Freedom of Expression in Nineteenth Century England: Weak in Principle, Robust in Practice

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Abstract
This article introduces the most significant steps taken towards the introduction of freedom of discussion in the UK and compares them with debates on freedom of the press and freedom of expression in the rest of Europe. Taking as a starting point John Stuart Mill's and Albert Dicey's nineteenth-century deliberations on freedom of discussion and freedom of the press, this article examines debates around the extent to which English law should guarantee or restrict the press's or the individual's ability to spread new ideas.

Keywords
freedom of discussion, freedom of speech, freedom of the press, censorship, English law

Introduction

In his influential book, *Introduction to the Study of the Law of the Constitution,* first published in 1885, Albert Dicey (1835–1922), Professor of Law at Oxford, contrasted the law relating to freedom of discussion in England with the position in France and Belgium (Dicey 1915: 146–147). In the continental countries the free communication of thoughts and opinions or (in Belgium) freedom of the press was guaranteed by the constitution, but in England these freedoms were barely known to the law; they were not to be found in any statute or even recognised by the courts. English law merely permitted anyone to say or write anything he liked unless the law intervened to prohibit publication. The press had no legal privileges; it was subject to the same restrictions as any individual. Dicey's summary of the law in chapter VI of his book was broadly correct, although it did oversimplify the position a little. Any exposition of the law on freedom of expression in nineteenth century England must therefore inevitably concentrate on the various restrictions imposed on the exercise of that freedom, rather than on the scope of the freedom itself.

A few preliminary points should be made before the most important restrictions are examined. First, Dicey generally referred to 'freedom of discussion' rather than to 'freedom of expression' or indeed 'the freedom of speech', the term used for the right guaranteed by the famous First Amendment to the United States Constitution (Dicey 1915). The chapter of John Stuart Mill's *On Liberty* (1857), which made the argument for full freedom of speech as necessary for the discovery of truth and for social progress, was entitled 'Of the Liberty of Thought and Discussion'. Like Dicey, Mill also referred to the 'liberty of the press' (Mill 1991: 20). This right was given much greater emphasis than any right of individuals to freedom of speech or expression, largely because of the increasing role the burgeoning print media – books, pamphlets, and newspapers – played during the late eighteenth and nineteenth centuries. In contrast, there was virtually no argument for any human right of individuals to freedom of speech or expression, although Mill's argument can be interpreted to justify such a right.

Secondly, there was a vigorous debate whether restrictions on the exercise of freedom of discussion about political, social and religious questions could be justified. Mill argued that, save in situations where public order was clearly threatened – for example, if an excited mob gathered outside the house of a corn-dealer – it was wrong to prohibit the dissemination of new ideas, however radical or challenging they might be. However, other writers took a more conservative view. In his essays, *Liberty, Equality, Fraternity* (1874), the lawyer and constitutional theorist, James Fitzjames Stephen, contended that any society which wished to safeguard its moral foundations was entitled to prevent the spread of revolutionary or morally subversive thoughts; for if they became widely accepted, the character of the society, or even its very survival, would be endangered. Mill's arguments have generally been accepted by liberal democracies in the last century or so, but it is important to appreciate that they were vigorously contested throughout the nineteenth century when many restrictions on the exercise of freedom of expression were widely supported. Stephen's views were shared by Tories and conservative Whigs, while radical politicians and their supporters naturally argued against limits on free speech and press freedom.

The most important introductory point is that there had been no censorship or licensing of the press and other print media since 1695, when Parliament failed to renew the annual press licensing measure which it had first enacted after the restoration of the Stuart monarchy in 1662. Press freedom meant therefore the absence of any previous restraint on publication, but newspapers and pamphlets were subject to a range of criminal laws applied after their publication. As Dicey boasted, English law allowed the uncensored press greater freedom than it enjoyed in eighteenth century France. The position of the press had also been strengthened at the end of that century when the Libel Act 1792, championed by the leading Whig politician, Charles James Fox (1749–1806), gave the jury authority to give a general verdict whether a publication amounted to a libel or not. Before the enactment of this measure juries had only been entitled to determine whether the accused had actually published the material, but now they were able to decide whether it amounted to a seditious libel. Juries were more

liberal minded than most judges, who were appointed by the Crown and normally sympathetic to the government.

Legal Restrictions on Freedom of Speech and of the Press

This section of the article outlines the principal restrictions on freedom of expression during the nineteenth century, while the following one examines their impact on political discourse. For the most part these restrictions consisted of common law offences established by judicial decisions over the previous two or three centuries, rather than offences created by Parliamentary statutes or set out in a criminal code. Consequently the scope of the offences was unclear; their vagueness could be exploited at times by the prosecuting authorities, but also benefited the publisher if he was tried before a sympathetic, liberal jury (Harling 2001: 44). Statute law supplemented the common law, sometimes providing tougher penalties for infringement of the criminal law, but on occasion conferring defences to a prosecution or otherwise, as in Fox's Libel Act 1792, improving the position of publishers.

