice. For this reason, courts are required to reconcile the competing public interest in the public administration of justice with the interests of those seeking to protect their rights to a fair trial from damaging or prejudicial publicity.

II. REGULATION

A court's power to deny public access and restrict or deny publication may arise from statutory provisions, the law of contempt, or from the court's inherent jurisdiction to regulate proceedings, which for these purposes is limited to situations in which justice cannot otherwise be administered. While the televising of Australian court proceedings is not specifically prohibited by statute, it is restricted by statutory provisions regulating all forms of media reporting. The de facto prohibition of the televising of court proceedings exists largely as a result of the exercise by the courts of their inherent power to regulate their own proceedings (a power also responsible for the isolated instances of Australian courtroom televising). Due to unsubstantiated claims that televising would distract, disrupt and subject participants to psychological pressure, unauthorised televising has also been perceived as potentially constituting contempt of court.

Courts already protect the rights of those who may be adversely affected by television or any other form of courtroom publicity, when it is appropriate. Those concerned with issues of privacy need to note that while parties and witnesses do not have a legal right of privacy, there is nevertheless protection under legislation, and from judges who are required to balance privacy interests against the public interest in the administration of justice. The *Access to Justice Report* concluded that despite the intrusive nature of television, such a balance could be struck through the formulation of appropriate guidelines.

An appeal has been lodged challenging the severity of the sentence imposed by Justice Teague. The appellant argues that in allowing the sentence to be televised, the judge was overwhelmed by the celebrity nature of the case, and that he imposed an excessively harsh sentence resulting in a reasonable public apprehension of bias. This highlights the dangers of permitting televising on an ad hoc basis. Uniform guidelines would lessen pressure on individual judges to grant or refuse permission to televise, thus avoiding allegations of bias of this kind while ensuring public scrutiny of cases. Otherwise some judges may decline to have televised purely to avoid public criticism.

III. PUBLIC ACCESS

To suggest that the access and publicity elements of open justice are met by merely opening the courts to the public and permitting accounts of the proceedings to be published, constitutes a misunderstanding of the principle and its purpose, and overlooks certain realities of contemporary life. Merely opening courts to the public does not satisfy the requirement of public access, as in reality access to courts is available to the very few who are able to attend, who feel comfortable being in court, and who are able to follow proceedings without commentary or explanation. With television cameras effectively barred from our courts, access is denied to the community's most relied upon source of public information, leaving publicity restricted to law reports, legal publications and media reports. Thus members of the public rely on media reports, which are largely commentary with extracts of proceedings used to support a particular story angle, hardly facilitating *public* scrutiny of courts.

IV. EXISTING EVIDENCE

Concerns about the desirability of televised court proceedings have been fuelled by the media circus surrounding televised American trials such as the OJ Simpson case. Numerous United States studies and experience have shown that physical disruption concerns are no longer valid due to technological advances, that televising does not distract participants, that there is little if any detrimental impact on participants, and that courtroom televising does not adversely affect the administration of justice nor interfere with the dignity and decorum of proceeding. Some evidence even suggests that televising enhances the performance of judges, advocates, witnesses and jurors.

Significantly, no American State permitting televising in its courts (forty-seven presently do) has later gone on to prohibit it. Even fears provoked by much publicised American excesses may be allayed when the absence of an Australian equivalent to the American Constitution's First Amendment is taken into account. Tougher Australian contempt and defamation laws and existing laws prohibiting the identification of jurors and - in some matters - other parties should serve to dispel remaining fears.

Positive findings are not confined to the United States. The 1989 Report of the Working Party of the English and Welsh Bar concluded that objections to televising are based largely on fears which in practice are revealed to be unfounded, and in part upon an emotive reaction to television. Actual experience, however, has shown that the anticipated risks were almost invariably without foundation and, in so far as elements of risk remained, capable of being controlled. Similarly the New Zealand Courts Consultative Committee, after examining the issues for over three years, recently concluded that open administration of justice considerations outweighed fair trial, privacy and television reporting concerns. In Australia, the 1994 *Access to Justice Report* concluded that valid concerns could be dealt with adequately through appropriate regulation of courtroom televising.

