IX CA CAMPBELL, J. B. Some reflections on the Indecent Publications Act, 1963

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"SOME REFLECTIONS ON THE INDECENT PUBLICATIONS ACT, 1963"

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The Indecent Publications Act 1963,[1] introduced a new and improved approach to the censorship of indecent publications. However, some aspects of the Act and the system of censorship set up pursuant to the Act are open to criticism. They are mainly concerned with the failure of the legislation to achieve consistency and clarity in an area where these qualities are of utmost importance. These aspects fall into two major categories:

(a) Those matters which have come to judicial notice or are the concern of the courts; and

(b) matters which are not within the jurisdiction of the courts, mainly concerned with the administration of an efficient and just system of censorship.

I do not propose to question the premises on which the Act is based; that censorship of written and pictorial matter on the grounds of indecency is justifiable; that the best type of organisation to determine the decency or otherwise of this type of material is a quasi-judicial tribunal; and that it is preferable to use preventative rather than punitive measures to administer this area of the law. Indeed, my criticism is dependent on the acceptance of these premises.

A. THOSE MATTERS COMING WITHIN THE COURTS JURISDICTION

Four matters arise for discussion:-

(i) Exhibition

(ii) Newspapers

(iii) Documents

(iv) Lithographics

(i) Exhibition

Of what does the offence of exhibition laid down in Sections 21 (1) (e) and (f) and 22 (1) (b) consist? Does the person accused of such an offence need personally to have brought the attention of the viewer to bear on the indecent document, or merely placed it in such a way that it could be seen? Indeed, must there have been a viewer for the offence to be complete? These elements of the offence have been considered by the courts. The problem is put in perspective when the booksellers' position is considered. If they are to sell any books that have been classified by the tribunal as being indecent in the hands of persons under certain ages or except in the hands of persons in a particular category, how are these books to be displayed? If the books are to be kept completely hidden from the public, under the counter or in a back room, then publications of this type will have many undesirable and sinister implications attached to them; they will become virtually unattainable by the public because of lack of free access to them, and attendant embarrassment in buying "illicit" material; and in all likelihood become much more desirable to those to whom they are banned, by virtue of being "forbidden fruit". On the other hand if the books are to be displayed on the shelves alongside other books in the shop, the objects of the classification system are likely to be frustrated as the bookseller can not be expected to

watch continually the people in his shop. In some countries, books available to a limited class of customer are wrapped in a sealed cellophane packet and placed on the shelves within easy reach of the public. This means that the privileged class can easily see all those books available to them and yet the other customers do not have access to indecent material. One disadvantage of the system is that although those customers eligible to buy classified books can easily see the titles available to them, they must buy a book before they may break the seal, consequently they are to a large degree not able to discover the contents and quality of a book until they have bought it. Another disadvantage with this system is that the cover of a book may well be indecent and exhibition of that alone will constitute an offence.

The question as to the degree of control necessary to be exercised by the bookseller to prevent exhibition taking place has been referred to by the courts in two cases. In the first[2] the Magistrate was able to base his decision on a different ground and only referred to the problem in passing. The second case, an unreported decision of Mr. A.A. Coates, S.M., in the Auckland Magistrates Court[3], gives a little more guidance. Mr. Coates said in his judgement:

> "I think the plain meaning of the words in the hands of persons under the age of eighteen years indicates that such persons are not (to) have access to the book. To display it where they can see it would be an invitation to them to inquire about it, and possibly to purchase; as indeed inquiries were made, according to the defendant's evidence".

Although Mr. Coates was obviously not referring to the particular provisions on exhibition when he made that statement, it can be inferred from the stand that he takes in respect of display and access that the onus on the bookseller to retain a high degree of control over classified books is a heavy one. I submit that, for the reasons already given, to compel a bookseller to keep books in such a manner that they are not visible to the general public is unsatisfactory. The test should be based on whether or not the bookseller has control over who has access to the books. This is still a heavy burden for the booksellers to bear, but it is a necessary burden if the classification system is to have any effect. When books are displayed so they can be seen by the public, inquiries are likely to be made about them, but the burden is on the bookseller to ascertain the age or status of the customer before giving him access to the books.

