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The BBC - Defending the public interest Transcript

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The BBC: Defending the Public Interest

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At the conclusion of my last lecture, I told you how the Kelly affair ended with the resignation of the Chairman of the Governors of the BBC, Gavyn Davies, and its DG, Greg Dyke, and put reform of governance on the agenda. Even before the Charter Renewal of 2007 the Governors separated themselves, their secretariat and their offices from those of management in order to look, and be, more at arm's length. The question today is whether the Trustees, who succeeded the Governors, are at the right distance from management, not so far that they cannot really know what is going on, but not so close that they lose strategic positioning. That is just one of the questions that are part of that overworked subject of governance of the BBC.

I also indicated to you in my last lecture that I thought Lord Hutton got it wrong in two respects. One was his acceptance of the government assertions that there had been no embellishment, no "sexing up" of the September 2002 intelligence dossier in order to strengthen the claim to go to war with Iraq; and the other was his expectation that the governors should actually check the veracity of claims broadcast in good faith, as opposed to just checking that the processes of the editors were proper. That is not to say that the Trustees do not have the last word in complaints. They do at the moment, albeit technically, in that they sign them off at the very last stage, after much previous examination by editorial units and a small committee of trustees.

You will recall that Alastair Campbell had refused to go through the normal complaints procedure, which might genuinely have entailed the checking, as far as possible, that Mr. Gilligan's assertion was correct (albeit that we do not know for sure even today). The fact that he would not use the normal complaints channel to my mind completely exonerates the Governors from the expectation that they should personally check the veracity of the disputed broadcast. Moreover, the Hutton Report made one more suggestion which I would regard as untenable, given the history. In paragraph 290 of the '*Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly CMG (HC 247, 2004)*' the judge said that "the allegations made against the Government in the broadcast at 6.07am were so grave and gave rise to such a serious public controversy that it was unreasonable for the BBC management to expect the Government to pursue its complaint about them through the usual channels of the BBC Complaints Unit . . . procedures which could take weeks or, perhaps, months before conclusion was arrived at." Now this is wrong on two counts. Everybody, Government complainant or not, should be treated in the same way in the context of the truth of BBC broadcasts and complaints about their accuracy; and secondly, with hindsight, it was only by the thorough investigation offered by the usual complaints channels of the BBC that the truth or otherwise of the broadcast in question might have emerged.

Lord Hutton's report also laid considerable weight on whether Mr Gilligan had given sufficient notice to the Government on May 28th of the allegations to be reported in his broadcasts on WMD on the *Today* programme the following morning. He had spoken in advance to the press officer of the Ministry of Defence, but in paragraph 455 Lord Hutton concluded that the reporter had failed to give a clear indication of the allegations he was going to make, that the dossier was exaggerated, and about the inclusion of the 45 minute claim. Now this is interesting because more recently, in the case of *Moseley v. UK* (2011, ECHR 48009/2008) it was decided that there was no right for a victim of an exposure of his private life in the media to be informed in advance that this was to take place, so that he could seek an injunction to prevent it. The Court held this invasion of privacy could not be prevented in advance because of the difficulty of doing so and the impediment it would place in the way of proper investigation of matters of public interest. Now this judgment is limited to *personal* matters such as those of Mr. Moseley, but the general point is a growing distaste for the blocking of information by those whom it would suit, whether by way of injunction or by law, provided the information has been obtained within the law.

I propose to look at the changes to BBC governance that ensued and why they are still the subject of investigation and controversy and in particular, how complaints should be handled.

The BBC Trust replaced the Governors from 2007. It is the sovereign body of the BBC, guardian of the licence fee revenue, the BBC's independence and of the public interest. The root of the BBC's governance is its Royal Charter, and has been since 1927. This is different from an Act of Parliament because it is not enacted there in the usual way but, in practice, agreed between the Trust and the relevant Minister and agreed to by the Privy Council. An Act of Parliament has been thought to be less protective of the BBC's independence because it can be changed relatively easily, whereas a Charter is above party politics. This argument now looks less sustainable, given the quick way in which the Government reached a fresh inter-Charter licence settlement with the BBC in 2010 as part of the drive to make cuts. The Charter can be changed by the Privy Council, and the reality is that changes requiring the consent of the two Houses of Parliament, namely, an Act, might actually be a more transparent and soundly based way to change the governance of the BBC than the Charter. In 2010 a letter from the Minister of Culture, the Olympics, Media and Sport announced that the licence fee was to be frozen at £145.50 for the next four years and that the BBC was to be committed to taking over the funding of the World Service, which had previously been resourced by the Foreign Office.

