

## **“And What Good Came Of It At Last?” Press-politician relations post Leveson<sup>1</sup>**

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### **Introduction: turning power on its head**

In the opening paragraph of his seminal book “The Abuse of Power”, James Margach writes of what he calls “the complex and fascinating exercise of real power in a war which has been neglected to an astonishing extent...”. He talks about the “almost obsessional ruthlessness” with which most of the dozen Prime Ministers whom he had personally known as a Sunday Times political correspondent had sought to dominate the media. They wanted, he said, to “enrol and exploit the media as an arm of government”, with the ultimate objective of consolidating their own personal power.<sup>3</sup>

His argument was that the Executive (a combination of Government and Whitehall) had eroded the power of Parliament and had created an “elective dictatorship” in which Prime Ministers were centralising power through systematic news management combined with a new breed of government information officers and an “impenetrable” Official Secrets Act. This creeping attempt at manipulation of the press demanded greater detached scrutiny, where journalists must avoid the temptation – as Walter Lippman had advised many years earlier – of any intimacy with those they should be scrutinising.

Margach did not absolve the press itself from all criticism, and reminded his readers of what he called the “four crises” involving Government and Press in which press behaviour had been excessive. First was that generation of press lords in the 1930s, including Beaverbrook and Rothermere, who had attempted to destroy the serving Prime Minister, Stanley Baldwin, by creating their own party. Then came the post-war press attack on Clement Attlee, an “unbridled campaign of screaming irresponsibility” in which sections of the press pursued Attlee’s government with reckless distortions. Third was reporting of the Vassall spy scandal under Macmillan, when the subsequent Radcliffe Tribunal concluded that they could find no truth in any of the press reports. And fourth, a year before Margach was writing, was a strident campaign by the Daily Mail about alleged corruption at the troubled car manufacturers British Leyland which, it transpired, was based on a forged letter.

By modern standards, these were scarcely heinous crimes. But Margach’s main point was that these events served only to amplify further the burgeoning power of Downing Street as successive Prime Ministers took advantage of press vulnerability in the wake of each crisis to further Whitehall’s obsessive secrecy and their own stranglehold on unaccountable political power.

His account, which stretched from Lloyd George in 1916 to James Callaghan in 1977, is a familiar *cri de coeur* from political journalists down the ages, arising from their pivotal fourth estate role of holding power to account, guarding against demagoguery and autocracy, and dismantling the walls of executive secrecy. It is ironic that Margach ends with Callaghan, probably the last British Prime Minister who did not regard the press – including broadcasters

– as central to their own political aspirations both to enter Downing Street and, once there, to implementation of their government’s policies. From Margaret Thatcher onwards, it was the new British press barons – in particular, but by no means exclusively, Rupert Murdoch – who became the power brokers, wooed by aspiring political leaders and crossed only at grave Prime Ministerial peril. In other words, the power struggle which so troubled Margach became inverted: in the 35 years since Margaret Thatcher succeeded Callaghan as Prime Minister, the Executive became cowed by – or at the very least complicit in – an increasingly powerful and self-aggrandising press.

### **From Thatcher to “feral beasts” to Leveson**

To what extent favours were granted during those 35 years in return for political support – or at least to quell editorial hostility – is still a matter of debate. But there is no doubt that questionable political decisions were taken and that close relationships were forged during those 35 years – perhaps with the honourable exception of John Major’s administration from 1990 to 1997 – which would have deeply disturbed Margach. Within two years of Mrs Thatcher becoming Prime Minister, recent evidence suggests that she personally intervened to ensure that Rupert Murdoch was allowed to acquire the Times and Sunday Times without referral to the competition authorities, despite already owning the Sun and News of the World.<sup>4</sup> It was Thatcher, too, who guaranteed that the 1990 Broadcasting Act – which legislated for the first time to place limits on cross-media ownership – contained an exemption for Murdoch’s nascent Sky satellite operation.<sup>5</sup>

When he took over the Labour leadership and launched his “New Labour” makeover, Tony Blair was determined to make overtures to the press in general, and to News Corp in particular. His trip to the Cayman Islands to speak at the News Corporation annual conference in 1995 is now the stuff of political legend, and he himself has not concealed his determination to avoid the kind of personal and political demolition suffered by the Labour leader Neil Kinnock in the months leading up to the 1992 general election. While he has vigorously denied any media policy deal-making – and the record on Labour’s 2003 Communications Act is ambiguous – the evidence again demonstrates that he went to enormous lengths to ingratiate himself with a media that he once described as “like living with a demented tenant.”<sup>6</sup>

Lance Price, who worked as Alastair Campbell’s deputy in the communications office from 1998 to 2000, has written that he was told by “someone in the know” shortly after he joined Number 10 that “we’ve promised News International we won’t make any changes to our Europe policy without talking to them”. He quotes the Guardian columnist Hugo Young as arguing that Blair would have to “face down the screaming and the bullying, which is the British tabloids’ matchless contribution to democracy”.<sup>7</sup> Both Rothermere and his then executive editor-in-chief David English were also courted, albeit somewhat more discreetly. According to Tim Allan, Price’s predecessor in the first few years of Blair’s government, “the government spent years trying to be chummy with the Daily Mail [and] .....wasted far too much time trying to turn the *Mail* around”.<sup>8</sup>

It is therefore scarcely surprising that Blair himself became convinced of the media's destructive potential, and concluded in retrospect that perhaps his government should have acted earlier to curb a growing and unhealthy concentration of unaccountable press power. When he first articulated his Damascene conversion two weeks before standing down from office in 2007, it caused a predictable storm. In a speech to the Reuters Institute, he said:

