News is now the News

Roles and Responsibilities
Of Journalism
In an Amazing Era

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News is now the news. For a long time, we didn't care. Gentle criticism on editors, journalists and media was the overarching tone and the news was what it was: radio and print in the morning, television in the evening. Everything changed, and news is now around us as if it was the air that we breathe. News became the news, think about 'fake news' or 'alternative facts'.

Meanwhile, the two Flemish newspaper editors are the owners of most of the newspapers in the Netherlands. Profitable media companies are an important protective factor for serious journalism. In that regard, the decline of commercial revenue, as a consequence of the agressive strategy of tech platforms, is an issue of great concern.

JOURNALISM

Journalism plays a central role in society. That's why we call it the fourth estate – suggesting that it is one of the building blocks of our societies, next to their basic institutions. Independent journalism is the biomarker of the condition of the fundamental fabric of society: democracy, rule of law and civil rights. That is an essential role that justifies to regard the journalistic performance critically.

We must not blame journalism or media for all the sins of the world. It is also unhelpful to cherish a nostalgic view, in the sense that journalism was better in the past. It wasn't.

In my view, we have excellent journalism and other journalism at the same time. The divide is not between serious outlets and the rest, all have excellent journalism regularly and they all struggle with the difficulty to comply in a consistent manner with editorial standards.

All media suffer from the daily tsunamis of social media, tweets and clickbaits that disorient newsrooms. Whilst social media steal a lot of advertising money from incumbent media, editors are under constant pressure to opt for speed and to adapt their news selection to what is 'trending' – risking to miss the rationales for an autonomous news selection, and failing to apply the quality norms that their charters and solemn editorial messages suggest.

However, with all their flaws, I am still convinced that 'media are good for us' – going against a trend that shows low levels of trust in journalism. We must applaud free media. But complacency that can inspire editorial blindness is worrying, and we can't afford it.

I would argue that an underestimated enemy of good journalism could be an internal one, the lack of ambition to excell, mediocrity in the newsroom, the conviction that performing on a "good enough"-basis will do. It won't.

AMAZING ERA

We live in an amazing era. We live in one of the most prosperous regions of the world, peaceful for more than 70 years now, where I was educated with values and the foresight of more freedom, emancipation, prosperity and solidarity. It inspired a conviction of progress, of science, knowledge and civilisation, and a belief in the realisation of the pledges of the French Revolution: *liberté*, *égalité*, *fraternité*.

Where did we lose our talent for optimism, our belief in emancipation and progress, and our willingness to share with others what we, privileged kids of history, have? We talk of inclusive societies, but we have difficulty to become one, now that we are confronted with real diversity in our country. The spirit of fairness and generosity that underscored my education, seems to weaken rather than to become stronger. The climate today is characterised to a considerable degree with fear and resentment, insult and innuendo, suspicion, selfishness and moral condemnation. More and more do identity-based claims clash without perspective, and societal divides seem here to stay. That is what I qualify as "amazing".

It is unhelpful that the commanding states pulverized to administrative entities, pale shadows of their former selves. For Belgium, we could refer to the institutional chaos of our country, the close-to-apartheid solution for our traditional language-based diversity and the appalling inefficacy of too much of our institutions and public services.

For a significant part of the Western world, we seem stuck with the confrontational character of public discourse, right- or left-extremist parties that attract large numbers of voters in many countries, states withdrawing from international treaties, and member-states of the European Union opposing its fundamentals with regard to rule of law and human rights.

That is in sharp contrast with the single most important event that I witnessed in my lifespan, the fall of the Berlin Wall on Nov. 9th, 1989. There were no reports of people fleeing from the West to the East.

And yet, many in the West hesitate and complain, and we are confronted with a sentiment of a sick society, whilst we live in countries that are not known for their autocratic regimes and that recognize freedom of expression at large. In terms of the reports of Freedom House, we are part of the priviliged 39% of the world's population that lives in a democracy and the 13 % that lives in a state that does recognize freedom of the press.

