
SPOKESMAN

Policy through media

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THE FREEDOM OF NEWS

Harry Evans made perhaps the biggest personal and longest lasting difference to media/government relations in Britain in modern times when editing The Sunday Times from 1967 to 1981. He virtually invented investigative journalism in Britain and often used his position to successfully challenge government action and its use of the law. For the past ten years he has been working in the US (his wife Tina Brown is editor of the New Yorker magazine) and is now president of the Random House publishing company. That his passion for truth, fairness and clarity has not dimmed one bit was made obvious when delivering a lecture for the Reuter Foundation at Oxford University recently. The detail of his talk, largely reproduced here, casts a lot of light on contemporary relationships between government and media.

THE
OBJECTIVE:
FREEDOM
FOR
JOURNALISTS
TO DO THEIR
DUTY

IN the early sixties in Britain there didn't seem to be much to prevent newspapers from doing their duty. I was wrong. Only a swift review can be suggested here, but very roughly it seems to me the story of press freedom and press performance in Britain went something like this. In the post-war years, as society grew more complex, there was a vast extension of state power and corporate power unmatched by institutional checks on what was being done with it. Parliamentary scrutiny was perfunctory. The press, in its staffing, traditions and leadership - in newspapers and in broadcasting - was hardly a monitor at all. Popular press investigations focused on petty fraud, slum landlords and villains of vice. The popular papers had a rollicking time but they did not disturb the mandarins. The quality newspaper scoops were Whitehall kites or leaks; it would not be too much to say the qualities were apt to regard investigation and campaigning as vulgar.

Bolder editors might have had campaigns of opinion in the fifties: one thinks of Alastair Hetherington at The Guardian and David Astor at The Observer who took a stand against Suez, and William Haley with his bolts from Olympus in The Times. But such campaigns, then and now,

are in the classic tradition of thundering. Their significance is moral, not factual. They might arouse official ire, but they do not excite the coercive power of the state - cannot excite it in the birthplace of Milton, Locke and Mill. This is what 'free speech' has long meant in Britain; it is the element our future judges absorbed when as young men they read Greats at Oxford; I doubt that any of them were obliged to debate the Federalist papers. In any event, Hetherington and Haley were then simply like men at Hyde Park corner, but with a bigger megaphone, indulged by the British policeman and the British public should they feel moved to incite the masses to revolution. The polemicists who fill so many columns today are the same.

Tolerance for dissent is very different, however, from tolerance for disclosure. As the American reporter Issy Stone put it, facts are subversive.

This is the fundamental point of divergence between the history of press freedom in Britain and in America. US founding father James Madison's language is explicit: 'A people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or both.' This is the logic of the First Amendment to the Constitution that 'Congress shall make no law . . . abridging the freedom of speech, or of the press.' Madison saw what Mill and Milton did not; the error of our classical philosophers was the same as the error of the classical economists - the assumption that there was a free flow of exchange in a perfect world; in our case a free flow of facts.

*Britain has a
half free press,
I would say*

It was not until the later sixties and seventies that the harsh fallacy of the assumption was exposed, that the limits of free inquiry, as distinct from free speech, were there for all to see. The principal reason, I suggest, lay in the arrival of a new breed of print and broadcast journalist. Many of them were restless university graduates trained to question authority, including, be it said, the authority of the editor, especially the hard core of didactic rebels from Australia. They and their newspapers collided with the barriers that had until then been the invisible defences of - to adapt Teddy Roosevelt - malefactors of great power. Malefactors capable of poisoning citizens with nuclear wastes; or building an airline knowing it will fall out of the skies; or concealing plans to rob communities of their railways; or bribing a member of Parliament for a foreign interest; or selling a deforming drug and refusing to compensate for the shattered lives; or bringing the weight of the state against a Cabinet minister who wanted to shed light on the hidden places in government.

I am not suggesting the 'invisible' barriers were erected in some conspiracy by the wielders of power. The law of confidence was a

bastard of commercial law; it is instructive to track its development from protecting a patent for glue to concealing affairs of the realm. Some statutes, like unexploded bombs, lay in the exigencies of war - the Official Secrets Act. But the last time I counted there were no fewer than 61 statutory provisions in Britain to conceal information. Again, the last time I counted there were 95 forbidden subjects in Parliamentary questions. The most significant restraints lay - still lie - in the marrow of our constitutional bones, in common law precedents which for long have exalted property rights over personal rights and in judges accustomed to regarding official information as the property of the government, not of the people. It was not some bolshie journalist but Thomas Jefferson who argued that the trouble with British democracy was that the Tory or Norman concept of rights is dominant: that rights are grants from the Crown, rather than the Whig or Saxon concept that they are natural to the people and the Crown has no powers except those expressly granted.

