A cloak that could shroud Whitehall

COMMENTARY
Hugo Young

AFTER Spycatcher, it was always likely that the Government would embark on a reform of Section 2 of the Official Secrets Act. After decades of media derision and complaint about this infamous clause, it may be thought the press must welcome such an initiative. In fact it is an enterprise which all concerned for liberty, and not just journalists, should view with foreboding.

The review which is now in train, under the Prime Minister's chairmanship, is designed to make good one of the rare failures of Thatcherite resolve in the early days. The same thing was attempted in 1979, with the Protection of Official Information Bill, which had to be ignominiously withdrawn after being torn apart in the House of Lords.

It was one of Willie Whitelaw's careless aberrations. He inherited a White Paper from the labour government, itself rooted in a report eight years earlier from the Franks Committee. (There have been so many Franks Committees that the designation might be incorporated in any structure-plan of the government machine from the 1950s to the 1980s). He understood Fleet Street wanted the reform as well, so though he'd get it through with an easy consensual flourish. He could not have been more wrong.

It is worth recalling the 1979 Bill because it seems certain to be the basis for a 1989 Bill as well. And the question it will pose, among others, is how far the climate which rendered it incapable of passage in 1979 has changed in ten years. It will be an interesting test of what has altered in attitudes towards state power, judicial review, freedom of information and the liberty of the subject, in the period of the Thatcher ascendancy.

The 1979 Bill proposed repealing the "catch-all" Section 2, which makes it a criminal offence to disclose any official information, whatever its importance and whatever its original source. Instead, there were to be explicit categories of punishable information. These included defence and international relations, security and intelligence, surveillance intercepts, crime and prisons, communications from foreign governments and matters of individual or business confidentiality.

The proclaimed object was to make the law more clear and less comprehensive. In fact the Bill did neither. At the heart of it was a stipulation that, in many important areas, a minister's certificate that disclosure would seriously damage the national interest should be absolutely binding on any court.

In all disclosures about defence or foreign relations, for example, this ministerial say-so would be enough to deprive the accused of any defence. It could not be reviewed. Its mere citation would be "conclusive evidence of that fact" — i.e. of the "fact" that disclosure might be injurious.

Disclosures about intelligence would not even need to be certificated. Knowingly to publish anything to do with "security or intelligence", which the Bill defined broadly, would be an offence. The merest mention of MI5 or MI6, let alone any disclosure of the Spycatcher variety, would be punishable at a stroke. Nor, under the 1979 Bill, would it have been any defence to show that information had already been disclosed elsewhere.

Far from producing greater clarity, the Bill created only greater arbitrary power. Ministers could "certify" even unclassified information. Equally, it conceded no ground to the civic merit of disclosure in certain circumstances. For example, investigative journalism in pursuit of criminal activities might itself have become a criminal offence.

All in all, it was a bad Bill, the product of Home Office minds allied to Conservative prejudices, presided over by a minister who sincerely imagined that the press would be willing accomplices in his scheme. In the argot of the period, we were supposed to welcome the arrival of "an Armalite rather than a blunderbuss" directed meticulously at our hearts.

Any new set of proposals seems bound to follow the rough pattern of 1979: the definition of categories in place of a catch-all offence, plus a system for deciding whether the categories include or exclude a particular disclosure. What will happen this time round?

The categories themselves are worth a serious argument. Why should messages from foreign governments automatically be included? Will "cabinet papers" be protected, as they were not in the unbelted days of 1979?

But the major question must undoubtedly be whether ministers, alone and uninvigilated, are to be permitted to determine who is a criminal and who is not. Shall their descretion be reviewable by judges? The contest over this ground has been one of the expanding themes of the Thatcher years — and every time the judges have insisted, ministers have winced and wriggled and sought to fight back. The rewriting of official secrets law promises to be the largest bid yet made for untrammelled executive power.

Mr Richard Shepherd, the Tory MP whose initiative in this field seems to have jarred the Government into acting, thinks it impossible that the bid could succeed. His Bill provides not only for judicial review but for a public interest defence whereby the citizen-journalist's reasonable belief that the information revealed "crime, fraud, abuse of authority, negligence in the performance of an official duty, or other misconduct" would be enough to legitimise disclosure.

A seductive idea. While not going that far, Mr Douglas Hurd, the most liberal of the ministers involved, will probably be the most sympathetic to the case for curbing ministerial autocracy. He will also be aware of the House of Lords, among the many other calls on its vigilance, lying in wait as it did in 1979. The arguments, after all, have not changed.

The context, on the other hand, has changed a lot. Secrecy has become, if anything, more of an obsession. The Wright affair has taken a bruising toll of ministers' dignity. The open-government lobby, still not entirely demoralised in 1979, is now less vocal. Power-hunger has grown in Whitehall. The media have not shown themselves very clever at getting together in defence of vital interests. So a test awaits not only ministers' respect for liberty but the people's willingness to fight for it.

Exercises - Multi-national Cly

+ Submarines

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Submarines defence link

By DESMOND WETTERN
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NATO

NATO forces for the first time are to be allowed to take part in the defence of Britain's nuclear deterrent: the Polaris missile submarines.

Despite assertions by past British Governments that Britain's strategic nuclear forces were part of the Western nuclear umbrella, there has always been a marked reluctance to permit Allied forces to have any part in the defence of the submarines and their Faslane base on the Clyde.

But it is now planned to have mine-hunters and minesweepers of the 10-year-old multi-national Standing Naval Force Channel, comprising of ships from the Belgian, Danish, Netherlands and West German as well as British navies, operating in the Clyde approaches to ensure mines have not been laid to bottle up the British and American missile submarines in their bases at Faslane and Holy Loch.

Last year the multi-national force was permitted, also for the first time, to take part in exercise "Highland Fling," designed to keep open the Clyde against a minelaying threat from Warsaw Pact submarines, aircraft and merchant ships, but they were confined to the Irish Sea sector and did not operate in the Clyde.