Steven Pinker argues in his *opus magnum "Enlightenment Now"* that we are getting healthier, richer, safer and freeer, and we are becoming more literate, knowledgeable and smarter. I believe that Pinker is right in emphasizing that people are also fitted with a sense of sympathy, an ability to reflect on their predicament, and faculties to think up and share new ideas – the better angels of our nature, in the words of Abraham Lincoln.

This is the wisdom that I want to convey to the next generations. Whilst I terminate my tenure as a media law teacher at this university, it is my motive to remain active in other roles. It is the duty of the elites in society – academic and media elites, entrepreneurial and civil society-elites - and the duty of all citizens as well to raise the standards and to overcome fear, anger and resentment that stall inititiative and hamper progress for the benefit of all.

MEDIA LAW

In 1831, the Belgian Constitution laid the foundations of the legislative, executive and judicial powers, as they were called, but it came also with 3 provisions on the press, the fourth estate. It was a liberal example on the Continent and it worked well. It is remarkable that 187 years later we see that the Belgian Constitution of 1831 still stands, whereas the solemn Paris

Déclaration des Droits de l'homme could not prevent that France had an unstable regime for more than 80 years after the French Revolution, with very repressive governments indeed. It is my conviction that the strong provisions on press freedom in the Belgian Constitution were substantial in order to ensure stability as well as incremental changes that are monumental if we look back.

There are always matters that can be improved: allow me to point to a nonsensical constitutional issue. Art. 25 of the Belgian Constitution reads: "La presse est libre". Notwithstanding a constitutional provision on the freedom of languages, it was in french only until it was officially translated in 1967 (sic!). "La presse est libre" was translated: "De <u>drukpers</u> is vrij"… Printing Press is free.

I would argue that that is an incorrect translation, 37 years after the vote of our first Radio law, and 7 years after the vote of Belgium's first television law. It leads to the oddity that the Belgian Constitution has 2 provisions with regard to *printed* press in 2018. In an intelligent manner, our courts and tribunals manage to judge all media cases, e-media included on that constitutional basis, but with a hesitation by our High Court — as if our founding fathers wanted a privileged status for the print industry, misrepresenting their promotion of media freedom.

DEMOCRACY

Since media are the 4th estate, allow me to briefly comment the other 3 estates. When queried when he left Independence Hall at the close of the Constitutional Convention in 1787, Benjamin Franklin is believed to have answered to a lady that asked what they had finally got, "A Republic, if you can keep it." He referred to a deliberative democracy without a sovereign operating independently of the people.

With all its flaws, its difficulty to deliver and the clumsiness of its processes, the underlying liberty and the ambition to not start governing without or against the population are reflections of values that we must not underestimate. Liberty is the foundation on which it rests, and it is difficult to combine fundamental liberty of all with a robust governance model. However, there are no such things as "illiberal democracies" that adopt the form of democratic regimes, mimicing elections, but ruining the substance.

And yes, Western democracies are imperfect, but perfectionism was tried in other regimes. The imperfections of free states are preferable in comparison with the pretended perfection of unfree regimes. Regimes based on the democratic canon create prosperity, and they combine stability with incremental but continuous change.

Churchill famously said in the House of Commons in 1947 that "democracy is the worst form of Government except for all those other forms that have been tried from time to time".

Nevertheless Peter Mair analysed "the hollowing of Western democracy", as if it were easing away of its popular component in favour of political parties failing in their capacity to engage ordinary citizens. It made citizens change from participants to spectators. The result,

Mair wrote, is the beginning of a form of democracy in which the citizens stay at home while the parties get on with governing.

Meanwhile, the dominant political parties of the 20th century were running out of steam whilst their visions were scrambled in the delivery programs of the welfare states, with citizens focusing on their entitlements as consumers in the supermarket of their state of the 21st century - as if consumerism would validly replace their active role as citizens.