*Our
thalidomide
triumph was
suppressed, all
the same*

I FIRST traced the restraints on the freedom of the press in the Granada Guildhall Lecture in 1974. Comparing a specific liberty in America with a specific restriction in Britain, in defamation, in access, in judicial attitudes, I suggested that ours was a Half Free Press - and, pace Lincoln, that a democracy so conducted could not long flourish. The British press would never have been able to expose a British Watergate because of the laws of contempt and confidence. Conversely, the American press would not have been prevented by archaic contempt of court rules from ventilating the scandal of the treatment of the thalidomide children. It is often overlooked that even when The Sunday Times won the right to publish facts about the origins of the thalidomide tragedy, by a belated judgement of the European Court of Human Rights under the free-speech provision of Article 10, a British judge subsequently denied the newspaper the right to quote from the drug company's documents. Why the suppression? The judge ruled that the documentation of negligence was a lesser public good than protection of the company's property rights.

The first Amendment was only part of what I had in mind in 1974. The First Amendment ensures that the press can do battle, but it does not guarantee that the press will secure the ammunition in spite of secrecy and deception. The ammunition arrived in the Freedom of Information Act signed by LBJ in 1966, and its progeny in sunshine laws in all 50 states. But in Britain in all these years the open society receded. Five years after the Guildhall Lecture, when the Institute of Stationers invited me to reconsider the Half Free epithet, the print unions had put another hand on the windpipe by their determination to prevent the journalist having access to the computer for printing. By 1989, such is British fortitude, I was asked yet again to review the Half

Free judgement, at the Freedom of Information Awards ceremony. It seemed to me then, after five years working as a journalist in America, that the scene was darker than ever. There was the Ponting/Belgrano case where Mr. Justice McCowan identified the 'interests of the State' as synonymous with the political interests of the government of the day. And there was Mrs. Thatcher yoking contempt and that deformity, the law of confidence, to suppress the Spycatcher book, i.e. in preventing the British people from learning that MI5 might have plotted against the democratically elected Socialist government of the day - information available to every foreign country, but suppressed in the country where it mattered.

It was some satisfaction to old Sunday Times hands that in a maelstrom of actions the death blow to the government's pretensions was delivered in Australia by a young lawyer who was a former Sunday Times reporter, Malcolm Turnbull: he joined the paper just as it closed for a year in 1979 and had clearly built up a head of steam.

*Free speech is
now a collective
right in the US*

IN our years of regression, the American press reinforced its constitutional freedom. It was imperfectly realized at the time what a remarkable victory The New York Times had won when it fought the heavy damages awarded to the police commissioner in Montgomery, Alabama, for an advertisement depicting the city's brutal response to blacks claiming their constitutional freedoms. The suit was nothing less than an attempt to suppress reporting and discussion of Southern racism; and it had a fair prospect of success since the Supreme Court had always regarded libel as a matter for the states. The success of the New York Times in persuading the Court, with the Sullivan ruling, that public officials should not be permitted to hide behind the law of libel was a stunning vindication of the role of the press as an agent of democratic change. Free speech was acknowledged as not only an individual right but a collective necessity. In the Pentagon Papers case the New York Times, joined with the Washington Post, established that there were limits to what the executive might suppress on grounds of national security.

The most glaring British comparison with the United States has lain, of course, in the use of ex-parte injunctions. In epochal cases, the American judiciary has stayed faithful to the great English jurist Blackstone: 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication. Every freeman has an undoubted right to lay what sentiments he pleases before the people; to forbid this is to destroy the freedom.'

British judges for many years ignored Blackstone; certainly they did not ingest Lord Northcliffe's dictum that news is something somebody somewhere wants to suppress; everything else is advertising.