“I am going to say something that few people in public life will say, but most know is absolutely true: a vast aspect of our jobs today... is coping with the media, its sheer scale, weight and constant hyperactivity. At points, it literally overwhelms.” In the passage which inevitably wrote its own headlines, in talking about the destructive nature of that hyperactivity, he said: “Today's media, more than ever before, hunts [sic] in a pack. In these modes it is like a feral beast, just tearing people and reputations to bits”. He ended:

I do believe this relationship between public life and media is now damaged in a manner that requires repair. The damage saps the country's confidence and self-belief; it undermines its assessment of itself, its institutions; and above all, it reduces our capacity to take the right decisions, in the right spirit for our future.<sup>9</sup>

Perhaps the most revealing fallout from this speech – apart from the predictable outrage it created amongst the well-paid commentariat – was a subsequent conversation with Blair reported by Sky News political editor Adam Boulton. According to Boulton, Blair regretted not mentioning the Mail newspapers (he had strangely singled out the Independent), and said that although the Daily Mail had been the real target, “he feared what the paper would do to him and his family should he have targeted it”.<sup>10</sup> Whatever political power had been exercised by the media barons of the 1930s, it never reached such a pitch of intimidation that a serving Prime Minister was terrified of criticising their newspapers.

That sense of awe and trepidation was inherited by Blair's two successors, Gordon Brown and David Cameron, as each attempted to forge their own alliances with powerful publishers and, if not tame, then at least not antagonise those “feral beasts”. Suddenly, on 4 July 2011, it seemed that this toxic relationship had been irrevocably shattered. The Guardian published its revelations that the News of the World had hacked the phone of murdered schoolgirl Milly Dowler and three days later, Rupert Murdoch announced that after 168 years the News of the World was to close. A day later, Prime Minister David Cameron announced a judicial enquiry to be led by Lord Justice Leveson, admitting that politicians were to blame for “turning a blind eye” to bad practices in journalism. He went on to say that the phone hacking scandal presented a “genuine opportunity” and a “cathartic moment” for both media and politicians. Giving evidence to the House of Commons liaison committee on 6 September, he conceded that he had personally allowed himself to get too close to media proprietors and editors, and said: “The relationship between politicians and media needs resetting and I think there is an opportunity in this Parliament to do that”.

After 12 months of oral evidence which included four former prime ministers and over 30 leading politicians from the previous 30 years, on 29 November 2012, Lord Justice Leveson published his 1987 page report and 92 recommendations for change. All the indications

therefore pointed to a seismic shift in those power relationships which would, indeed, see some kind of “resetting” in light of Leveson’s recommendations.

The rest of this paper looks at two specific areas in which leading politicians seemed eager during their evidence to accept a need for change. Had there genuinely been a seismic shift in press-politics relationships, we would have expected a fundamental policy shift in both those areas. We conclude, however, that current evidence suggests the prospect of very little change.

## **1. Data Protection - “a classic case study in realpolitik”**

In 2005, private investigator Steve Whittamore received a two year conditional discharge after pleading guilty to offences under the Data Protection Act 1998. His notebooks, recovered during the Operation Motorman investigation by the Information Commissioner’s Office (ICO), had recorded personal details relating to over 4,000 people and, significantly, who had paid for them. It transpired that Whittamore’s clients included numerous national media organisations and the ICO’s 2006 report, *What Price Privacy? (WPP)*, revealed that 305 journalists had been identified as “customers driving the illegal trade in confidential personal information”.<sup>11</sup> Although the ICO threatened it would “not hesitate to take action against any journalist identified during the Motorman investigations who is suspected in future of committing an offence”<sup>12</sup>, no journalist was prosecuted.

The ICO’s response to the Motorman revelations was to recommend a new policy approach to data protection offences: the introduction of a two year prison sentence for breaches of Section 55 of the Data Protection Act and a specific recommendation that the Press Complaints Commission should “take a much stronger line to tackle press involvement in this illegal trade”<sup>13</sup>. Data protection guidelines for the press were published, but the first policy goal – the introduction of custodial sentences – has never been achieved (although it exists in inactive legislation). The ICO’s decision not to pursue prosecutions was the result of a “three-way negotiation” between the ICO, press and government, according to the Leveson Inquiry report and part of what Mr Robert Jay, counsel to the Inquiry, described as a “classic case study in realpolitik”. What exactly did that entail, and what does the “negotiation” tell us about the operation of media power?

In 2008 the then Secretary of State for Justice, Jack Straw was in a difficult position. The government needed to enact the Criminal Justice and Immigration bill speedily, to bring in provisions relating to industrial action by prison officers and avoid the prisons going into “meltdown”. Unfortunately, this Bill was also the vehicle for introducing the ICO’s recommendations on custodial sentences for breaches of data protection, and the relevant Clause 75 was bitterly opposed by the press. Straw’s answer was to replace clause 75 with two amendments: one creating powers to alter the penalty for DPA breaches, and thus create custodial sentences for DPA 1998 Section 55 offences; and one introducing a “subjective test” as a special defence for journalism which went beyond existing public interest defences. “Royal assent had to be obtained by a certain date for reasons extraneous really to the merits

of the case in Section 55,” Mr Jay explained during a session that questioned Straw on media influences on public policy:

Had it not been for that consideration and/or the pressure that you were under by the press, would your policy position have been either adhere to the original position, in other words just up the sentence to include a custodial penalty, or were you in fact persuaded by the merits of the argument that the subjective/objective test should be introduced?<sup>14</sup>

Straw responded by setting out the various time pressures, including his concern that the bill would be blocked in the House of Lords, but continued: “I’d like to think that even in slower time I would have made the same judgment about the subjective defence that was inserted, but I can’t say for certain”. As it was, the Act was passed, a prisons crisis averted, and a compromise between the press and the ICO was apparently reached – at the behest of the Prime Minister Gordon Brown.