Unsurprisingly, these evolutions inspired the cry of despair of all sorts of identitarian groups that don't feel involved in the political decision making and left behind because there is always a sentiment that their claims should be met more properly. We call it populism, and extremist parties left and right try to capitalize on that despair and attack the so-called elite, politicians and their institutions, incumbent media and journalists included.

And so, the suggestion of Benjamin Franklin "A Republic, if you can keep it..." was prophetic. We underinvested in the discipline and self-restraint that is required to keep our valuable institutions in good shape, and this confronts us with growing impatience of identitarian groups, and the emptiness of a deflated public sphere.

FREE SPEECH AND MEDIA FREEDOM

For lawyers, free speech comes with an inconvenient truth. In the wording of Eric Bahrendt, the philosophical insight favours a free speech principle under which speech is entitled to a greater degree of immunity from regulation than other forms of conduct which cause similar harm or offence.

In general, lawyers tend to think that strong liability principles, a vibrant litigation that enforces accountability, and regulation are the indispensable conditions to ensure that professions and sectors act in a professional manner. The 117.000 pages that the Belgian Offical Gazette published last year, prove unconstrained belief in the benefits of regulation.

With free speech, we reverse the debate. We consider speech should be immunized from regulation, and government's interventions are regarded with suspicion. Free speech is the exclusive zone in society for which we accept that less regulation will lead to more excellence. It places a heavy burden on the shoulders of journalists. I would argue that the low levels of trust in journalism suggest that journalists underestimate how heavy the burden on their shoulders is.

The importance of speech is based on different arguments, the first of which is individual delevopment and self-fulfilment. The right to express one's opinions is linked to the intrinsic value that we attach to each individual person. Their development and self-fulfiment leads to a consequential benefit for society, the presence of reflective and mature individuals – which brings us to the more consequential arguments for free speech.

THE ARGUMENT FROM CITIZEN'S PARTICIPATION IN DEMOCRACY - THE PUBLIC SPHERE

The argument from democracy refers to the importance of public discourse on matters of public interest. It is the cornerstone of liberal democracy, that is fuelled by fearless and open debate of facts, figures, beliefs and opinions that underscore good policies.

Justice Brandeis wrote that "... that the greatest menace to freedom is an inert people." His warning against "an inert people" is essential, and it refers to the deliberative character of modern democracy. That is symbolised by the iconic opening sentence of the preamble to the US Constitution... "We, the people...".

Sunstein remembers that "We the People" came with a form of gatekeeping. Not a filtering of what people would see or hear, but a form of filtering by checks and balances, institutions that would filter popular desires so as to ensure policies that promote the public good. The new-invented republic for a great group of people would, in the words of James Madison, have... "to refine and enlarge public views, by passing them through the medium of a chosen body of citizens". Representation would submit the public voice to checks and balances, and make it "...more consonant to the public good than if pronounced by the people themselves".

That refinement and enlargement offered a cautionary note, in the sense that all that could be said and expressed was to be brought together to coherence, consistency and reason – so as to ensure that what would emerge would be both reflective and well informed. At the same time, Sunstein continues, the founders placed a high premium on the idea of *civic virtue*, which required participants in politics to act as citizens dedicated to something other than their own narrowly-conceived self-interest.

It is believed that better decisions are likely to emerge from uninhibited discussion than from a process regulated by an authority. That was the approach of Justice Holmes of the US Supreme Court in his famous dissenting opinion: "The ultimate good desired is better reached by free trade in ideas, or... the competition of the market."

"The ultimate good desired" refers to the wider societal context of the public sphere. A good democratic order attempts to ensure informed and reflective decisions, based on open and intelligent public debate. Over the last years, with people enabled to publish their most individual thoughts and emotions, we were starting to think that each snapshot of individual opinion or emotion contributes to collective progress on equal foot. It doesn't.