Much the most important common law offence was that of seditious libel: publishing material with a seditious intention, broadly defined as an intent to bring the Crown, government, Parliament or the administration of justice into hatred or contempt or to incite disaffection against these authorities, or to promote reform otherwise than by lawful means or feelings of hostility between different classes in society. However, to advocate reform and the removal of grievances by peaceful means did not amount to sedition. This distinction was stressed in an important court ruling in 1886, when a Socialist speaker at a rally in Trafalgar Square drawing attention to the need to help the unemployed if civil unrest was to be avoided was acquitted of the offence (Cox 1886: 333). Court decisions in the early twentieth century emphasised that a defendant could not be convicted unless he had intended to provoke disorder and violence. Despite these rulings, the existence of the offence was an important restraint on freedom of political speech. Dicey admitted that rigid enforcement of

the law would have been 'inconsistent with prevailing forms of political agitation' (Dicey 1915: 150).

Other categories of libel also imposed significant restrictions on public discussion. It was a blasphemous libel to publish a denial of the existence of God or the divinity of Christ, or express opposition to the teaching of the established Church of England. Unlike for seditious libel, there was no need to prove an intention to blaspheme; the only issue was the character of the publication. Prosecutions were frequently brought, even in the 1850s when Mill protested against the sentencing of a Thomas Pooley (c. 1788–1846) in Cornwall to 21 months imprisonment for offensive remarks about Christianity (Mill 1991: 34). Decisions towards the end of the nineteenth century liberalized the law a little: in one leading case it was intimated that only licentious or misleading material could amount to blasphemy, with the implication that a dispassionate critique, say, by Charles Darwin (1809–1882), of Christian teaching was not against the law (Cox 1883: 231). But as Dicey pointed out, freedom of discussion in this context as in others depended on the jury (and also, it should be added, the prosecuting authorities): '[f]reedom of discussion is … in England little else than the right to say or write anything, which a jury, consisting of twelve shopkeepers, think it expedient should be said or written' (Dicey 1915: 152).

It was also a criminal offence to publish a libel of any individual, defined as a defamatory publication tending to bring the person concerned into hatred, ridicule, or contempt. It was only after the Libel Act 1843 that the publisher had a defence if he could show that the allegations were true, provided publication was for the public benefit. A defamatory allegation could also provide the basis for a civil action for damages – slander if it was made verbally, libel if made in writing. Civil actions became much more common than criminal prosecutions during the course of the nineteenth century, largely because the award of damages by the jury provided an attractive remedy for the claimant, while juries had become reluctant to convict newspaper editors and other writers of a criminal offence, as a conviction might lead to a term of imprisonment. The Law of Libel Amendment Act 1888 provided that no prosecution for criminal libel against the owner or editor of a

newspaper could be brought without an order of a judge after hearing the parties – this was an unusual example of a legal privilege for the press.

While these two libel statutes liberalised the law for the benefit of publishers, other statutes were intended to increase the penalties for committing an offence. A number of laws (the Six Acts) were passed in 1819 by the Tory government after the Peterloo Massacre, when a number of people had been killed and hundreds injured at a peaceful rally near Manchester. The Seditious Meetings Act 1819 gave magistrates wide powers to control the date and time of political meetings, of which notice was required to be given, while the Blasphemous and Seditious Libels Act of that year enabled a sentence of transportation for 14 years from the country for a second offence of libel. A much more important measure was the Newspaper Stamp Duties Act amending the laws which had imposed a stamp duty on newspapers from the early eighteenth century. Stamped newspapers were entitled to free postage, provided the required duty was paid; pamphlets, often published weekly with commentaries on the news, had not been required to pay the duty. The 1819 Act extended the duty of 4 pence a copy to pamphlets and other periodicals appearing at intervals of less than a month; the measure was intended to limit the dissemination of radical literature and had that effect (Wickwar 1928: 137–141; Gilmartin 1997: 48, 79–83, 97–98). Stamp duty was increasingly unpopular among radicals and lower income groups as a 'tax on knowledge'. It was reduced from 4 pence a copy to one penny in 1836, and finally abolished in 1855. Abolition of the duty was contemporaneous with the rise of newspapers, the most important vehicle for the spread of news and political opinion during the nineteenth century.

The Impact of the Law on the Press and on Free Speech

The libel laws were frequently used to prosecute radical and subversive literature during both the Napoleonic wars which finally ended in 1815, and the immediate post-war period characterised by inflation, unemployment and civil unrest (Harling 2001: 108). But the number of prosecutions does not bring out the impact of the law on freedom

of speech and press freedom during the first twenty years of the nineteenth century. The vagueness of libel law meant that publishers could never be confident that their newspaper or pamphlet would escape prosecution, though equally the Home Secretary and law officers (the Attorney-General and the Solicitor-General) could not be sure that a jury would convict if the case came to court. The government met that difficulty by ensuring that special jurors were picked for important libel cases, increasing the chance of a conviction (Harling 2001: 116–118). Moreover, the Attorney-General could take advantage of an information procedure under which he could require a publisher (or anyone distributing libellous material such as a bookseller or newsvendor) to appear in court and to post securities of up to £1,000 if he were to be allowed bail; if no securities could be found, he would remain in prison before trial. It was only after a statutory amendment in 1819 that the Attorney-General was required to bring a prosecution under this procedure within a year (Wickwar 1928: 140–141).