However, the compromise was something of a wasted exercise as the amendments in question were never actually activated. To this day, there are no custodial sentences available for S55 breaches, nor the accompanying subjective test to protect the press. According to the Leveson report, commencement requires an Order-making power “which has not to date been exercised”. For Straw, that was a point of regret: “I wish I’d done it before the election. I can’t remember why I didn’t, but anyway”. Disappointingly, he is not pushed further on the reasoning, although he mentions that there is “a wider issue about activation of legislation”.

Press concern appeared to be a major factor in Straw’s hasty decision to water down the relevant amendments, and subsequently not to activate them. For Leveson, it was “clear that pressure from the press as a whole was brought to bear, but cause and effect is not necessarily established by narrating the relevant sequence of events”.<sup>15</sup> It is therefore necessary to look in detail at the different components of press lobbying and exercise of press power on this issue.

### **Industry “representatives” and access to politicians**

There had been “a lot of conversations with Mr Dacre and other senior colleagues from the press about Section 55 of the Data Protection Act and the increase in sentences”, according to Jack Straw. Specifically, he had been approached by a number of individuals, Paul Dacre (editor of the Daily Mail), Rebekah Brooks (née Wade and editor of the Sun), Murdoch MacLennan, chief executive of Telegraph Media Group, and Guy Black, then an advisor for TMG, who Straw interpreted as “representing the views of the national press as a whole”. Robert Jay probed this assumption:

Mr Robert Jay: *Because these were the most powerful figures, either within the PCC or on the Editors’ Code Committee, was that your inference?*

Mr Jack Straw: *Yes. I never, Mr Jay, said, “Can we see your precise credentials?” They plainly were and are - were powerful figures who were representing the generality of the ...”*

Straw then met Dacre, MacLennan and Brooks, and wrote to Dacre on 12 February 2008. He explained that the government appreciated their concerns, although he was not aware that Section 55 (with its non-custodial sanctions) had caused any chilling effect on media freedom of expression. However, as he explained when they met, he “was increasingly minded to consider inclusion of provision for the reasonable belief of someone at the time an offence was committed”. Nonetheless, he was keen for the bill to pass quickly, owing to the provisions relating to industrial action in prisons, a scenario described by Jay as a “a double pincer movement”: on one side, Straw faced the “press stirring up trouble” and on the other, a pressing need to get the bill through. Thus, Straw felt it unnecessary to challenge the authority of a small coterie of powerful media figures, whom he took to represent the views of the wider industry and who had easy personal access to his own office.

### **Conflicting versions of how and when influence was exerted**

At the Society of Editors’ conference in 2008 Paul Dacre spoke dramatically of a “truly frightening amendment” to the DPA, which would have Britain “the only country in the free world to jail journalists”. Fortunately, he said, the Prime Minister Gordon Brown “was hugely sympathetic to the industry’s case and promised to do what he could to help”. Under the “brokerage of Number 10” there were meetings with Jack Straw and officials. “The lobbying on both sides was fast and furious”, he said, with the Information Commissioner Richard Thomas determined to bring in custodial sentences. It was a “rear-guard” action, but a compromise was reached with amendments allowing protection for journalists who had a ‘reasonable belief’ that their actions were in the public interest. More pertinently, in Dacre’s view, the Act was amended so that “the jailing clause cannot now be implemented unless the Secretary of State seeks approval from Parliament to activate it”.

This was not how Gordon Brown saw it. He described how he had dinner with Les Hinton, Murdoch McLellan and Paul Dacre on 10 September 2007:

I told them, as we started the dinner, what my own view was. I didn’t ask them for their view, I’m afraid. Maybe I should have. I told them what my view was, that there should be a public interest defence, and therefore it wasn’t a question of them lobbying me. I was informing them that this was my view, but that [ministers] were consulting people about how we could implement this in a way where there was a public interest defence but we weren’t going to back off entirely the potential need for legislation.

For Robert Jay, the accounts by Dacre and Brown did not match. Brown disagreed, saying the two accounts were not mutually exclusive: “They raised it, but I told them as they raised it: ‘Look, this is my view’.” A little further on, Jay pushed the point again:

Mr Dacre’s account is that you were hugely sympathetic to the industry’s case and promised to do what you could to help. It sounds as if the industry, through Mr Dacre, Mr Hinton and Mr McLellan, were allowed to put their case and you were persuaded by it; is that fair or not?

Brown defended the point vigorously: "...these were my views and I think any suggestion that I was under pressure from the industry and yielded to it is quite ridiculous".

In light of this evidence, the final report is troubled by a few inconsistencies: why, for example, was the government pushing ahead with the bill in 2008 *without* a public interest defence if Brown was sympathetic to the press argument in 2007? For this reason, it finds that "the impact of the private dinner of 10 September 2007 on the evolution of Government policy at this time is difficult to tell".<sup>16</sup> Dacre's speech suggested that the dinner had made a difference, but government policy remained unchanged until later negotiations with Jack Straw. Straw was also questioned on whether he had been persuaded by the press case; the final report found that "understandably, and very frankly" Straw had found that awkward to answer, "given the difficulty in disentangling cause from effect: as he put it, 'because I became persuaded, if you follow me, so you have to work out why you were persuaded...'"<sup>17</sup>

These exchanges demonstrate, as will invariably be the case when reputations are at stake, that cause and effect of policy shifts can be difficult to establish. No Prime Minister or senior politician will willingly admit to having been browbeaten by any industry lobbyist – least of all the press – into legislation they did not support. Nevertheless, the sequence of events, and the very detailed (and unusually public) account by Paul Dacre of his concerns and subsequent compromise by the government, suggests at the very least that concessions were made which were not initially either mooted or welcomed.