Nor can one readily imagine a British judge echoing Justice Gurfein's declaration in the Pentagon papers case that national security is defended not only on the ramparts but in the institutions of a free society. The Sunday Times in 1969 in Thomson v Times Newspapers won a declaration from Lord Salmon that the issue of a writ could no longer stifle comment, but scores of gag orders were issued in family law cases - the unwisdom of which was demonstrated in the Satanic Abuse scare that unfairly deprived a score of families of their children. The difference in the two democracies has never been more starkly exemplified than in contrasting Robert MacFarlane in the Iran Contra scandal and Mr. Clive Ponting in the Belgrano affair. In America, MacFarlane, President Reagan's National Security Advisor, was prosecuted for deceiving Congress. In Britain it was the whistle-blower Ponting who revealed the deception of Parliament, not the deceiving Minister of the Crown, who was prosecuted. J. B. Morton's story about Dr. Strasbismus (Whom God Preserve) of Utrecht summed it up: In the middle of a public speech the good doctor reached down for rotten eggs and threw them at his audience. As he was led away by police called to quell the uproar, he remarked 'Oh, dear, I seem to have got things the wrong way round.'

*Libel damages
for a public
body are ruled
out*

A FEW things seem to have been got the right way round in the period from Spycatcher to today. Shafts of sunshine have penetrated the brooding gothic of the Appeal Court and the House of Lords. The most brilliant was in the rout of the Derbyshire County Council claiming libel damages as an official body: a nod to the European Convention of Human Rights and a promising echo of NYT v Sullivan in its veto of libel writs from authorities local and national. It is pleasing to me to see The Sunday Times, both here and in the Albert Reynolds case, being willing to bear the burden of legal cost and risk for a fight on principle of importance to the whole press. Rupert Murdoch deserves full credit for that. Other national proprietors please copy. When I catch wind of some of the battles avoided on grounds of the legal costs, insurance problems, etc. I wonder if the accountant has supplanted the lawyer as the brake on reform. A viable battle avoided is a battle lost for all. The vindication of Alan Rusbridger and Peter Preston in their quite brilliant investigation of sleaze was a vindication not just for The Guardian but for journalism.

But these and other achievements have been by what is still a half-free press. It is understandable that smaller newspapers who expose a public wrong frequently cave in rather than face bankrupting libel costs and possibly damages. Only the jury saved The Guardian, for the time being, in its police-corruption libel case where the judge shut his face against public interest evidence. Only a newspaper with resources could risk what The Daily Mail so sensationally risked in challenging the acquittals in the Lawrence murder. In America The Daily Mail would

have been able to investigate and report before trial, a practice with mixed results.

Where can we go from here?

*Now: a British
Freedom of
Information
Act - perhaps*

IN Fidelio I am always moved by the moment of anguish when the jailer tells Leonore that Florestan has already been in the dungeon for two years and she cries out piteously 'zwai jahre!' Well, we have been crying out rather longer than that, but at last my transatlantic ear picks up the first sound of a trumpet in Act I. Can rescue really be at hand?

Nothing less is in prospect now, with the advent of Tony Blair's government, than a press almost as free as the American. If they mean what they say, the chains are set to be sundered by two hammer blows. The first, of course, is the promise to incorporate the main provisions of the European Convention of Human Rights into domestic law. If Labour's Act rules that future UK legislation has to conform to the Convention, Britain may soon lose the European championship as the leading recidivist on breaches of human rights. A lot will still remain for judges to decide. At Strasbourg in the narrow 11-9 Sunday Times victory on thalidomide, the focus of hostility was the British judge. The passage of time has made the court at Strasbourg less inviting, since with the enlargement of the community it now includes judges from former communist countries who cannot be relied on to quote Tom Paine. At the appellate and Law Lord level, the prospects are now better than they have ever been for a reconciliation in Britain of the competing claims of publicity and privacy, fair trial and free speech, free speech and reputation. Still, I'd recommend to the new Lord Chancellor that he send his lower court judges for a constitutional refresher with Anthony Lewis's law course at Harvard.

The second hammer blow is the promise to enact a Freedom of Information statute. The postponement of that Bill must remind the great campaigners that often have they cried 'once more unto the breach dear friends' only to fill up the wall with their English dead. I don't underrate the 'Yes, Minister' genius of Whitehall. I am sure a silken web of plausible exemptions will be stitched together to hobble the radicals, but will not the dashing Tony Blair with one bound be free? The velocity of his rhetoric on the subject is certainly impressive. The press can use this next year or so to good effect.

Be ready for the Cassandras who will predict the end of orderly government; they predicted it in Washington: I can testify that it was still there when I flew out last Thursday. They predicted that publication of the Crossman diaries would end Cabinet government; it seems to have survived. The law of predictive amnesia applies. The more catastrophic the prediction the more swiftly the naysayers forget when experience proves them wrong. The press should re-examine that intelligent draft Bill drawn up when Labour was in opposition, check that what is given

with one hand in a Freedom of Information Act is not taken away with the other in the extended UK Data Protection Act. And British press and television should look again - now! - to the most recent experiences in the United States. The benefits of FOI, as amended, have been well documented. But the difficulties have to be addressed; the delays, the cost of appeals, the varying practices of departments, the counter claims of national security, privacy and commercial confidence.