(In 1944 the Foreign Minister of France, Bidault, said: "It is thanks to you, dear familiar voices, that our minds

stayed free, while our limbs were bound.” The Free French and General de Gaulle broadcast from London during the second world war, and the French government presented a tapestry for Broadcasting House in gratitude at the end. When the World Service celebrated its 70th birthday, the Secretary General of the UN declared that the World Service was Britain’s greatest gift to the world in the 20th century. By contrast with other national services in beleaguered countries, it is broadcasting the truth, not propaganda. The global news service fosters national and international understanding and aims to be the most impartial and accessible, although of course rivalled by CNN now. But it is now down to 27 languages from 42 and will no longer be funded by the Foreign Office but by the BBC itself. While this is an additional burden on resource, arguably the independence of the World Service may be perceived to be even stronger if it is free of direct state funding. It has 188m listeners, and the languages are supported on line with their websites, enabling for example, Somalis to keep in touch with each other across the globe. The first foreign language broadcasting was Arabic, and then German, added just before the war.

What is the job of the Trust? According to the Charter (Cm 6925, 2006) the BBC exists to serve the public interest, and its main object is the promotion of its Public Purposes, namely, sustaining citizenship and civil society; promoting education and learning; stimulating creativity and cultural excellence, representing the UK, its nations, regions and communities; bringing the UK to the world and the world to the UK; and delivering emerging communications technologies and digital TV switchover. Lord Reith’s mantra of “information, education and entertainment” is still there in the Charter. These phrases do indeed require the highest standards from the BBC and this is something that is internalised. I quote from the Chairman, Lord Patten’s RTS Fleming Memorial Lecture 6 July 2011, “I think the BBC is a core part of our civic humanism in this country... our sense of shared citizenship... underpinned by a common set of values, a common conversation. And an acceptance of mutual responsibility for our individual and collective welfare. How does the BBC fit into that? By providing a public space for argument and creativity. By being a party to the public’s engagement with democracy. By allowing citizens to test the trustworthiness of the information they get from those in authority... The BBC can do all this because it has a licence to be different. Its scale, security and independence allow it the freedom to experiment, to be creative, to take risks. To surprise, sometimes to shock and even sometimes, unfortunately, to offend. It has the courage to do all that. And it must retain that courage, and keep its nerve. All this points to the value of the BBC as an independent institution. Not for its own corporate sake, but for what it has come to represent for the rest of us.” With all of this I agree.

How does governance of the BBC cope with this major national responsibility? It is often asked whether the BBC Trust, formerly the Governors, are cheerleaders or regulators. I cannot see the problem. Every school governing body, for example, is used to the situation whereby the school is cheered on but also held to book. The trustees do not regulate, or at least that function is shared with OFCOM and through the application of other laws of the land (e.g. on fair trade), not to mention the close supervision by *inter alia* Ministers and Parliamentary subcommittees. The governance structure is laid down in the Charter and the Agreement which fills in some of the details, and it is always under criticism; I agree with Lord Patten in the speech referred to above that it works, and has always worked pretty well, and there is no need to force it to conform to some business or European template of regulation and governance, especially given the failures revealed there in recent years.

From the start until very recently the BBC had a Board of Governors, which operated with little public scrutiny or concern. It included people such as PD James, Daphne Park, Charles Hill, Lady Violet Bonham-Carter, Barbara Wootton, Hugh Greene, William Rees-Mogg, and Marmaduke Hussey. Their job was to appoint the DG, approve the BBC’s strategic direction, ensure its fulfilment and oversee complaints. Why were they replaced by a Trust, which as far as I can tell does very much the same while being paid more than twice as much? One reason was the desire for more separation and therefore objectivity in the relations between the Governors and the management, although the process had started before 2007. It was complained, quite rightly, that the papers that the governors saw were only those that management allowed them to see, and I hope that has changed. I had to fight very hard to get the management to disclose to me the Balen report on Middle East reporting, which became the subject of a court case defining the limits of freedom of information. (*Sugar v the BBC* [2012]UKSC 4). After extensive litigation the Supreme Court held that the Balen report was held to a significant degree for the purposes of journalism, which is an exempted category under the Freedom of Information Act 2000: it did not therefore have to be disclosed.

The main reason for replacing the Governors by the Trustees was the events of which I gave an account in my last lecture, the Kelly affair. The governors were seen by some to have acted more as cheerleaders in their response, and not regulators. I expressed my disagreement with the role that some thought the Governors should have taken in that episode, but the Minister thought that there had been revealed insufficient independence and clarity about the Governors’ role. I agree with the chairman of the time, Gavyn Davies, that the events were an assault on the independence of the BBC. Many proposals for change were put forward at the time and the device of the Trust was chosen, with more clarity about its job in the new Charter.