### **Press influence on the ICO and Leveson's response**

Negotiations over data protection began in 2006 and 2007 when the Information Commissioner Richard Thomas pursued what he called a "twin-track approach" to deal with the discoveries of Operation Motorman: he initiated a dialogue with the Press Complaints Commission (PCC), and simultaneously began a campaign to persuade the government to introduce custodial sentences for S55.<sup>18</sup>

This twin-track policy led to the "three-way negotiation" between the press, government and ICO, which included the later meetings between Straw, Brown and the press detailed above. Parallel to this, no prosecutions were brought against the media. Richard Thomas explained this inaction in terms of fear of the consequences: "perhaps thank goodness we did not prosecute the journalists", whom counsel had advised were "tricky, well armed and well briefed, effectively a barrel of monkeys". In Thomas's view, "[t]he impact for the office would have been very, very demanding indeed" if prosecutions against the press had been brought, and he was unequivocal about levels of press influence: "...it became increasingly clear that the press were able to assert very substantial influence on public policy and the political processes". In oral evidence to Leveson he explained that he may even have been better advised not to draw attention to the press abuses revealed by Operation Motorman:

[I]n the matters covered by this Statement, the press had a direct interest and a hostile attitude which made it very difficult to achieve our objectives. The history of the campaign over the Criminal Justice and Immigration Bill ... left me in no doubt about the power of the press. I can recall saying to my colleagues in 2007 and 2008 that,

with hindsight, it may have been a mistake on our part to have highlighted press misconduct in our reports. We may have made better progress if we had concentrated more on breaches of s55 by other sectors.

The press therefore wielded power on two levels: first, media organisations appeared to be immune from possible criminal prosecutions arising from the Motorman revelations or alternative civil law responses; and second, they were able to run a successful ‘counter-campaign’ to the proposed custodial sentences for S55.

In his report, Leveson is unsympathetic to the lack of regulatory and legal progress and comments that “it is noteworthy that at no stage since the Motorman material was found has the ICO raised as an issue the sufficiency of its powers to tackle breach of the data protection regime by the press”.<sup>19</sup> This is crucial in making sense of the ICO-press part of the negotiations. While the CPS has a role in handling criminal prosecutions, the ICO is the only authority with the appropriate civil powers. However, it appeared reluctant to even consider pursuing the media over data protection breaches through a civil route. Leveson quotes Alexander Owens, a former ICO employee, to highlight the “operational implications” of the ICO’s approach: “It’s our job to take them or indeed anyone else on, that’s what we are paid to do. If we do not do it, then who does?”<sup>20</sup>

Leveson is similarly scathing about the government’s response, and does not appear convinced that the non-commencement of S55 provisions is entirely accidental:

...the legislative process by which the maximum penalty was increased and the defence to the substantive offence available to journalists broadened, with both changes left uncommenced, was strongly indicative of a political compromise, designed as much as anything to quieten two opposing campaigning voices rather than as a response to a thought through policy analysis for which there was genuine empirical evidence. It is not surprising to find that the delicate balance of the compromise has not proved something which succeeding Secretaries of State for Justice have been in a hurry to revisit.

Additionally, he was unpersuaded by press concern of a “chilling effect” arising from the custodial sentences introduced in the 2008 Act. Leveson saw this issue as an example of the press acting “as powerful lobbyists on self-interested questions of media law and policy” and therefore concluded that “the public interest, taken in the round, favours there being no further delay” in the implementation of relevant measures in respect of Section 55 breaches.

### **Government inaction**

Lord Justice Leveson reported in November 2012, leaving Parliament and industry to act upon his final recommendations. What, then, of the recommendations on S55? In short, not much. The ICO has followed recommendations for its own approach by publishing draft guidance on the media and data protection, and launching a consultation which will close in April 2014. A response from government to a report on private investigators by the House of Commons Home Affairs select committee in July 2013 mentions Leveson’s recommendation



for the commencement of Sections 77 and 78. Instead of promising their activation, however, it proposes a consultation:

Given the potentially far-reaching nature of Lord Justice Leveson's proposals in relation to data protection, in particular for the conduct of responsible investigative journalism, it is the Government's view that the recommendations require careful consideration by a wide audience. It is therefore our intention to conduct a public consultation on the full range of data protection proposals, including the introduction of custodial penalties, which will seek views on their impact and how they might be approached.<sup>21</sup>

Most recently, in March 2014, Simon Hughes MP, Minister of State for Justice and Civil Liberties, promised that the government has "begun to review the sanctions available for breaches of the Act" so it "can decide whether to increase the penalties as the law permits".<sup>22</sup>

Chris Pounder, a data protection specialist, is sceptical of this official line; his reading is that the government now thinks a custodial offence is unnecessary and that there is political advantage in "waiting for Leveson" and the resolution of the even more troubled negotiations over press regulation. It would be, as he sees it, politically advantageous to delay this element, especially in light of the forthcoming general election.<sup>23</sup> At the time of writing, there is *still* no sign of the consultation, although it was mentioned again in a letter to the chairman of Parliament's Home Affairs Committee from the incumbent Secretary of State for Justice, Chris Grayling, in September 2013. This is the latest (non) manoeuvre in this long-running saga of media-legal policy realpolitik. While this case is specific to the reach and powers of data protection regulation, its twists and turns reflect a much broader pattern of self-interested media influence on legal policymaking, exposed during other politicians' evidence to the Leveson Inquiry.