PRIVACY is the most difficult, the area of vulnerability. It is a genuine value, one where the practices of the worst among us constantly threaten the freedom of the best. On privacy, the American legislation allows the custodians to deny information where it involves an 'unwarranted' intrusion. Experience shows this leaves too much leeway to the custodian to judge what is 'unwarranted'. A better definition may be found in the US tort law language: protection should be for 'highly intimate information disclosure of which would be offensive to a reasonable person.'

The FOI act is justified by the citizen's right to know. We might well ask government to imitate the practice of the better departments which make reading rooms available where newly disclosed documents may be examined by any member of the public. Better still, put them on-line. That also simplifies administration: typically after the first disclosure hundreds of press and public requests follow, aggravating the delays - there is a two year wait for FBI documents. The press should also insist on a provision for multi-tracking of requests so that the urgent gets priority over the routine: 90 per cent of the FOI requests, it has to be remembered, are not from the press but from commercial companies snooping on their rivals.

*Liberty must
still have limits
- which are?*

BUT there is an even bigger question than the technicalities of the Freedom of Information Act, important though they are. If there is to be freedom, it is freedom for what? Freedom for the clandestine taping of calls to a therapist? Freedom for snooping on children at school? Freedom to pay for a video of the Princess of Wales and her supposed lover? Freedom to trespass in hospital wards? Freedom to ridicule a Minister because she has put on weight? Freedom is an opportunity; the eternal vigilance required for liberty is also required to frustrate the misuse of liberty.

Having now lived and worked in the United States for more than a decade, I am troubled by the present state of the free press in America. A decline in standards of reporting and especially in the frequency, quality and range of investigative journalism is discernible, with a sharp rise in public disaffection with the press. Let me emphasise at the outset that fine original reporting and investigations are still to be found in the New York Times, in the intellectual magazines, The New Yorker and The

Atlantic, and occasionally in the regional press, and there is unexceptional routine reporting from C-Span, the PBS news hour and CNN. But generally several things seem to be happening.

Tabloid values now suffuse the press in ways unthinkable a decade ago. Complex stories are squeezed into good-guy, bad-guy formats. A significant degradation began when television news programmes became a profit centre. Bill Paley, the founder of CBS, always said it would be a lamentable day if that happened. Well, it is now around dusk on that lamentable day. Sam Donaldson is no Walter Cronkite.

The 1964 Sullivan ruling that transformed libel laws in the US in the favour of the media was a progressive and necessary reform, but it has been abused. It is one thing to facilitate criticism and exposure of public officials in the public interest. It is another to dilute 'public official' to 'public figure' and so remove the right to a reputation from anyone who happens to have had five minutes of fame.

*Television
can't afford to
do it's best,
said Fred
Friendly*

THE panic over audiences has resulted in an erratic, not to say, zany sense of priorities. Television, said Fred Friendly, makes so much money doing its worst that it can't afford to do its best. The emerging rule seems to be the more trivial the event, the more tremendous the coverage, the more frantic the chase. It is indeed the era of the trivia cops. Newspapers and network TV do not hesitate to use a supermarket scandal sheet as the source and pretext for the most scurrilous stories of no redeeming public value. The practice is defended - if it is defended at all - on grounds that the story is about 'character'. This is no more than prurience on stilts. It is as much about character as Joe McCarthy's list of names was to do with state secrets.

There has been a significant growth of paranoid radio where lies in all shapes and sizes go forth unchallenged. At the same time, paradoxically, various inhibitions of political correctness, a false patriotism, a suffocating sanctimony, and a culture of victimisation, restrict reporting and debate in ways unfamiliar in Britain, or France for that matter, where there is more tolerance for the wayward and unconventional. When Dick Morris wrote his book about just how Clinton was re-elected - something nobody had thought possible in 1994 - it was better reported in Britain, notably in The Guardian, than in the US because in the US, however newsworthy his revelations, his sexual misconduct made him a non-person.