The underlying assumption is the hypothesis of a shared commitment to better decisions – that need to rest on a reliable factual basis. With that, it is also clear that free speech as an individual right on the one hand, and media freedom on the other hand, are rather different basic rights: the distinction should make editors and journalists more critical to their personal or private beliefs, because, as media professionals, they act with a purpose, defined by what we expect from the fourth estate, and that is the common good.

Cass Sunstein formulated this role as the role of well established general-interest-intermediairies, that enable people that find themselves together in a country to gather in a

single public space receiving and discussing reliable reports on the issues of the day. That comes close to the case law of the ECHR that defines journalism as "the public wathdog of democracy", it comes close to qualifying media as essential infrastructures of democracy, with systemic relevance indeed. More recently, the ECHR came up with a broader formulation, that of "living together". The argument from "living together" refers to the framework of the set of values of an open and democratic society, or the minimum requirements of life in society. That is the provisional highlight of the consequential approach to freedom of expression: it serves a peculiar purpose in society, it is a function of the collective effort of "living together", in Sunstein's words, of the production of social glue.

That social glue rests on a societal canon, built by gremia that construct society's framework, the truth that is accepted knowledge at a given moment, produced and under constant review by science, politics, justice, education, the arts and media.

Allow me to build in a caveat here. My focus here is the intellectual foundation of media freedom, but it is important for media to pay attention to a broad range of issues, as highlighted by Lord Leveson in his Executive Summary of the Leveson inquiry: "It is not necessary or appropriate for the press always to be pursuing serious stories for it to be working in the public interest. Some of its most important functions are to inform, educate and entertain and, when doing so, to be irreverent, unruly and opinionated. It adds a diversity of perspective. It explains complex concepts that matter in today's world in language that can be understood by everyone. In no particular order, it covers sports, entertainment, fashion, culture, personal finance, property, TV and radio listings and many other topics. It provides help lines and advice; it supports its readers in a wide variety of ways. It provides diversion in the form of crosswords, games, and cartoons. In short, it is a very important part of our national culture".

THE ARGUMENT FROM TRUTH: THE ART OF VERIFICATION

Kovach and Rosenstiel define truth as the first and the most confusing principle of journalism. It is good to realize that it is always under pressure of social context, timelines, influences and, I would add, the monstruous intellectual demolition industry of postmodernity that is overrepresented in newsrooms.

They coined the notion of journalism as the discipline of verification. Without it, the public sphere becomes an arena solely for polarized debate, not for compromise, consensus and solution that are necessary for the potential of civil society to confront and solve problems. It is not a coincidence that the key elements of the scientific journalistic method are written in codes of conduct: "truthfulness, fair play, independence and respect for human dignity", with all the implications these have for journalistic methods.

At this point, it is interesting to note that media law internalized these elements completely. First of all, in all the media judgments of the ECHR, it is now said that journalism must be in accordance with the ethical rules of the profession. For a lawyer it is interesting to see that soft law-principles are now part of the judicial assessment of media cases, as if they were binding legal rules. And secondly, the judicial assessment of journalistic products evolved from an assessment of the end result to an assessment of the quality of the editorial production process. The strict veracity of what was said, printed or broadcasted is no longer the decisive element in media litigation. Judges now evaluate the plausibility of the journalistic product on a given moment, in the light of the carefullness of the editorial production process, done in good faith and in accordance with the ethical principles of the profession.

THE ART OF ARGUMENTATION & CONVERSATION

It is well documented now that the unrestrained content of the tech platforms does little to strengthen the "living together", rather on the contrary: it megaphones unfiltered resentment, fear and identitarian claims that resonate in echochambers and deconstruct citizenship. I would argue that this is an excellent opportunity for journalism as the purveyor of validated content, and as the essential fluent navigator of democracy, the *general interest-intermediaires* coined by Cass Sunstein.

