A Review & Assessment
of
The Leveson Report

The protection of constituents under a regime of freedom of expression

December, 2012

Agence Presse Européene

Safeguarding freedom so that we may be free from corrupt representation, factional impositions & unjust settlements .

Introduction

APE-Agence Presse Européene is an international news distribution, wire & syndication service independent of political parties, factions, state & private organizations. All of our media operate online.

Our operations are geared towards the safeguarding freedom so that we may be free from corrupt representation, factional impositions & unjust settlements. We therefore welcomed the Leveson Enquiry given the abuse of the public at the hands of some working for media organizations. We were therefore also curious about the outcome of this work in the form of the Leveson Report to see to what degree it contributes to the shaping of solutions to this type of issue.

We have conducted a short review and assessment of the Report. In spite of what we consider to be a highly restrictive Terms of Reference we consider Lord Justice Leveson and his team to have discharged their duty in a comprehensive and effective manner.

However, we feel that there is an unrealistic vision of what is meant by “freedom of the press” as opposed to the more important topic of the free flow of information. These are not the same thing. The concentration of ownership of the press and the reliance of media on corporate advertising has resulted in a limited number of channels whose content is more attuned to a business survival model delivering information packages designed to shape opinion. The opinion shaping follows the mutual interests of corporations, media and political parties who are content to support mutual interests to be found within specific subsets of these groups. The result has been fewer concerns being addressed and the rise of minority factional governments in the United Kingdom. This is a direct result of tiny political parties, who together muster less than 0.5% of the electorate as members, relying heavily on corporations, banks and the media to lever their “message” as opposed to assessing and responding to the messages of the constituents. The failures in conduct of political parties, financial intermediaries and the media are all related to the politicians’ legislative role being abused through an overt tendency to avoid the rule of law impinging on these sectors and the opting for extra-constitutional solutions.

There remains a need to de-concentrate media ownership by opening up the media to more effective competition so as to reduce the purposeful self-imposed censorship over the selection and presentation of information (bias). This issue has not been adequately addressed.

Those supposedly defending the freedom of the press by attempting to avoid a legal underpinning refer to media regulation opening up the process to future abuse by governments. This is indeed more serious in the case of factional minority governments. However the most effective means to combine a legal base, which is essential, with protection of freedom is to apply the well-established principle and practice of English Law to embed the role of the community conscience, in the form of a jury, in legal processes and settlements. The role of the jury is essential in settlements in the case of abuse of individuals by the media.

It is worth observing why such a suggestion might be opposed. Opposition needs to explain how this supports the freedom of flow of information as opposed to “self-regulation” which would preserve the media’s freedom to provide selective support for factional minority opinion emanating from corporations, media owners and political parties.

What is of importance is the ability of the electorate to access the information they, as individuals, demand, rather than be spoon fed moulded information that factions feel is appropriate.

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Background

The introduction of the Leveson Report recounts that on, 13 July 2011, the Prime Minister made a statement to the House of Commons that The Lord Justice Leveson had been asked to"

"*… inquire into the culture, practices and ethics of the press; its relationship with the police; the failure of the current system of regulation; the contacts made, and discussions had, between national newspapers and politicians; why previous warnings about press misconduct were not heeded; and the issue of cross-media ownership. He will make recommendations for a new, more effective way of regulating the press—one that supports its freedom, plurality and independence from Government, but which also demands the highest ethical and professional standards. He will also make recommendations about the future conduct of relations between politicians and the press. That part of the inquiry we hope will report within 12 months."*

Later on 20th July 2011, the Prime Minister added amongst other changes in the terms of reference for the enquiry,

"…We have also made it clear that the inquiry should look not just at the press, but at other media organisations, including broadcasters and social media if there is any evidence that they have been involved in criminal activities."

In the final draft of the Enquiry Terms of Reference (ToR) (see Annex 1) no reference is made to

"…*other media organisations, including broadcasters and social media…"*

Enquiries and ToRs

It is always advantageous to review, given the general relationships that exist between media organizations and other organizations, groups and individuals, what has not been included in a ToR. The exclusion of certain relationships can reveal an imposed slant or tendency on the work to be undertaken. This is not a reflection of possible bias on the part of the person/s carrying out the enquiry, but rather it is a reflection on the agenda of those authorizing the enquiry in the form of the Government represented by the Prime Minister.

Interpretation of ToRs

In spite of the fact that ToRs usually contain a narrow focus, the obligation on the part of the enquirer to do a thorough job requires the application of common sense in "broadening" the brief so as to produce a comprehensive and coherent analysis and report.