The question of whether one element of the offence of exhibition is that the material need actually be seen by a member of the unauthorised class has been considered in two recent conflicting decisions. In Thompson v Poy Hong Chin[4] several books declared indecent in the hands of persons under the age of eighteen by the Tribunal, were seen displayed in the defendant's shop window by a policeman on the 27th of May, 1971. In the course of his decision, Mr. Willis, S.M., after alluding to the fact that no evidence had been given to show that on the date in question anyone was seen in the shop except the policeman, said:

> "It is possible, indeed it is almost certain, that persons under the age of eighteen would have been in the shop at sometime, but to enable this prosecution to succeed, I think the court must have evidence that on 27 May a person had the books exhibited to him. I do not think it is sufficient to say that unknown persons had the books exhibited (to them) when there is no evidence that on the day in question any person had the books exhibited (to them)".

In the Police v Brien[5] specific evidence was given to the effect that children and school boys were seen looking in the defendant's shop window on the day in question. However, the Magistrate said:

> "In any event, I would still infer from the evidence as a whole that a book which is displayed in a shop window, situated as this shop was, opposite the chief Post Office in Queen St., would be seen by passers-by under the age of eighteen years. It is an irresistible inference that people of all ages use the footpath in this very busy main thoroughfare".

and two sentences later he concluded his remarks on this point by saying:

> "I am satisfied therefore that the proper inference to be drawn from the facts is that this book was on display in such a position and in such circumstances that it could be seen by persons under the age of eighteen years".

Confusion exists as to what standard the Magistrate laid down because of his use of the words 'could' and 'would', but it seems from his conclusion that it is enough if a book 'could' be seen. As this can be inferred, evidence that on the day in question any person actually had the book(s) exhibited to them is not necessary.

The approach taken in Thompson v Police is the preferable one in my view on three grounds. First, the offence is "exhibits to any person under the age of eighteen years any document.....," and these words clearly do not cover the situation where no-one has seen the book. Secondly, the word 'exhibit' appears in the following context: "sells, delivers, gives, exhibits, or offers". All of the other offences have an element of contact with the recipient, not just the possibility of it, and following the rule noscitur a sociis, 'exhibit' must be construed with regard to the words which precede or succeed it. Thirdly, 'exhibition' is a criminal offence and thus the onus of proof the prosecution must discharge is 'beyond all reasonable doubt'. If the Court is to accept irresistible inferences and imply certain facts, then the prosecution is not discharging the onus of proof upon it.

(ii) Jurisdiction of the Tribunal over Newspapers in The Collector of Customs V Fisher

12 M.L.D. 307, a case concerning the attempted importing of a newspaper published at three weekly intervals, the Court held that it had exclusive jurisdiction over the document, and consequently the document was not referred to the Indecent Publications Tribunal. Two reasons were given for this decision: firstly, Section 10 limits the functions of the tribunal to books and sound recordings, and 'book' is defined as:

> "any book, magazine, or periodical except newspapers published at intervals of one month or more"(6)

Secondly, Section 11, which begins:

> "Where any Court is required to classify or determine the character of any document (other than a book)....."

leads one to believe that the appropriate body in some cases is a court. This case was approved and followed by the Supreme Court in Christopher Robin Wheeler v Collector of Customs[7] where Beattie J. said:

> "Reading between the lines, although no doubt the learned Magistrate would like to have had the matter referred to the Indecent Publications Tribunal for a decision by that body, he properly found, in my view, that the Magistrates Court was the only court to determine the decency or otherwise of this newspaper".

Although this state of affairs was not discussed in Parliament during the debates on the Indecent Publications Bill, it would seem from a reading of the Act that the courts have correctly interpreted the intention of the legislature. This is an undesirable situation, as we have set up a specialist tribunal to obtain consistency in a turbulent area, and yet the vast bulk of the published material in this country does not come under the jurisdiction of that body. Why are newspapers published at intervals of less than one month put in this position? There would seem to be two reasons for the differentiation.

The first may be summed up in the phrase 'prior restraint' of the freedom of the press' and has two prongs to it; the first being that newspapers should not be subject to censorship prior to publication as this is contrary to the ideal of freedom of the press,

and may lead to the suppression of ideas and criticism if any abuse of power occurs; the second being that originally the Tribunal met bi-monthly and for the newspapers to be subject to this system would have meant that referral to the Tribunal for a decision would almost inevitably have resulted in such delays that the news was out of date before a decision was given.