The Charter of 2007 states that the Trust is the guardian of the licence fee revenue and the public interest. There are 12 members including four with special responsibility for the nations of the UK. Appointments are made after advertisement, by Order of Council with the approval of Ministers. It has been suggested that Trustees should be interviewed by a Commons select committee before approval, as is now the practice with the appointment of the Chairman. The Trust’s other Charter duties are to act in the public interest, assess the views of licence fee payers and represent their interests, secure the independence of the BBC, exercise stewardship of public

money, have regard to the competitive impact of the BBC's activities on the wider market and ensure the BBC observes high standards of openness and transparency.

With regard to the last two objectives, I comment on the hard fight, ultimately successful, that the BBC put up to prevent the public seeing the inoffensive Balen report, based on the journalism exemption ground in freedom of information law. And I also think that the BBC is far too modest in relation to the independent competition, for example, the BBC digital curriculum, an educational service launched for schools, tied to the national curriculum, had to be abandoned after a year because the commercial competitors complained to the EU. It was known as BBC Jam and became the subject of legal challenge on the grounds of fair trade. So where is the free online education for schoolchildren that might have been provided? There would rightly be an outcry, if the NHS, likewise publicly funded, did not provide the latest scanners because the private hospitals objected.

The Trust has separate staff and roles from those of the Executive. I do hope that they are not too separate, for challenge and information exchange require a certain degree of closeness and familiarity, but quite where to draw the line is problematic. OFCOM also has a certain role, as we shall see. It has even been suggested that all governance should be handed over to OFCOM. There may be a case for some complaints going there, but anything more would indeed be a curb on independence, for the members of OFCOM have an agenda which is not the same as the Trustees'. (Mark Damazer, *In the Pursuit of Purity: Reflections on the BBC*, lecture to the Reuters Institute for the Study of Journalism, Oxford, 14 June 2011.)

My own view is that Trust (a misuse of the word) or Governors, separate offices/secretariat or not, is not the real issue. It is the ability of the Trustees to know what is going on, to get the information, make input into the agenda, and get the issues debated. In my time the Chairman had considerable control: it was he who appointed members to committees, set the agenda, timed debates, and determined the outcome of Board discussion. Criticism of the quality of output was not on the agenda, for the Governors were not proper critics, and it was indicated that the governors were not capable of judging content, they had to stick to strategy. There is a case for having the deputy Chairman, if not the Chairman, elected by his or her fellow trustees: this would at least ensure that all trustees are appointed of that calibre and are closer to the Chairman. Governors used to be a feisty bunch. It is personality that counts, not structure. A case in point is that under the leadership of Lord Patten, the Trust has taken control of the Remuneration Committee and has listened to public concern about the level of salaries and bonuses paid to top BBC people.

I described how the BBC is grounded on a Charter rather than a statute. This does not mean that it is any the less accountable. The question is to whom, for a BBC accountable to the government of the day would feel that its independence was threatened. The Charter was intended to remove the BBC's independence and its funding from political control for a decade at a time, but the recent mid-Charter settlement of 2010 has interrupted that idea. For example, by way of accountability to its listeners and viewers, the BBC has established Audience Councils, conducts consultations and extensive audience research, and listens to them through the Radio 4 programme *Feedback*. The audience can just switch off – that's a loud message! In the end there is no way that the BBC can listen to all its licence fee payers other than by ratings and polls. The BBC's annual report is scrutinised by the Commons Culture, Media and Sport Committee; the Lords Communications Committee regularly invites the BBC to give evidence to it on the subject of inquiry; potential new BBC services are subjected to a Public Value Test to decide whether they have public value and what effect they will have on the market, the latter being studied by OFCOM. The NAO carries out two Value for Money studies into areas of the BBC every year which, after submission to the BBC Trust, are laid before Parliament with the BBC's comments on them. But the BBC should not in any case be *accountable* to Parliament in the sense that it has to change what it is doing in order to satisfy the politicians. It does however have to give an *account* of its activities to Parliament and to the wider audience and that, I would say, it does with great thoroughness through the avenues I have listed and by its publications about itself and the website.