## **2. Media concentration – like-minded thinking of ministers and proprietors**

In the 22 months before the Guardian's revelations of 4 July 2011 sparked a wholesale shift in political attitudes, a series of controversial negotiations had focussed attention on a policy issue which had been repeatedly aired but never resolved: concentration of media ownership and, in particular, the burgeoning media portfolio of News Corporation. News Corp's bid for full control of the British TV satellite operation BSkyB was coming to a head at precisely the same moment as the Guardian exposé, a highly lucrative deal that was on the verge of completion.

Controversy around News Corp's undue influence had been revived in 2009 following a controversial speech by James Murdoch in his MacTaggart lecture, which prompted what appeared to be serious policy concessions by a Conservative party seeking victory at the next general election. Following a vehement attack on regulation and government intervention, Murdoch called for a "radical reorientation of the regulatory approach", in particular a relaxation of rules restricting the number of advertising breaks and abolition of impartiality requirements which represented "an impingement on freedom of speech and on the right of people to choose what kind of news to watch." He accused the BBC of producing "free, state-

sponsored news” which throttled the news market. “We must have a plurality of voices and they must be independent. Yet we have a system in which state-sponsored media – the BBC in particular – grow ever more dominant.”<sup>24</sup>

It was not a generally accepted vision of plurality, but the thrust of Murdoch’s thinking had already been echoed by senior Conservatives. A few weeks earlier, in condemning what he called “the growth of the quango state”, David Cameron appeared to single out Ofcom for particularly harsh criticism:

Jeremy Hunt [then shadow culture minister] has concluded that Ofcom currently has... responsibilities that are matters of public policy, in areas that should be part of a national debate, for example the future of regional news or Channel 4. These should not be determined by an unaccountable bureaucracy, but by ministers accountable to Parliament. So with a Conservative Government, Ofcom as we know it will cease to exist. Its remit will be restricted to its narrow technical and enforcement roles. It will no longer play a role in making policy.<sup>25</sup>

Justifying his emphasis on Ofcom he subsequently told the Leveson Inquiry that, compared to Ofcom’s predecessor the Independent Television Commission, “I did think Ofcom was quite a good example of a quango that had got too big, too expensive, and the pay levels were pretty excessive.” But its size and cost was a direct consequence of having merged five separate regulators or government functions, of which the ITC represented just one; and salaries were comparable to others in the public sector. It was a flimsy explanation.

Less than two months after James Murdoch’s lecture, in an interview with the Financial Times, Jeremy Hunt had laid into the BBC, suggesting that it was out of touch with what licence-fee payers wanted and crushed media competition. He said that its governance structure, the BBC Trust, needed replacing and that his party was “looking into whether it would be appropriate to rip up the charter in the middle of it, or whether one should wait.”<sup>26</sup> In fact, as several serving and former senior ministers testified during Leveson, these were by no means isolated examples of apparent – though always denied – commitments or promises being made which chimed with the commercial and ideological interests of powerful media groups, and particularly News Corp.

### **The politics of News Corp’s BSkyB bid**

Serious political questions were therefore raised when, just one month after the 2010 General Election, News Corporation bid for complete control of BSkyB. Although it effectively controlled the company through its 39.1% shareholding and James Murdoch was its chairman, ownership was diluted by independent directors representing other shareholders. Much more importantly given the fast-growing revenue flows from pay-TV, News Corp was only entitled to 39.1% of the £1 billion annual profits now being generated. Ben Bradshaw, the last Culture Secretary of the outgoing Labour government, was convinced that the bid’s timing was a calculated political move:

Murdoch's desire to take full control of BSkyB was well known about before the election and one of the most commented upon media stories. We had expected a bid in Government until it became clear (again widely reported at the time) that News Corp were holding off making a formal bid in the hope they'd get a more favourable reception from a Conservative Government.<sup>27</sup>

What made this a particularly potent issue was a last minute amendment to the 2003 Communication Act, following a rebellion led by David Puttnam in the House of Lords. It introduced for the first time a public interest plurality clause to media mergers and acquisitions and allowed discretion to the Secretary of State to intervene if he thought there was a public interest threat. This had been resisted by the Labour government because, in the written evidence of then Culture Secretary Tessa Jowell, they feared that it "could lead to uncertainty in the market which would be bad for the development of the sector." Though consistent with Labour's emphasis on deregulation coupled with content regulation, this approach nevertheless prompted accusations of favouritism towards Murdoch and News Corp.

Quite how politically toxic and vulnerable to prejudice the whole process could become was graphically revealed by the events of the following 12 months, and by private texts and correspondence which subsequently emerged during the Leveson Inquiry. The decision to intervene fell to the Business Secretary, the Liberal Democrat Vince Cable who issued a formal notice on 4 November asking Ofcom to investigate the proposed merger's impact on media plurality. Although emphasising that he could only operate within the law, his written evidence to Leveson revealed the political context for his decision:

Having considered all the evidence and submissions, it seemed clear to me that the proposed merger did raise genuine concerns affecting the public interest and that these should be properly considered. In my opinion as a politician, I also believed that the Murdochs' political influence exercised through their newspapers had become disproportionate. The accusation that leading political figures in the Conservative Party and the Labour Party had offered disproportionate access to the Murdochs was widely made, as was the perception that both parties had shown excessive deference to their views (as expressed through News International newspapers).