So, for all the size and vivacity of the country, there are proportionally fewer independent voices than in Britain. The American manufacturing genius for standardisation seems to have carried over into journalism in the newspapers and the network news shows. In the supposedly sophisticated east, in the sunbelt and the midwest, you find the same packaging of news, the same columnists, the same

preoccupation with the same celebrities, the same semi-enviuous, semi-admiring fascination with their lifestyle rather than their work, the same obsession with short term finances.

Also, the increase in mandated sentencing has resulted in a subtle but enormously important shift in power from judges to prosecutors in the federal system. It should have caused the press to scrutinise more carefully prosecutors' exercise of discretion, but it has not, according to a study by Judge Kimba Wood. The press continues to focus on the need for access to judicial proceedings because that is what they are used to doing; plea bargains on file are not scrutinised to see if justice has been done.

Also, more ink was spent, more air exhaled, on Mrs. Clinton's conversion of \$1000 in cattle futures than has ever been spent monitoring the secretive institution that deals in trillions - the Federal Reserve Board. The Fed's monetary actions affect the prospects of millions of Americans. Nobody expects the press to be in on decisions that will affect the stock and currency markets, but when the minutes are released years later they can be reviewed, and there is nothing to stop the press giving us regular profiles of the changing membership, their attitudes and actions.

*Oh dear, he's a
disciple of
Ghengis Khan,
is he?*

THE profile, incidentally, is altogether a neglected art in the US; typically, only when Congress starts to monitor a nomination for some office or other is it discovered, shock-horror, that the candidate has long professed to be a disciple of Ghengis Khan.

Again, if only the forensic energy expended on an Arkansas law firm could be deployed to look into the murk, say, of the National Rifle Association which terrifies numerous legislators into voting against a ban on the street criminals' choice, automatic machine guns. Who are the men who run the NRA? How do they get their mandate, decide their policies? Precisely how much money has been paid to which legislators? The press constantly exclaims at the influence of the NRA, but never penetrates the facade.

I offer the mighty Army Corps of Engineers as another neglected public institution of great power.

The press shortcomings in areas like this are much more important than the failed land deal called Whitewater which developed into a witchhunt. The distaste for Clinton - reminiscent of the sectional hatred for FDR - distorted news priorities. Mort Zuckerman at US News & World Report was about the only editor to draw attention to the fact that the original Whitewater allegations were splashed on the front page, but the subsequent rebuttals by independent inquiries were not reported or were buried inside - even on the New York Times.

IN case the thought should cross your mind that these are the

lamentations of a homesick expat, let me say that America is a most stimulating place to work and that the anxieties I report are shared by a host of distinguished journalists - people like David Broder, Mike Wallace, Robert McNeil, Ben Bagdikian, Jim Squires, Abe Rosenthal, Bill Kovach, Adam Gopnick, James Fallows, Osborn Elliott and others have created a whole literature of criticism. A typically American exercise of self-improvement. They use words like malicious, negative, self-serving, mean, shameless, sanctimonious, belligerent, aggressive, disingenuous, plain nasty. Elliott, a pioneering editor of Newsweek in the Watergate and Vietnam years, deplors it as journalism with a sneer with little sense that any public policy is much worth pursuing. Adam Gopnick discerns a transference from investigation to inquisition with very few unequivocal successes in proportion of the amount of human misery caused.

And so to the opportunity for the British press. Can it be saved - saved by freedom?

*A new right of
privacy is
needed, it
seems*

I BELIEVE the British press can rise to the occasion. The editor of The Guardian, Adam Rusbridger, has suggested a subtle bargain which would balance a new right of privacy, a new right of free expression, and a new right to know. Will other editors respond?

The British press has certain advantages over the American just now. This society is less afraid of controversy; perhaps, perhaps, a little less obsessed by money. Television is not driven by the same demons - at present. The buoyant quality press is as good as any press anywhere in writing and it has a wider view of the world. And there are no better popularisers of the complicated, no better dramatisers of the dull, than the tabloids.

One thinks back, also, to US founding father Alexander Hamilton. He was wrong in doubting the worth of a Bill of Rights, as our experience has shown, but he was surely right when he wrote that 'whatever fine declarations may be inserted in any constitution must altogether depend on public opinion and the general spirit of the people and government'.

The spirit is willing. The force is with us. Yes, the half-free press can be saved and it can, it will, it must, enhance the quality of democracy in Britain.

OUR OPTIONS FOR ACTION:

Refer to this talk when in conversation with journalists. The fact that you know what's in it and they (probably) don't could grant much credibility. Readers who are not Anglo-American may find it also helps clear a lot of cultural fog which, again, is well worth mentioning in conversation with journalists.