So, in the case of the Leveson Enquiry, where the ToR made no specific reference to the abuse of the public by the media, the enquiry, to its credit, took considerable evidence from those who were affected directly by media abuse. As the enquiry progressed, these sessions of evidence-giving by aggrieved members of the public drew much attention and caused particular concern for some media and politicians who sensed the enquiry was "backfiring" with several inappropriate comments being made by ministers on the likely "chilling effect of the enquiry".

On balance, the process of evidence-giving was an extremely good process because it was thorough and exposed to the public the true extend of abuse. Left to the British media alone it is unlikely that this information would have reached the general public.

In spite of what we consider to be a highly restrictive ToR we consider Lord Justice Leveson and his team to have discharged their duty in a comprehensive and effective manner.

The press and democratic imperatives

In section B of the report there is a section that deals with the role of the press in society and in particular the freedom of the press and democracy. This is largely made up of citations of the point of views of interested parties, past politicians and philosophers; in terms of the state of affairs in Britain these content is largely fanciful.

A fundamental confusion surfaces in this context-setting discourse. This is that, in the past, publications were used to inform the public often in the form of pamphlets and with time the majority of circulating publications became newspapers. In this transition the imperative of the need to provide a wider access to information on all matters of interest to constituents has become more evident, but newspapers and the media have become more concentrated in terms of ownership and more limited in the range of information provided.

The provision of facts, as opposed to such points of view, is now to be found on the World Wide Web in the form of publications like Wikipedia founded in 2001. No British media group possesses the ability to output the volume of factual information available through Wikipedia. For example Wikipedia has some 23 million articles, over 4.1 million in English, it has about 100,000 active contributors. As of December 2012, there are editions of Wikipedia in 285 languages and it has become the largest and most popular general reference work on the Internet, ranking sixth globally among all websites with an estimated 365 million readers worldwide.

Search engine services such as Google are not the same thing because most of the searches result in lists of articles from a limited range of media or Wikipedia articles.

Newspapers or the media cannot respond to the challenge of providing information that constituents desire simply because they tend to support specific approaches to policy and the political economy. They shape their messages to support a specific point of view and will use the evidence supporting that view whilst often not referring to evidence that might weaken or refute the position being promoted. The media, to an increasing extent, exercise a self-imposed censorship where editors need to be careful to satisfy media owner points of view and journalists need to satisfy those editors; all remain employed to the extent that they follow this discipline. The situation is not one of freedom of expression of journalists and editors but rather one where the points of view of a very small number of corporate and media groups “compete” for advertising and sales. It is this dynamic of economic survival that shapes the information provided through the media to the public.

Therefore the range of information made available to readerships is limited and biased and this undermines the fundamental requirement for a balanced approach to decision-making based upon access to all relevant facts.

The overall-arching position of media represents a trade-off between the opinion of advertisers and the thrust of media content. So the power over content has little to do with exposing all relevant facts but represents a fine adjustment between media owners’ point of view and those of the leaders of corporations who provide the financial support, through advertising, to the media concerned.

Political parties are aware of this dynamic and they also respond to the fine balance between what corporations want and shaping policies to encourage a positive support from the media. Political parties in the United Kingdom are now extremely insignificant private organizations whose total membership accounts for less than 0.5% of the British electorate. They only survive in their current

form by directing their efforts to participation in a tripartite arrangement within which they make up a node in the dynamic relationships between large private corporations and the media supported by such corporations.

Because of the mutual benefits that accrue from such relationships, political parties have always been amenable to keeping the rule of law at some distance from this interaction. Any regulations are overseen by extra-constitutional arrangements where those regulating the activities are also those who are regulated. Thus MPs oversaw their own expenses arrangements, banks oversaw their own operations and the media had their own complaints commission.

The pressure for an anti-regulatory agenda arises from this dependency of political parties on financiers and the media to amplify their messages.

Confusion between freedom of information flow and freedom of the press

There is therefore a fundamental confusion between freedom of information flow and freedom of the press. Since the press is involved in a self-censorship moulded by the mutual interests of corporate financiers, banks, media and political parties they cannot be considered to be primarily concerned with access and transmission of information of interest to the constituents. They supply information that they want the readership to receive and they mould this from specific perspectives so as to "shape opinion". In other words there is no consideration of the quality of information demanded by constituents as a basis for assessing options and coming to freely formed decisions and preferences. Information quality, from the standpoint of constituents is largely related to relevance to issues of concern to individuals and not corporations, accuracy, comprehensiveness by including all relevant facts, the degree of representation of the relevant facts and timeliness in terms of being available when someone desires or needs to evaluate the facts so as to take a decision.

Clearly the current functional operational and business models of the British media cannot fill this demanding role. There is therefore a danger in permitting the media to yet again draw up a basis for their own oversight since what is being overseen is not a process of freedom of information flow but a limited process of moulded opinions not much different from political party positions.