The second reason is the danger of abuse of administrative tribunals, such as happened in Italy during World War II. Because these Tribunals are not usually subject to strict procedural and evidentiary rules, and do not usually give long, reasoned decisions, the opportunities for any pressure being applied to them to become obvious are much less than in the regular courts.

These reasons do not seem to be particularly weighty to me. In the first place, the Tribunal does not act exclusively in the pre-publication situation, as both the Courts and the Secretary for Justice submit material after it has been published. Secondly, under Section 25(1) newspapers may be seized prior to publication and dealt with by the courts, and this is prior restraint as much as action by the Tribunal.(8) Thirdly, although the Tribunal originally met bi-monthly it now meets fortnightly and provision could be made for the Tribunal to meet at very short notice. This would then obviate the second part of the first argument.

If the second reason carries any real influence then a Tribunal

would never have been chosen in the first place and the resignation of two Tribunal members in response to pressure in 1967 is evidence of the integrity of its members. Why do newspapers need more protection than books? It is not easy to find an answer to either of these problems.

Mr. Hanan, the Minister of Justice, when introducing the Bill into Parliament, said in support of a tribunal that it would give us "a single consistent standard set by the best qualified people .....".(9) During the debates on the Bill Mr. Harker, M.P., said "Courts exist to decide strict matters of law and fact but here we have primarily matters of morals and taste, and the very qualities which make a man an ideal Judge may make him rather less suitable for a job of this sort".(10) These comments apply equally to books and newspapers,(11) and our law should be amended to include newspapers in the jurisdiction of the Indecent Publications Tribunal, to ensure consistency in the administration of the law.(12)

iii The Jurisdiction of the Tribunal over Documents, Other Than Books and Newspapers

As previously noted, Section 10 limits the functions of the Tribunal to books and sound recordings. Consequently, apart from newspapers, another class of material comes within the jurisdiction of the courts: documents. As with newspapers, this situation is in itself considerable. However, additional problems arise in this area when books passed by the Tribunal have pictures or excerpts taken from them displayed or published, and generally when parts of a book are displayed

out of context. Under Section 11 (1) (a), the Tribunal must take the dominant effect of the book or sound recording as a whole into account when determining the character of it. Because of this, many passages or pictures that when viewed by themselves would be indecent, are allowed to be published because of the redeeming features of the rest of the publication. The problem was brought to Parliament's notice by Mr. Freer, M.P., during the debates on the bill:

> "It would be possible for a newspaper to publish, say, an indecent serialised comic strip as part of the paper and get away with it, and yet if the comic was published as a book it would be declared indecent". (13)

His comments were a general indictment of Sections 11(1)(a) and in fact the example that he cites is covered by Section 21(1) (d) which makes it an offence to cause any indecent matter or thing to be inserted in a newspaper. He did, however, point up a difficulty that has arisen. Two cases have highlighted different aspects of the problem and laid down some rules.

Powell v The Police (1971) N.Z.L.R.110, illustrates the difficulties that may befall a publisher who uses excerpts from a book to advertise it. The facts become clear from the following statement by Richmond J.:

> "I think the whole question of indecency falls to be considered to a large extent by reference to the context in which photographs appear. If they appear as part of a nature magazine then the whole setting of the photos is different from the setting which the same photographs have when concentrated together on the front page of a brochure advertising books on sex and arranged in such a way as to throw emphasis on the private parts of the male figure forming the

> centre piece of the brochure. What can be acceptable according to the common standards of the community in one context can be unacceptable and injurious to the public in another".(14)

The context of the picture is seen to be of prime importance in deciding upon its decency. This view was approved by Roper J. in a case stated to the Supreme Court, Brien v The Police(15) where he said:

> "It comes back to a question of context. Just because a book meets with the approval of the Tribunal cannot mean that regardless of circumstances a picture from that book can never be displayed in an indecent manner".