He also referred in his evidence to "inappropriate" approaches from News Corp representatives to his colleagues and went on: "These colleagues expressed some alarm about whether this whole affair was going to lead to retribution against the Liberal Democrats through News International newspapers." Subsequent reports suggested that these were not exaggerated fears, and that threats to persecute the party through News International's newspapers if the bid was referred had indeed been made to senior party members.<sup>28</sup> However, Cable's involvement was cut short when, on 21 December 2010, a recording emerged of inappropriate comments he had made to two female reporters from the Daily Telegraph posing as his constituents, including a promise that he had "declared war on Mr Murdoch". Given his quasi-judicial role in determining the outcome, his position was clearly

untenable and responsibility for the bid was immediately transferred to the Culture Secretary, Jeremy Hunt.

Hunt himself, however, was a free-market Conservative and was not politically neutral. He had, it transpired during Leveson, sent the Prime Minister a private note on 19 November expressing his own disquiet about at Cable's decision to intervene:

“James Murdoch is pretty furious at Vince's referral to Ofcom. He doesn't think he will get a fair hearing from Ofcom. I am privately concerned about this because NewsCorp are very litigious and we could end up in the wrong place in terms of media policy.... I think it would be totally wrong to cave in to the Mark Thompson [then BBC Director General]/Channel 4/Guardian line that this represents a substantial change of control given that we all know Sky is controlled by NewsCorp now anyway.”<sup>29</sup>

Further evidence of his position emerged through private texts which were also disclosed during Leveson. On the very same day that Vince Cable's recorded comments were made public, the European Commission announced that it had cleared the competition aspect of the merger. Hunt sent a text to James Murdoch which read: “Great and congrats on Brussels, just Ofcom to go!”. He claimed during his evidence to Leveson – with some justification – that he then diligently followed due regulatory process regardless of his own prejudices.

Nevertheless, the combination of Hunt's manifestly positive disposition to the bid, Cameron's own closeness to News International Chief Executive Rebekah Brooks, and the barrage of texts which were subsequently disclosed between Hunt's special adviser Adam Smith and News International's chief lobbyist Frederic Michel (suggesting a remarkably close relationship) all served to create inevitable suspicion about the process.

In March 2011, it appeared that concessions demanded by Ofcom – including spinning off Sky News as an independent entity – had been met, and it remained only for a formal consultation period before approval. By 1 July, the government was ready to give clearance and Hunt allowed one more week for opponents to register objections. In the middle of that period, the phone-hacking story ignited and – with Ofcom invoking its obligation to investigate whether broadcast licence holders were “fit and proper” people – News Corp withdrew its bid on 13 July. In the immediate aftermath, Nick Clegg said that the Government would review the “fit and proper” laws, and Vince Cable argued that laws governing media ownership were “clearly unsatisfactory”.

### **Consensus on the need for action**

In their written and oral evidence to Leveson, leading figures from the last 25 years of government advanced arguments for substantial policy changes on media ownership. Former PM John Major was convinced that Parliament needed to act, telling Leveson in his oral evidence that “Parliament should set a limit on the percentage of the written press and the percentage of the electronic media that can be under the ownership of either one individual or one company.... There should be a limit beyond which, in the interests of plurality, no individual or single company should be permitted to go.”

Nick Clegg focussed more on the need for removing political calculations from the regulatory process on media mergers and acquisitions: “The Inquiry might want to consider suitable mechanisms to allow an independent regulator to trigger a market investigation... into media ownership, without political interference.” In his oral evidence, he was even more explicit about the flimsiness of the current plurality regime and the need to remove politicians from the equation:

If you read in the Enterprise Act how public interest and plurality are defined, you can run a coach and horses through it. And then, as we all know, there are various hoops you go through, the Secretary of State can... refer the decision, and then makes a further decision on whether to refer it to the Competition Commission and so on and so forth. [We should] make that a more rational, coherent and more tightly defined process, because that in itself then makes it much, much more difficult for politicians to infuse the process with their own prejudices.

He also raised the question of why investigations could not be triggered by organic growth: “I find it very odd that if a media group grows organically..., under the present rules of competition and plurality there’s nothing which triggers an ability for the competition authorities to have a look...”

On the basis of his own somewhat painful experience of having his integrity impugned, Jeremy Hunt concluded in his oral evidence that perhaps the decision-making process could follow accepted competition practice:

...if you’re giving so much weight to independent regulators at every stage and you’re removing your discretion to a very large degree, if not entirely, why not just give the whole decision to independent regulators? That’s what we do in competition law. It used to be in competition law that those decisions were made also by secretaries of state and we removed that and gave that to independent regulators.

Hunt’s position was echoed by David Cameron who raised the question of “removing politicians from decision-making positions in respect of media takeovers” and by (Lord) Chris Smith, the Blair government’s first Culture Secretary from 1997 to 2001 who told Leveson in his oral evidence that “I believe very strongly, looking back on my time at Secretary of State [and] what’s happened subsequently, that those decisions should almost certainly not rest with a political figure, however honourable that person may be; that decisions about applying the public interest plurality tests to media ownership issues are matters that should be for either the Competition Commission or Ofcom or both, and should not rest in the hands of a Secretary of State.”