We need to focus on the essentials here. Castells was an early thinker on networking as the new normal in communication, and today there is a Silicon Valley-hype that is rarely contradicted and can be unpolished and a little uncritical, as in the title of Peter Hinsen's book, "The network always wins". That is certainly true if one regards their dominant economic position and the eventual abuse thereof, only slowly corrected now, sometimes by European antitrust authorities, but also by advertisers that don't want to see their brands any longer in connection with negative content. By the way, journalism ethics was introduced in the beginning of the 20th Century under the pressure of advertisers that soon found followers under the more intelligent owners of newspapers. Recently, one of the biggest advertisers repeated his position: "We will not invest in platforms or environments that do not protect our children, or which create division in society, and promote anger or hate." Mind the opportunity for real media companies, that promote excellent journalism.

I would argue in favour of an additional dimension to the journalistic production process: the art of argumentation that regards the quality of the content. Whilst human beings, fortunately, act and react with emotions, the living together-ambition carries duties and responsibilities that presuppose reasoned judgment as well - in Kahnemann's terms, our Slow Thinking or system 2, that refers to the cognitive part of our brain. It is about reflection as opposed to reaction, argument instead of emotion.

An important and irreplaceable role for journalism in the 21th Century is the promotion of reason as an important *modus operandi*, in order to correct the spontaneous and emotional content that is easily megaphoned by the tech platforms filled by millions of individuals. The added value of excellent journalism is to analyze and contradict "the real or imaginary dictates of public feeling" — referred to by the ECHR in different judgments - that overwhelm social media, and pick up their role as general-interest-intermediairies in a democratic society, "since", as the ECHR judged, "that society must remain reasonable in its judgment". At the end of the day, democracy must lead to decisions and it is important that these make sense, are well funded and rest on a reasonable basis.

Journalism with a purpose should inspire a sound basis for reasonable decisions and a public basis as well. In view of the essential role a free press fulfills in society, that role is of an overwhelming importance for the future of our values and institutions. In that regard, the agenda of editors is an agenda of promoting the public sphere, of assisting people in their not-so-simple role as citizen.

Jonathan Haidt famously coined the image of the rider on the elephant: the rider on the back of the elepant is his metaphor for our reflective brain, acting with controlled processes and reasoning - and the elephant is the metaphor for automatic quick moral emotions and intuïtive reactions. It is a reminder of Spinoza's wisdom according to which he made a ceaseless effort not to ridicule, not to bewail, not to scorn human actions, but to understand them.

Journalism is in a unique position to strengthen its USP, rather than to weaken it. Journalism and, for that matter, academia, are the preferred professions that can heavily invest in the art of argumentation and art of conversation that society and citizens need badly. That is opposed to mediocrity, it requiers sharp selection criteria of what is really important, it leads to the creation of a constant stream of curated content, highly valuable insights, amidst a diversity of subjects from sports to entertainment. That is not a minor role or responsibility, nor can it be cheap.

VALUABLE CONTENT

The production process of validated and valuable content is expensive. But in the connected age, analysed by Timothy Garton Ash, content is everywhere, and the illusion is that it is free. That makes more reach easy, more weight uncertain, and more income unlikely. The paradox was summarized by Stewart Brand in 1984: "On the one hand information wants to be expensive, because it's so valuable. The right information in the right place just changes your life. On the other hand, information wants to be free, because the cost of getting it out is getting lower and lower all the time. So you have these two fighting against each other".

However, the zero-marginal-cost-world coined by Jeremy Rifkin doesn't exists for the creative sectors. In his cry from the heart "Free Ride" of 2011, Robert Levine reacted against the destructive impact it could have on culture businesses. In a blunt manner, Levine added: "the information that wants to be free is almost always the information that belongs to someone else".

In his iconic analysis *World without Mind*, Franklin Foer warned against the dismantling of the structures that protected our ideas of authorship by the tech platforms that pursue a business plan that radically deflates the value of knowledge.