It seems highly likely that written material will be dealt with on a similar basis as the same considerations apply. Superficially the position is justifiable, but it is so extraordinary that problems must arise. Consider for example the facts of Brien v The Police.(16) The defendant, an Auckland bookseller, displayed in his window three naturalist magazines, all of which had been passed by the Tribunal as not indecent. None of the books were displayed open, but all had pictures depicting full frontal female nudity only one had a title showing on the cover and this did not resemble a book's title, but rather a caption.to the picture. Speight J. held on appeal in the Supreme Court that the covers of these books in the context of the defendant's shop window were indecent. After discussing the relevant law he concluded:

> "Consequently by a quaint twist of the legislative process, the Indecent Publications Tribunal considering it as a whole, can make a declaration which does not act as a defence in relation to part of the book. Consequently the bemused bookseller is faced with the

> situation that legally it can be held that the cover can be an indecent document when the article as a whole has been declared by a competent tribunal in its book status not to be".(17)

This state of affairs applies not only to booksellers and those in the commercial sphere, but also to individuals in their private capacity. Thus a 'pin-up' picture may be indecent when taken from the context of the book in which it was bought and which had previously been passed by the Tribunal under Section 11 (1) (a) as not indecent as a whole.

The remedies available to the courts in situations such as that in Brien v The Police(18) are limited, and this does salvage some sanity in an otherwise very confused area. In Brien's case the information was laid under Section 21 (1) (e) which deals with exhibition to a person in consideration or expectation of payment. It was necessary to do this as the facts of the case did not fulfil the requirements of any of the other offences in Sections 21 and 22. The offence of offering an indecent document for sale(19) had not been committed as the whole book was for sale, and that had been declared not indecent. Neither had the offence of exhibition of an indecent document in view of a public place(20) been committed, as a component of that offence is that the defendant knew, or had reasonable cause to believe, that the document was indecent, and as the whole book had been declared not indecent by the Tribunal, Brien was quite justified in his belief to the contrary. Speight J. held, however, that Section 21 (1) (e) did not apply, as that section had been intended to cover

the penny peep-show, and it did not seem appropriate to him to stretch the facts to fit such an offence. Consequently the main effect of an action of this sort is to prevent a re-occurrence of the situation by providing the defendant with the knowledge or belief necessary for Section 22 to apply.

Notwithstanding the respite offered to Brien, the advantages of Section 11 (1) (a) outweigh any advantages that the present differentiation between books and parts of books may have and this distinction should be removed from our law. Whether or not this is done I submit that all documents should come within the jurisdiction of the Tribunal so that a single consistent standard of indecency, set by an experienced panel, may prevail.

(iv) Lithographics

An interesting, if minor point of law, is whether or not the offence of printing an indecent document in Section 21 covers the reproduction of indecent material by means of the photographic process known as 'Lithography'. The process includes the reproduction of documents by the process commonly known as 'Xerox'. Documents are reproduced by a process based on light sensitivity - somewhat similar to the process by which a photographic negative is obtained. The difficulty arises because at no stage of the process is anything done resembling 'printing', which in its usual sense entails some form of physical impression. Section 21 covers the printing press process, and also normal photographic reproduction, as this is 'printing' with

its attendant physical impression, but whether or not lithography is covered, depends on how 'printing' is construed. As this part of the statute may be considered penal, it could be given a strict interpretation pursuant to the maxim that penal statutes shall be strictly construed,(21) and on such a strict construction 'printing' could not be held to cover lithography. If, however, 'printing' is construed widely to cover general document reproduction, (and to hold otherwise would probably frustrate the obvious intent of the Act) lithography would be included.

B. OTHER FACTORS RELATING TO THE ADMINISTRATION OF THE SYSTEM

Since the passing of the Act in 1963, many complaints have been made about the efficiency and fairness of the system of censorship then introduced. I propose to examine some of these complaints and certain other matters that need clarification.

(i) Retroactive Legislation

There have been recent accusations that a declaration by the Tribunal that a book is indecent constitutes retroactive legislation.(22) The basis of the accusations is that a declaration of indecency is an act of recognition that a book is indecent, and not an act of making it indecent. But this situation is not peculiar to the tribunal system of censorship; it existed under the old law. In fact the tribunal system has diminished the retroactive aspect of indecency declarations, because the opportunity now exists for submission of material to the Tribunal independently of proceedings in the regular courts, whereas previously, declarations of indecency all came within the context of criminal prosecutions. To remove any hint of

what has rather harshly been termed 'retroactive legislation' it would be necessary for every book either published in New Zealand or coming into the country to be examined by the Tribunal, and this is obviously impractical. The harshness of true retroactive legislation is absent in our system of censorship because of two factors: first, it is possible to predict with a good degree of accuracy in most cases what the decision of the Tribunal will be; and secondly, in almost all cases the police issue a warning to the would-be offender, who can then submit the material to the Tribunal if there is any doubt as to its decency. This latter provision is not of course available if the material consists of documents not being books or sound recordings.