It has been argued quite strongly, not least by the NAO itself, that it should be allowed more access to BBC activities, and that it should choose the areas to study, and publish the results to Parliament without first submitting them to the BBC. The dangers are that this could impinge on independence. If the NAO chooses the areas at will, and the Public Accounts Committee scrutinises the results, then BBC editorial judgments such as where to send reporters and how much to spend on different areas of BBC business will be examined by people who, however well meaning, cannot and should not pass judgment on sensitive creative and journalistic matters, or jump in because a particular area, such as sport, is targeted from outside as one that is proving expensive. A new settlement has been reached between the NAO and the BBC which will allow the NAO to choose the areas it wishes to study in advance, having consulted the Trust, but the reports will still be submitted to the Trust first, for comment, before onward transmission to Parliament. Let us hope this is not a step in the wrong direction.

The crux of the importance of the BBC's impartiality and accountability lie in the way in which complaints about its service are responded to and handled. Here there have undoubtedly been failings and complications. First the complexity. There is overlapping jurisdiction with OFCOM, which is empowered to look into complaints regarding BBC output that relate to taste, fairness, privacy and decency, while issues of accuracy and impartiality remain solely within BBC jurisdiction. Some complaints are handled by both organisations simultaneously (standards), others get passed from one to the other (fairness). At stage 1 of its published complaints procedures the BBC promises to respond quickly and apologise if necessary (note, it would only be fair for the BBC to apologise for any error in the same place and outlet as the original mistake, ie, on the *Today* programme, but that is not often

done; and as a viewer I am not conscious of ever having seen an apology aired, although I have heard them mentioned on the news when escalated to the final level of appeal.) For example, there was an immediate retraction on the website when there was a complaint about interviews conducted during the inner city riots of August 2011. On the same page the BBC dismissed at stage 1 a complaint about the portrayal of gay sex, and found it justified in context. At stage 2, if the complainant is dissatisfied, the complaint escalates to the Editorial Complaints Unit. For example, an apology four months later for disparaging comments made about Mexicans in *Top Gear*. If they relate to editorial standards the Unit deals with them, if on other matters, they go to the department concerned. Then the decision may be appealed against to the Trust at stage 3. This stage is concerned with whether the complaint has been properly handled. The Trust can instruct management to take account of its findings. An example is a finding that footage showing the use of Indian child labour alleged to be for Primark clothes was not clearly authentic and that the complaint had not been well handled. The programme was *Panorama* in June 2008, the finding in June 2011 and the apology was ordered to be conveyed in an edition of *Panorama*, appropriately enough.

In recent years there have been about a quarter of a million complaints a year to the BBC of which only a tiny number are upheld by the Trustees on final appeal, 12 in 2009/10. Anecdotally, and confirmed in the *BBC Annual Report* there is quite some failure to respond to complaints not only in the advertised time framework, but at all. Moreover the OFCOM on line guide to complaining is more helpful than the BBC's. People who complain to the BBC about output are left to write letters in their own words about the problem, instead of being guided to the requirements of the BBC Charter. A good complaints system would direct a complainant to the principles of the Charter that govern the situation, or the editorial guidelines, that may have been breached, and would assist him or her to frame the complaint accordingly. Instead, the complainant, who is probably angry and upset, is left to write a letter or online submission or phone, typically accusing the BBC of bias, obscenity etc., descriptions which can so easily be refuted, whereas a statement that the broadcast offended against Editorial Guidelines paragraph 3.1 (accuracy - and they are hard to find online) might have more success and credibility. Without doubt, the procedure needs to be clarified, proper guidance given on line, and a clear division between OFCOM's and the BBC's jurisdiction over taste and decency determined.

Taste and decency complaints (e.g. about Russell Brand or Jeremy Clarkson) have less importance to my mind, compared with those about accuracy and impartiality, the values by which the BBC stands or falls. This is the heart of the public nature of the BBC. The current slow and unpopular handling of complaints is harmful to the BBC. Its impartiality is what makes it a world influence through the World Service. It is therefore of the utmost significance that its impartiality be guaranteed by a complaints process that matches the significance of the issues. Issues such as: was the Iraq intelligence dossier "sexed up"?, who may be designated a "terrorist" or a "militant"; the accuracy of Middle East reporting, the attitude towards climate change science and so on. These are issues of exceptional national and international importance and deserve to be treated as such, not least because they form national political opinions. It is even possible that judicial review might be sought by a complainant unhappy with the result, and who was personally affected. If complaints were quickly and satisfactorily handled, more were upheld and not taken so personally by staff, there would be even more confidence in the BBC and more audience satisfaction. BBC executives understandably regard a complaint which has been upheld on editorial grounds as an attack on the integrity of the producer or journalist and therefore take the process very much to heart. The process as it is has been extensively criticised for its labyrinthine qualities, for slowness, for not responding at all. The elements of "natural justice" should be observed: complainants should see all the documents that the BBC defendants see; they should have the chance to make representations if the appeal goes to the top; the members of the Trust's complaints committee should not be closeted with editorial advisers and internal staff but have a genuine chance to hear both sides and get expert advice.