During the 1820s, however, prosecutions for libel sharply declined; there were none at all between 1824 and 1829. The explanation is that the government found them counter-productive. Defendants would repeat the offending material at their trial and it would then be further reproduced in newspaper reports of the proceedings and in pamphlets containing an account of the trial. Although Richard Carlile, a prominent agitator for press freedom in the early nineteenth century, was convicted of blasphemy for republishing Paine's *Age of Reason,* sales of the book rocketed and a ribald account of his trial had an enormous circulation (Wickwar 1928: 82–96). It was considered unwise to prosecute William Hone for parodies published in 1819 satirising the Prince Regent and then a year or so later the Regent after he became George IV (Wickwar 1928: 131–134, 163–165). Libel trials were political theatre, enabling writers and editors to appeal to the verdict of the nation (Gilmartin 1997: 139–142).

There were, however, occasional successful prosecutions for sedition and for blasphemy in the early 1820s. Richard Carlile's wife, Jane, was convicted in 1821 of sedition for selling an issue of the *Republican* (a weekly advocating republican government) which referred to ministers in the government as tyrants and recommended their assassination;

his sister was convicted of blasphemy at much the same time for re-publishing one of Paine's theological works (Wickwar 1928: 205–211). Two years later, a Unitarian founder of a radical paper was convicted of libel for publishing false reports that George IV was dangerously ill from a hereditary disease; the charge was that the publication had shown contempt for the Monarch (Wickwar 1928: 253–255).

The most notorious prosecutions in this decade were those brought in December 1829 by the Duke of Wellington when he was Prime Minister against the owner and editor of the *Morning Journal*, an ultra-Tory newspaper, which had protested vigorously against the government's policy of Catholic Emancipation – the removal of legal disabilities from Roman Catholics. One charge was of seditious libel of the King, but the most surprising was that of libel of Wellington himself; he had been accused in a letter to the newspaper of 'despicable cant and affected moderation' and of 'the grossest treachery to his country, or else the most arrant cowardice – or treachery, cowardice, and artifice united.' Wellington actually appeared in person in court to give evidence for the prosecution. The defendants were convicted and the editor, Alexander, was imprisoned for a year. But it was an empty triumph for Wellington; the press condemned the prosecution as an unwarranted attack on press freedom (Sack 1990: 159, 166; Jupp 1998: 62, 344).

After the 1830s the law of sedition does not appear to have exercised much restraint on freedom of political discourse which became increasingly vigorous during this period. One factor was the increased circulation from 1830 of radical handbills and cheap unstamped papers. Regular newspapers assumed greater importance in national life, a development enhanced by the reduction in the level of stamp duty in 1836 and its abolition in 1855. Political conservatives tried to resist the influence of radical newspapers and pamphlets not by resort to the criminal law, but by establishing papers which would support their own views. By the 1850s the vocabulary of 'sedition' and a 'licentious press' was rarely used (Jones 1996: 165). There was now a lively debate whether newspapers established public opinion, or reflected it. A number of writers expressed concern over their growing influence. Among them was the distinguished novelist Anthony Trollope, who in *The Warden* and his Palliser novels satirised journalists

for their irresponsible treatment of Church and political leaders. In his view, more soberly expressed in his (then unpublished) essay, 'The Press', daily papers, unlike the Crown, ministers and judges, lacked clear duties and responsibilities; unless their faults were corrected by their readers, they could become the ruling power in the land. It was even said that public opinion had become a tyrant, and newspapers were her ministers (Jones 1996: 162).

Any reference to the character of political writing in newspapers, pamphlets and cartoons from the late 1820s shows very clearly that it was little affected by the criminal libel laws, particularly the law of seditious libel. The King was often ridiculed and governments, whether Whig or Tory, subjected to hostile and bitter criticism. Newspapers influenced, or shaped, the development of public opinion in the absence of any real constraint imposed by the law. Dicey's view of freedom of discussion, outlined in the first paragraph of this paper, may have been legally correct, but it does scant justice to the robust level of public debate which developed after the first three decades of the nineteenth century.

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Endnotes

[1] Stage plays and other performances were in contrast subject to licence by a court official, the Lord Chamberlain, under powers which had been put on a statutory basis in 1737 and were reformulated in 1843: they were not abolished until the passing of the Theatres Act 1968.

[2] It should be noted that this power was never implemented; the provision conferring it was repealed in 1830.

[3] Harling reports over 200 prosecutions for libel between 1790 and 1832, a marked increase over the figures for comparable periods in the eighteenth century.

[4] It is unclear from Wickwar's account whether the prosecution, brought by the Home Secretary, Robert Peel, against the advice of the law officers, was for seditious libel or for a personal libel of the King.

[5] The essay is now published in *The New Zealander*, Hall, N. J. (ed.) (Oxford: Clarendon Press, 1972) and by the Trollope Society (London: Trollope Society, 1995).