(ii) The Role of the Police

A complaint that is levelled at the Police is that they do not concentrate enough attention on importers and publishers to prevent the distribution of indecent material at an early stage. The problem in this area is that any pressure they do bring to bear is largely ineffective, due to the lack of a sanction. This is brought about by the existence of a six month time limit, beginning at the date of the offence, within which proceedings must be brought. As indecent material does not usually come to the notice of the Police until after importation or distribution a prosecution to be brought against the importer or publisher. I submit that to ensure that less indecent material is distributed to booksellers, that a change in the law on this point is desirable.

The Police were accused of being engaged in a witch hunt earlier this year,[23] but the Police, not surprisingly, denied the allegations[24] which did seem to be unfounded in the main. However, the exchange did highlight the role of the Police as the first line of censors. It is they who issue the warnings that may be followed by a prosecution if a book is not removed from the shelves.[25] Although these warnings are not compulsory, it has become customary for them to be given. It is perhaps better that these warnings remain unofficial so that booksellers do not come to rely on them in preference to using their own discretion.

The Police are in the same position as ordinary citizens in not having the power to submit material to the Tribunal. Material must be either referred to the Comptroller of Customs or to the Secretary for Justice, or the leave of the Minister of Justice and failing him the Chairman of the Tribunal must be obtained. The public do not have direct access to the Tribunal, because it is considered that the Government should be able to prevent abuse of the system by frivolous submissions and exercise some control in the area by expressing its view as to whether or not a book is capable of being indecent. The reason for the Police not having direct access to the Tribunal is that it is best to have only one policy making body in this area and the Department of Justice is better suited to fulfill that role than the Police.

(iii) The Role of the Customs Department

Before 1963, the Customs Department ran their own system of censorship of publications coming into the country. It consisted of circulating a list of books which the Customs Department would confiscate if they came into its hands, and of dealing with new titles by threatening to prosecute on the grounds of indecency. The former system, while not illegal, had no real legal basis but did serve to notify importers of what they could bring into the country without involvement in legal proceedings. The latter system was based on Section 46 of the Customs Act, 1913, which made importation of indecent material an offence. Under this section, imports considered indecent by the Controller of Customs were confiscated and the owner informed. To retrieve his property the owner had to obtain a court order, and in this manner material was brought before the court for a decision as to its decency. If the owner did not want to go to the trouble of court action, or thought that the material was probably indecent he took no action. In practice the importers invariably desisted, which meant that the Controller's judgement was seldom put to the test in a court. After the 1963 Act came into force, the Customs Department continued to operate its system, but when protests were made to the Government the old system was dropped. The provisions under which it operated are, however, still in force.(26) Nowdays, to prevent the importation of a book which may be indecent, the Customs Department seize it, submit it to the Tribunal and await the result before releasing it. If, however, the material is not a book or sound recording, it may be confiscated and a charge brought under Section 48 of the Customs Act, or an order

may be given for the condemnation of the material under Section 282 of the Customs Act, and this may only be quashed by a court which finds the material not indecent.

(iv) Publication of Results

There was much argument when the Bill was before Parliament on whether or not the Tribunal should have the power to prohibit publication of its decisions in all newspapers except the Gazette. The objection to wide publicity of the Tribunal's decisions was that such publicity would serve to advertise the tendencies towards indecency in the books which were the subject of the decision. Consequently, the Tribunal was empowered by Section 15(4) to prohibit publication of its results in all newspapers except the Gazette, and periodical and technical publications bona fide intended for circulation among librarians, booksellers, publishers or members of the legal and medical professions.(27) Although only eleven hundred copies of the Gazette are published, by virtue of Section 15 all booksellers belonging to the Booksellers' Association are informed of the decisions of the Tribunal by an Association newsletter. Problems arise, however, in connection with the many dairies that sell books. Their owners are not members of the Booksellers' Association and consequently do not receive the newsletters, and a large majority of them have probably never heard of the Gazette, let alone have had access to it. The situation then arises that if the decisions of the Tribunal are not published in the daily newspapers, or are not read, the indecent books may remain on sale either until a complaint is made to the