It's a confronting idea in a knowledge economy; for journalism it can imply that there is now a business model in the hands of global corporations in dominant positions that disrespects the investment in the expensive validation process that precedes the publication of serious journalism. That is a challenge for modern media companies, and one that inspires great uncertainty. Owners and editors need to clear their minds and set their ambitions right.

However, we may need a little more here. We have laws on abuse of dominant positions in the economic field, essentially in an effort to protect consumers and the level playing field in economy. But we don't have laws on abuse of dominant positions in the democratic field. What if dominant communicative positions, or rather their abuse, would influence a healthy public discourse on matters of public interest in an irrepairable way? This is where regulation may be necessary in order to prevent collapse of democratic institutions.

NEWS, POST TRUTH, FAKE NEWS...

Recently, we see a lot of discussion on so-called post-truth – that is why news is so much the news now. Semantically, the notion of post-truth suggests that the post-truth era we live in was preceded by a truth-era. Reality is probably a little bit more modest.

"C'est du choc des idées que jaillit la lumière": the belief is that false beliefs will be corrected by better beliefs, and that the free expression of both will inspire deeper insight. False, inappropriate, extreme, radical, disturbing, offending or shocking speech can be protected, and it will be protected in most cases. It must not be forbidden but corrected.

If that is true, fake news is less important, because editorial intelligence should be able to detect falsity and capable to bring in better beliefs that correct the false ones. Bad speech is not *per se* unprotected speech. But free speech implies that bad speech is corrected by more speech, not by less speech, that is the basic lesson from the Enlightenment, and it is the legal doctrine as well.

NEWS SELECTION

I would like to make a final remark with regard to the journalistic production process, after the art of verification, the art of argumentation, and the art of conversation. News values research highlights that editors rely on a relatively stable set of news criteria: sudden events,

elements out of the ordinary and bad news are newswhorty; simple events, action events and stories with conflict are often selected.

I would argue that there is room for sharper news selection. What if the important issues evolved more like flows – take the really important things for modern societies, such as the creation of wealth and prosperity, the redistribution of equal opportunities in society, the provision of healthcare or the difficult process of integration?

With news criteria that focus on the incidents, newsrooms tend to miss the most important evolutions, because their selection would dominantly be directed to the hick ups. That could be one of the elements that fuel the impression that politicians are constantly in serious crisis and that societies keep sinking. Look at the pages and minutes that news bulletins devote to the "Wetstraat", as if it rules the world, and at the attention for all the pony-and-dog-shows of elected officials, their tweets not excluded. Pinker argues that there will always be enough incidents and bad things that are thought to deserve attention. As a result, the nature of news is likely to distort the people's view of the world because of the mental bug described by Kahnemann called "the availability heuristic": people will overestimate the atypical selection of news reports and forget the bigger trends of society that weren't withheld in the news selection. With dated selection criteria, media are out of sync with reality, Pinker argues, and he adds that it is unhelpful that they tend to report the news as live sports commentators.

The repetition of incidents and bad things creates the impression that the societal fabric is on fire and that the political world has no control whatsoever. It discourages people to engage as active citizens in an environment is depicted as hopeless and negative.

That would be the opposite of the purpose that underpins media freedom. So, I would, finally, argue that media are good for us, but that it would not be wrong to review editorial selection criteria — now that all the other paradigma's of journalism and its business environment have changed.

CLOSING REMARKS

With that I conclude my attempt to define the roles and responsibilites of journalism in the 21st Century, of the fourth estate as essential in the *living together* that we have to reinvent. The recalibration of vital, multidiverse and active democracies depends to a large extent on serious journalism. But that journalism will not have to act in an isolated manner. It will act in a shared commitment to a better environment for the next generations with all of us, citizens, politicians, civil society, academia and journalists.

Let us indeed dream, and not only dream, but ... realize "the impossible dream".

Thank You.

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