In spite of overwhelming and ostensibly reassuring evidence, even this proponent of televising feels a sense of unease at television's potential to deny a fair trial and to subject parties and witnesses to unnecessary pressure. Similar reservations led the Judicial Committee of the United States to stop televising court proceedings in spite of positive findings of a commissioned report on their experiment. Unsubstantiated reservations do not, however, justify a blanket prohibition on courtroom televising. Instead, great care must be taken in determining which cases should be telecast and how televising is to be regulated.

V. EDUCATION

Justice Teague's decision, made in the interest of improving community education about legal proceedings, recognised that the televising of court proceedings can educate. Earlier Australian courtroom telecasts had also been hailed for permitting the public to gain an appreciation of positive aspects of legal work and judicial administration which would not otherwise have been considered newsworthy.

Some argue that rather than educate, televised proceedings, would sensationalise and create misconceptions about the judicial process. The weakness of this argument, however, lies in that it measures televising against an ideal. If all interested citizens could enter courts to observe entire trials, adequately see and hear the proceedings, and understand what they were viewing, there would be no need for televising. It is more appropriate to assess the potential for sensationalism and creation of misconceptions by comparing it with the status quo. My observations of American courtroom televising lead me to the conclusion that viewing edited televised proceedings with commentary has certain advantages over access and publicity presently available in Australia. The television viewer is better placed to hear and see proceedings clearly, is permitted to witness the most important segments of drawn-out proceedings, and is much more likely to understand the nature and relevance of what they are observing. Restrictions on editing and commentary imposed by Justice Teague, imposed in the current New Zealand experiment, and proposed by the Access to Justice Report, appear to be overcautious and at odds with the absence of similar restrictions on other forms of media reporting.

It is important to distinguish between media reporting and the televising of court proceedings. The former has tended to distort the nature of proceedings and sensationalise, while the latter has shown a capacity to restore some balance to public perceptions of judicial matters coloured by the press. As a recent *New York Times* editorial observed:

> Even the often unsavoury coverage of the OJ Simpson murder case is made more educational by the camera's courtroom presence. Without the ability to witness the actual proceedings on television, many Americans would be left only with the sensationalist distillation of the supermarket tabloids.

It is ironic that in seeking to avoid a repetition of OJ Simpson's media circus, the presiding judge in the Susan Smith case (Smith's children drowned in the family

car, after she allegedly pushed it into a lake) recently decided to prohibit television cameras in his South Carolina courtroom, despite the proven capacity of televising to counterbalance the excesses of media behaviour and reporting, which the judge is largely powerless to control or restrict.

It is media attention rather than those who televise court proceedings which focuses on sensational cases. This difference is well illustrated by a recent decision by Court TV, which is responsible for televising court proceedings generally, not to show the testimony of OJ Simpson's young daughter, despite protests from other media organisations. In addition, the United States experience reveals that a broad cross-section of judicial proceedings receive extended coverage, which is quite contrary to the popularly held view that only sensationalist cases would receive extended television coverage.

Television's capacity to dispel rumours has been acknowledged and utilised by ethnic leaders in the United States and in the Chamberlain case in Australia. Similarly, Justice Black has suggested that televising of court proceedings might replace stereotyped images of judges with a more realistic and accurate perception, instilling confidence in our legal system.

In evaluating television's potential to distort, we also need to examine whether the concern is for fair and accurate reporting or whether it is a fear that viewers of televised proceedings will not share the perceptions of law and judicial processes held by those with vested interests in preserving the status quo. Similarly, some politicians are dismayed that with the televising of Federal Parliament, public attention has focused on the sniping and name-calling, and that such antics are not necessarily perceived as robust parliamentary debate.

Arguments against the popularising of the law, while appearing obvious on the surface, also warrant a closer analysis. Fears that our laws and judicial process may not withstand a broader public scrutiny and possible ridicule, could be indicative of a need for reform rather than restriction of public scrutiny. Even the coverage of the OJ Simpson case is now being recognised as having highlighted aspects of judicial process in need of reform.

VI. CONCLUSION

In the light of proven benefits and evidence suggesting that appropriate regulation can alleviate potential dangers, the existing blanket prohibition of courtroom televising is unwarranted. It is also inconsistent with the principles of open justice and difficult to defend in the light of the access and opportunity to report available to other forms of media.

Although not the first Australian instance of televised court proceedings, Justice Teague's decision to allow a television camera into his court was a significant step in an inevitable direction for Australian courts.

It may well be time for the focus of this debate to shift from "should we allow it?" to "how are we to regulate it?".