Police by a member of the public, or the Police check the premises. If one accepts the basic justification for the censorship of indecent publications, viz. that it has a harmful effect on readers, then this situation is obviously unsatisfactory. The usual retort, that people who sell books should make themselves aware of what is decent and what is not, is, I submit, missing the point as this is not preventing the distribution of this material. This situation could be remedied by forcing all commercial booksellers, not members of the Booksellers' Association, to register with that body for a small annual fee, in return for which the Association would supply them with details of the Tribunal's decisions.

(v) The Classification System

Under Section 10(b) the Tribunal is empowered to restrict the circulation of certain books and sound recordings to specified persons or classes of persons. Four main criticisms may be levelled at this provision. Firstly, if a book is classified as for example indecent in the hands of a person under the age of eighteen years, a demand for that book would probably be stimulated.[28] Secondly, it is particularly difficult to enforce distinctions between sixteen, seventeen, and eighteen year olds, particularly if it is a twenty years old shop assistant making the distinction. Additional problems arise when the shop assistant is sixteen years old and the books she is selling are indecent in the hands of persons under the age of eighteen. Thirdly, on what basis is a distinction to be made of material suitable for sixteen year olds, and seventeen year olds.

The Act lays none down, and it would seem that none exist. The fourth and last objection to the system is that it applied only to books, and not to newspapers and documents. Surely if any belief as to the value of the system is held, it must be extended to cover this other type of material.

CONCLUSION:

Although it is doubtful in the light of the Danish experiment and the recommendations of the recent United States Pornography Report, whether censorship of indecent publications serves any useful purpose, it would seem that our society is neither emotionally not culturally ready to live without it. If we must have censorship then one of the most important characteristics of a just and efficient system is, I submit, consistency. Yet in New Zealand we differentiate between books and other types of publication with the result that not only do we make a dual standard of indecency possible but also fail to utilise a specialist tribunal constituted specifically for the purpose of adjudicating on the decency or otherwise of written and pictorial matter. The consequences of this failure are seen in the areas of

(i) retroactivity,
(ii) procedure in the Customs Department,
(iii) Publications of results,
(iv) The application of the classification system.

Thus I submit that the Indecent Publications Act, 1963, should be extended to include both newspapers and documents within the jurisdiction of the Tribunal.

(1) Hereafter referred to as "the Act". All sections quoted are from this Act unless otherwise indicated.

(2) Thompson v Pay Hong Chin unreported. Heard 25.9.70 in the Wellington Magistrates Court. Decision delivered 8.10.70.

(3) Police v Brien. Heard on the 22.10.70 and the decision was given on the 3.12.70.

(4) Supra.

(5) Supra. The facts of which are almost identical to those in the previous case.

(6) Section 2.

(7) An unreported decision of Beattie J. given on the same day as the hearing (14.10.70) in the Wellington Supreme Court.

(8) If not actually seized by the Police or others, an injunction may prevent publication until the material has been subjected to the Court's scrutiny. The recent Pentagon Papers case in the U.S.A. was an example of this in another field of censorship.

(9) N.Z.P.D. vol. 336 at page 1694.

(10) ibid at page 1701.

(11) It is arguable that the factors in the Cinematograph Act that the Film Censor is obliged to take into account when deciding upon the decency of films, should be changed to encourage a single standard of indecency.

Although, by virtue of the basic difference in nature between written and printed material and films, I do not advocate the abolition of the Film Censor in favour of the Tribunal, it is arguable that the factors to be taken into account under the Cinematograph Act when determining the decency of a film should be changed to bring them into line with the factors laid down in the Indecent Publications Act.

(12) The other disadvantage of having a dual system of censorship are described post.

(13) N.Z.P.D. vol. 336 at page 1734.

(14) At page 111.

(15) (1970) N.Z.L.R. 119 at 121 not to be confused with the earlier unreported case of the Police v Brien.