

## Leveson and Media Policy: A Lost Opportunity?

Setting up a judge-led inquiry into press standards had a number of advantages when compared to previous government-appointed Royal Commissions on the press, government appointed reviews such as Calcutt, and Parliamentary Committee Inquiries. Lord Justice **Leveson's Inquiry** enjoyed genuine operational independence from both press and government, and legitimacy from all sides of the debate. This was hugely important at a time when there was widespread loss of trust in the ability of politicians to deal with powerful media interests. The Inquiry also had a very high standard of proof and a forensic approach to evidence, and could summon witnesses for cross-examination. And the inquisitorial court setting provided a perfect live-streamed theatre for public catharsis following the trauma of multiple failures of legal and democratic checks and balances.

But there were also disadvantages and difficulties, particularly with the Inquiry as a vehicle for developing public policy. Judges – unlike parliamentarians – do not have a strong mandate to think creatively about changing policy, as Leveson acknowledges in his **report**. This tendency to small 'c' conservatism was compounded by Lord Justice Leveson's approach to the facts: Leveson felt he should make policy recommendations not on the balance of probabilities but on whether his prognosis of the problem was established 'beyond reasonable doubt'. If the same evidence were discussed in another forum, or is properly discussed in Parliament, policy recommendations might have been quite different.

This problem of evidence was reflected when counsel persisted in questioning politicians on whether there was an 'implied or express deal' on media policy between the Murdochs and successive governments. Inevitably given such a high bar, no conclusive evidence was found, so individual politicians were free of blame. Whilst Leveson did acknowledge that 'all is not right' in the relationship between politicians and the press he felt unable to go beyond recommending transparency of press-politics relations to assess the structural basis of the problem: media power.

Given that his priority was to deliver reform of the self-regulatory framework for the press, Leveson had to tread a fine line: keeping the press on board as far as was possible, but at the same time not criticising the government in ways that would force them to dismiss the report. Failure on both these fronts would leave Leveson extremely vulnerable. If the PM disagreed with criticisms the report made of his government, he might be constrained to deliver on previous threats to dismiss the report's conclusions as 'bonkers'. Then it would be easy for the press to fall in line with his view, leaving the judge's proposals dead in the water.

The '**Inquiry into Public Inquiries**' chaired by Lord Woolf, the former Lord Chief Justice will no doubt help unpack some of the procedural limitations inherent in what appears to be an increasing tendency for governments to kick political hot potatoes into the long grass of an Inquiry. They will have ample cause to reflect on what the experience of Leveson can teach us about Inquiries in general. But it is also worth asking whether Leveson – and the media – are a special case which deserves a special solution.

The key 'significant issue' that Leveson saw was at the heart of press-politics relations was not phone hacking, privacy or journalism ethics. It was media policy. *"there have been those in positions of leadership of the press who have shown themselves to be exceptionally dedicated, powerful and effective political lobbyists in the cause of their own (predominantly commercial, but also wider) interests. That lobbying has been conducted in part overtly and editorially, and in part covertly and through the medium of personal relationships with politicians"*. (Leveson, Executive Summary at p28, section 129). This is a key issue because *'Not only are the press powerful lobbyists in their own interests, but they wield a powerful megaphone with considerable influence over the personal and political reputation of politicians'*. (Leveson, p28, section 132).

This issue ran through the Inquiry including reforms to media law relating to privacy and libel, data protection and the procedures for reviewing media mergers. But when it comes to a solution Leveson sees such broader issues as questions for Parliament, rather than an inquiry. *“More than one view is no doubt possible of how the freedoms of the press should best be held in balance with other freedoms and public goods. Parliament is the proper and legitimate forum within which such views can and must be debated in a democracy. If the press fears for its liberties in a Parliamentary context, its answer is to ensure that the case is put with maximum clarity in that forum, not to seek to avoid the forum altogether.”* (Leveson Vol 1 (5.15).

Unfortunately, it is hard to see how Parliament can escape the megaphone. That campaigners insisted on a judge led inquiry, and the leaders of the major political parties were happy to agree to one was an admission of a deep and chronic conflict of interest at the heart of media policy. When he announced the launch of the Inquiry, the Prime Minister acknowledged that *“because party leaders were so keen to win the support of newspapers, we turned a blind eye to the need to sort this issue, get on top of the bad practices, to change the way our newspapers are regulated”* (David Cameron, July 2011). A Royal Commission that did not operate in a court setting, with a high evidential standard and which had a mandate to think creatively about public policy might have felt much more able to investigate the link between the central problem of press power identified by Leveson, and its structural basis in media concentration. These questions were explicitly discussed – though ultimately without resolution – in the previous commissions of inquiry, starting with the first Royal Commission on the press in 1949. It is possible to identify the moment in the report when Leveson justifies his approach to the issue of media power: *“many have ... argued that elements of the press in this country have acquired a sense of impunity, of being above the law, because they have become too powerful, their economic and social power having become concentrated into too few hands.* (Leveson p719). **“2.3** *I have set out these possible causes without necessarily endorsing any of them. This is so for two reasons. First, many of these potential causes, assuming that they have been correctly identified, are beyond the scope of this Inquiry to the extent that it is difficult if not impossible to devise an antidote or a solution. If, for example, the problem lies within society as a whole, there could be little or nothing I could say or recommend to encourage (let alone force) the tectonic plates to move into an altogether different place. Secondly, and in any event, the Inquiry has not investigated many of these alleged causal factors to the extent necessary to reach clear conclusions on these complex issues, and I doubt whether it would have had the expertise to do so in all instances.* (Leveson p719).

So the limitations of Leveson are related not to the evidence before him, which is a rich stash of evidence and frank admissions of policy compromise and media power, but to the forum of a judge led inquiry and the way that Leveson approached the evidence.

Above all, Leveson has been cautious. When **I gave evidence** to Leveson in July, the judge already had more or less decided his approach:

*LORD JUSTICE LEVESON: ...I'm keen to hear your view on my reasons for caution, because I don't want the LSE to be producing a paper headed “A lost opportunity!” Maybe it will.*

*Damian TAMBINI: “I think the LSE is the least of your worries”.*

*LORD JUSTICE LEVESON: I might agree with that, too. (p73)*