It would therefore be a good idea to remove the final appeal from the BBC, in line with most public bodies against whom complaints are made; it is expected today in best practice that there will be an independent arbiter who is not associated with the organisation being complained against. The first and second stages should remain with the BBC on the principle that the alleged offender should have the first opportunity to put things right rather than let them escalate. My suggestion is an Ombudsman, who would report his or her findings to the Trust, leaving them to decide whether to accept or reject the findings. The trustees would have to have an exceptionally strong reason for rejecting the findings of the Ombudsman, but this system would give them the appearance, indeed the reality, of retaining the final say, and retaining independence. Many of the issues that are the subject of complaints are highly technical: the precise meanings of court judgments, UN findings, types of weapons, whether stopping a ship in international waters is legal, the accuracy of spoken Chinese, for example. This demands expertise to assist the decision making, not persuasiveness of output.

An alternative, put forward by the House of Lords Select Committee on Communications in its report on BBC Governance (HL Paper 166, 2011) is to give the final appeal to OFCOM. The difficulty here is that OFCOM is not recognisably "superior" to the BBC (nor should it be) but is on a level. Appeals should go upwards to bodies that are more and more expert, just as litigation moves from court to superior court. It might be possible to have a special tribunal within OFCOM to handle those appeals, with outside experts (legal or political) or say a retired judge. My criticism of the Hutton Report is not an argument against that choice because it was a one-off. Only if there were a special tribunal within OFCOM to hear final appeals would their outcome be acceptable to the BBC: the repercussions are such that an adverse finding against the BBC relating to a political broadcast, if made by OFCOM or even the trustees, is hard for the corporation to bear. It is slightly more palatable coming from a

distinguished outside figure, and this would give the public confidence. The BBC has been content to commission distinguished outside experts in the past to study particular issues of impartiality, e.g Sir Quentin Thomas on the Middle East and Lord Wilson of Dinton on EU coverage. I believe that people like them could be trusted to hear appeals. But I think on balance that the BBC's independence and its reputation for impartiality would be compromised in the eyes of the public if another quango, namely OFCOM, could rule on these matters. Determinations as delicate as these need to be made by people who have reached the top of their careers and can afford to be fearless. Moreover, the members of the board and committees of OFCOM are too close to the BBC and its culture to be seen as sufficiently detached. Many of them were once with the BBC and several others with ITN. (Gardam, Woolard, Bury, Levy, MacTaggart, Mathias, Walker, Davies, Prag, Teague, Browne, Hodgson.) The House of Lords Select Committee were unanimous in regarding externality as essential to complaints handling. It was therefore extremely disappointing that Lord Patten, shortly after publication of their report, replied only with the intention to appoint the new post of Chief Complaints Editor, tasked with making the internal complaints systems as fast, effective and devoid of complexity as possible. A consultation is currently underway.

How would my proposal have worked in the case of the complaint made by Alastair Campbell regarding the Gilligan broadcast on the sexed up dossier? Had it gone through the existing channels, it would have ended up with the Trustees or Governors as they then were, perhaps a year or two after the event. The notes on the journalist's Palm Pilot would have been examined and government documents might have been produced to show whether the intelligence dossier was embellished as it went through various drafts or not; and there would have been time to find out what editorial controls and checking were exercised over that early morning phone in report. While the government might have been left to fume, a thorough investigation would have taken place. It might have had to be determined on a balance of probabilities for by then Dr Kelly would have died, and as we know after many years and in depth inquiries we are still not sure what happened. There might well not have been the expertise within the editorial complaints unit of the BBC to tackle it. If there were a system with an independent Ombudsman, as I would prefer, this may well have been a little more face saving for the BBC and would have been a strong weapon with which to face the government and say that their complaints could not be answered immediately but would be settled in the end by an expert external to the BBC.

In conclusion, the main reform I would make to the governance of the BBC relates to a need for externality in complaints handling. I see nothing wrong with the Trustees/Executive structure, although I hope the trustees will be "big beasts" and that they have the power to get the papers they suspect they might need, shape the agenda and elect their own deputy chairman. I hope the Executive Board can find some non-executives who are from more moderate income bands than most leading businessmen are, to join them.

And I wish they would allow more older women to appear on screen in positions of authority, presenting news programmes and announcing! There are plenty of well groomed older women, and it should be remembered that if the BBC wants to be inclusive and diverse, as it says it does, that half the female population is size 16 and over. We see no women on screen who are as white haired, wrinkled and cuddly as some well known male news readers and commentators.