### **Government inaction**

As an integral element of his inquiry’s terms of reference, Sir Brian Leveson was asked to make recommendations on plurality, regulation and cross-media ownership. Perhaps because he devoted so much time and thought to the perennially intractable problem of press regulation, just 15 of 1987 pages of the four volume report were allocated to

recommendations on plurality which were pitched, in his own words, at the level of “desirable outcomes and broad policy framework”. He invited the government to consider whether periodic plurality reviews or an extension of the public interest test might provide a “timely warning” of developing plurality concerns.<sup>30</sup>

After much speculation that it was going to produce a full-blooded Communications Green Paper, covering all aspects of media policy, the government chose only to publish what it called a “Consultation Paper” on media ownership in July 2013.<sup>31</sup> Rather than explore the major policy concerns raised during Leveson, this paper confined itself to “the scope of a measurement framework for media plurality”. It then proceeded to outline five measurement criteria, focussing purely on audience consumption of news and current affairs. This simplistic approach therefore excluded any notions of media influence on politicians, regulators or policy makers, or on the news and policy agenda. In short, it severely circumscribed the notion of media power. It also excluded any broader consideration of the efficacy of the public interest plurality test, the need for periodic reviews, the involvement of government ministers in the decision-making process, and the need for streamlining a complex regulatory process.<sup>32</sup>

More progress was made by a House of Lords select committee inquiry, which made a number of imaginative recommendations around regular reviews, rationalising the regulatory investigation process, and giving more powers to Ofcom.<sup>33</sup> Government reaction is unlikely to be much more than a non-specific “welcoming” of the report, particularly just a year before a general election on such a delicate issue.

On media concentration, then, just as with data protection, progress appears to be grinding to a halt. The urgency and anger which defined debates in the summer of 2011, when senior politicians rushed to apologise for their proximity to media proprietors, have subsided. Meanwhile, News UK (originally News International) launched the Sun on Sunday in February 2012, thus restoring News Corp’s 36% of national newspaper circulation in the UK. And according to a Daily Telegraph report, Rupert Murdoch is contemplating a renewed bid for the whole of BSkyB which “makes more strategic sense now than it did in 2010”.<sup>34</sup> Any bid would come from his newly created film and TV company, 21st Century Fox which he split from his publishing empire News Corp, but in ownership terms the end result would be no different: a highly profitable and enormously powerful media conglomerate ultimately controlled by one individual.

## **Conclusion**

In his written evidence to Leveson, David Cameron conceded that neither the Labour government at the time nor his own opposition reacted with appropriate urgency to either the Information Commissioner’s reports in 2006, or to a critical Culture Select committee report in 2003: “It is not clear that Government Ministers at the time took these concerns seriously enough and they did not take action to change Government policy. Similarly, I regret that opposition front bench politicians failed to devote enough time to scrutinise the Government and hold them to account for their inaction.” He continued: “there are dangers to the public

interest if politicians fail to set their own agenda rather than merely respond to media campaigns.”

In evidence to the House of Commons Liaison Committee Inquiry on 6 September 2011, Cameron conceded that “what is clear is that the relationship became too close in that the politicians were spending a lot of time trying to get their message across and win support, but the issues of regulation were being put on the back burner”, adding in his oral evidence that proper engagement with regulatory issues “wasn’t happening, and I think that’s been happening under governments of both parties for some time.”

Returning to the theme at Prime Ministers Questions on 25 April 2012, Cameron appeared to make a commitment: “I think on all sides of the House there’s a bit of a need for a hand on heart. We all did too much cosying up to Rupert Murdoch.” In response to needling from Ed Miliband, Cameron responded: “The problem of closeness between politicians and media proprietors had been going on for years and it’s this government that’s going to sort it out.”

Two years on, there is little indication of political will on either of these issues to “sort it out”. Nor, to be fair, does it appear that any great pressure is emerging from the Opposition. There is every likelihood that we are reverting to the kind of foot-dragging that has long characterised the post-Callaghan era of media-politician relationships: a fear of antagonising media proprietors, particularly in advance of what is likely to be an unpredictable and closely fought election campaign, and particularly when these issues are scarcely burning topics on the doorstep. It is far more likely that manifesto commitments on media reform, which are already being developed, will remain at the level of broad principles with a vague commitment to “sort it out” after the next election.

Little, it seems, has changed. On 4 October 2010, with allegations of phone hacking still bubbling under and with the Milly Dowler revelations still 9 months away, the Telegraph’s Peter Osborne presented an outstandingly prescient *Dispatches* programme on Channel 4. He painted a profoundly disturbing picture of blatant intimidation by a burgeoning media empire which included overt threats of tabloid revelations to secure compliance. Osborne rehearsed the Information Commissioner’s findings in 2006 that newspapers were unlawfully mining a wealth of personal information, and reminded viewers that this criminal activity had resulted in just two convictions. On the programme, Guardian journalist Nick Davies quoted his own sources from within Scotland Yard: “they will tell you that there was a constant and articulated fear that if we pursue this investigation too hard... we are going to alienate the most powerful newspaper group in this country and we don’t want to do that”.

Osborne also asked why Parliament and government were so supine in tackling an issue of such fundamental public interest, and concluded that the answer lay in the unchecked power and influence of News Corporation. John Prescott admitted on the programme that Labour was scared of alienating News International in advance of the 2010 election. Plaid Cymru MP Adam Price – a member of the Culture Select Committee which investigated phone hacking allegations in 2009 – told Osborne that committee members did not compel News International Chief Executive Rebekah Brooks to give evidence because of fears that

journalists would delve into their personal lives. And MP Tom Watson told him that former ministers were not prepared to go public about having their phones hacked “because at the moment they feel frightened and intimidated by News International”.

That particular ghost was laid by the Leveson Inquiry, and the scale of that criminal activity is now better known and being addressed through the courts. But neither the specific problem of widespread and unlawful data-mining nor the democratic problems implicit in media power being concentrated in too few hands show any sign of prompting serious political action. Four years on from Osborne’s programme, three years on from the Milly Dowler revelations and abandonment of News Corp’s BSkyB bid, and nearly two years on from publication of the Leveson Report, our politicians appear to be no nearer to correcting the serious imbalance of power relations. Just as it was in the days of Margach – though for precisely opposite reasons – the electorate and the public interest are being seriously compromised.

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<sup>1</sup> Quote from Robert Southey’s poem *After Blenheim* (1796), questioning the point of the Battle of Blenheim in 1704.

<sup>2</sup> This work was supported by the Arts and Humanities Research Council (AHRC) under its Fellowship scheme (grant number AH/K002864/1). We are very grateful to the AHRC for enabling this research.

<sup>3</sup> James Margach, *The Abuse of Power: The War between Downing Street and the Media from Lloyd George to James Callaghan*, W.H. Allen, 1978, p

<sup>4</sup> See Woodrow Wyatt, *The Journals of Woodrow Wyatt, Volume One*, Pan Books, 1999, p372 and Bruce Page, *The Murdoch Archipelago*, Simon and Schuster, 2011, p241. This was also covered by Sir Harold Evans in his oral evidence to the Leveson Inquiry, 17 May 2012, p29. <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/05/Transcript-of-Afternoon-Hearing-17-May-2012.pdf>

<sup>5</sup> Steven Barnett, *The Rise and Fall of Television Journalism*, Bloomsbury, 2011, pp115-6

<sup>6</sup> Steve Richards, *Whatever It Takes*, p194.

<sup>7</sup> Lance Price, *Where Power Lies*, Simon and Schuster, 2010, p348. Young’s article, in 1997, was titled “It’s the Sun wot really runs the country” in 1997

<sup>8</sup> John Lloyd, *What the Media Are Doing to Our Politics*, Constable, 2004, p94.

<sup>9</sup> Speech to the Reuters Foundation, 12 June 2007 “Tony Blair’s ‘Media’ Speech: The Prime Minister’s Reuters Speech on Public Life” *The Political Quarterly*, Vol. 78, No. 4, 2007, pp476-480.

<sup>10</sup> Quoted in Lance Price, *Where Power Lies*, p394.

<sup>11</sup> ICO, 2006b, *What Price Privacy Now?*, p8

<sup>12</sup> ICO, 2006a, *What Price Privacy?*, p32

<sup>13</sup> ICO, 2006a, *What Price Privacy?*, p32

<sup>14</sup> This and all other quotes from oral evidence to the Leveson Inquiry can be found at <http://leveson.sayit.mysociety.org/speakers>

<sup>15</sup> *An Inquiry into the Culture, Practices and Ethics of the Press*, chaired by the Rt Hon Lord Justice Leveson (“The Leveson Report”), HC 780-III, November 2012, p1273: 4.16

<sup>16</sup> Leveson Report, Volume III, p1275: 4.23

<sup>17</sup> Leveson Report, Volume III, p1275: 4.28

<sup>18</sup> Leveson Report, Volume III, p1027: 5.10

<sup>19</sup> Leveson Report, Volume III, p1042: 2.8

<sup>20</sup> Leveson Report, Volume III, p1042: 2.10

<sup>21</sup> The government response to the fourth report from the Home Affairs Committee Session 2012-13 HC 100, Cm 8691, TSO, 2013.

<sup>22</sup> Hughes, S., 2014. Simon Hughes speech to ICO’s Data Protection Practitioner Conference.

<sup>23</sup> Pounder, C., 2013. “Section 55 custodial offence left waiting for Leveson and party politics”, retrieved from: <http://amberhawk.typepad.com/amberhawk/2013/08/section-55-custodial-offence-left-waiting-for-leveson-and-party-politics.html>



<sup>24</sup> James Murdoch, “The Absence of Trust” 2009 Edinburgh International Television Festival MacTaggart Lecture, 28 August 2009.

<sup>25</sup> Speech to the Reform Club, 6 July 2009.

<sup>26</sup> Ben Fenton and Andrew Parker, “Tories aim to reverse broadband and BBC proposals” in *Financial Times*, 19 October 2009.

<sup>27</sup> Written evidence to the Leveson Inquiry. This quote, and all others from written evidence, can be found at <http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/evidence/>

<sup>28</sup> Henry Porter and Toby Helm, “News International ‘bullied Liberal Democrats over BSkyB bid’” in *The Observer*, Saturday 23 July 2011 <http://www.theguardian.com/media/2011/jul/23/news-international-liberal-democrats-bskyb>

<sup>29</sup> This was included in David Cameron’s written evidence to the Inquiry.

<sup>30</sup> Leveson Report, Executive Summary and Recommendations, HC779, November 2012, pp45-6.

<sup>31</sup> DCMS, Media Ownership and Plurality, A Consultation, July 2013.

<sup>32</sup> This was not for want of advice. Barnett, amongst several others, provided both written and oral evidence with detailed policy ideas:

<http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/wp-content/uploads/2012/10/Submission-from-Professor-Sтивен-Barnett-on-plurality.pdf>

<sup>33</sup> House of Lords Select Committee on Communications, *Media Plurality*, HL Paper 120, July 2014.

<sup>34</sup> Christopher Williams, “Is Murdoch poised to launch another BSkyB takeover bid?” in Daily Telegraph, 25 January 2014

<http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/media/10596720/Is-Murdoch-poised-to-launch-another-BSkyB-takeover-bid.html>