Clearly the current arrangements of the political process and the actual insignificance of political parties, in terms of their membership, provides a strong incentive for them to encourage the media to come up with a credible working contract on their practice and sell this to the constituents as "freedom of the press". But this very same model does not serve the function of supporting a free flow of information so essential to the underpinning of decision-making in a participatory democracy.

The role of Law

There has been a considerable amount of confusion on what is meant by statutory underpinning of any voluntary proposal for a regulatory regime drawn up and agreed to by the media. In this discussion the overall approach seems to have been an assumption of introducing some form of codified law or list of rules including limits on fines for tort or assessments of abuse of the public at the hands of the press.

Law is the foundation of press freedom

Although the Report traces out the history of the relationship between press freedom and the law it is worth visiting the facts surrounding a celebrated case of the application of English law in the case of the American colony that relate to John Peter Zenger (1735). Details are provided in Annex 3).

Zenger was the publisher of a newspaper in New York, the New York Weekly Journal. Editions of the newspaper contained criticisms of Sir William Cosby (1690–1736). Zenger was accused of Zenger was accused of seditious libel and put in jail and 9 months later his trial began. Zenger was defended by Andrew Hamilton (1676 - 1741) who was born in Scotland and at that time a Philadelphia-based lawyer. Hamilton undertook this work on an entirely voluntary basis. He did not address his defence to the handpicked judges but rather to the jury. It was clear that the law had been broken but Hamilton argued that the law itself was a reflection of the corruption of the government and he summed up stating that the press has,

"a liberty both in exposing and opposing tyrannical power by speaking and writing the truth."

Zenger on his part simply told the truth, admitting he knew that the articles carried in his newspaper were critical and broke the law.

The judge instructed the jury to pass a verdict of guilty. The jury ignored the judge's instruction because what was stated in the articles was considered to be factual and therefore not libelous. They also considered the sedition law to restrict free speech and therefore was a threat to all freedoms.

Therefore, the anti-regulatory agenda that states that future governments might abuse their power by extending them might be true if the courts handling issues were subject only to codified law. The English practice of using juries is the safety value that can prevent such abuse.

The community conscience represented by a jury prevents abusive regulations

Juries, largely as a result of European codified law, are being undermined since European law has no role for juries. However, juries are the institutions that have established the main human rights precedents in history. Human rights, including freedom of religion, association and expression as well as the content of published articles in the media were all established as precedents arising from jury decisions that nullified the law in specific cases. These rights were not established initially by legislation, governments or politicians.

It is of importance that any legal underpinning of media operations be resolved by settlements decided through legal processes that involve a judge and jury. The community conscience is the most robust means of assessing prejudice suffered by members of the public at the hands of the media.

It is likely that those who still insist on extra-constitutional arrangement in the name of “freedom of the press” will need to explain why juries are not the best means of assessing press behaviour. The jury can cut through comfortable arrangements and “nods and winks” that surround much of the practice of judgements related to codified law where the interpretation of all rests with a compliant judge.

As Lord Devlin stated in 1956:

"The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject’s freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives”

And

"*It (trial by jury) has been the bulwark of our liberties too long for any of us to seek to alter it. Whenever a man is on trial for serious crime or when in a civil case a man's honour or integrity is at stake... then trial by jury has no equal.*"

Whose freedom?

The restricted manifestos of tiny private political parties who use corporate funds and media coverage to lever their message, combined with the first-past-the-post electoral system results in factional minorities making Parliament subservient to their will. The last government held just 19% of the electoral support but a significant Parliamentary majority and the current coalition has just 39% of the electorate support, also with an effective voting majority.

This is not to equate Devlin's tyrant with these factional minorities. However, it is the case that we have political parties, or their coalitions, who do not represent a majority of the electorate controlling Parliament, deciding on macroeconomic policy, "acting for the good of the country" and deciding whether or not to wage war "in the name of the people".

The weak de facto levels of electoral support for political parties and therefore government, in a country concerned about the role of freedom of the press in our democracy, needs to be seen in the context of the outcome of the application of extra-constitutional arrangements for MPs, banks and the media.

There is a need to shore up constitutional provisions so as to avoid the problems associated with factional minority governments including the economic crisis caused by incompetence and criminal activities in the banking sector and public abuse resulting from unacceptable activities by many working in the media.

With Parliament under the sway of factional minorities then at least the second act to diminish freedom, that of marginalizing juries from their role in carrying out decisions in cases involving politicians, political parties, banks and the media, would be a step too far.

The community conscience in the form of a jury needs to have a central role in resolving the issue of regulating the actions of politicians, financial intermediaries the media and so as to guarantee just settlements.

Annex 1

Final Draft of Leveson Enquiry Terms of Reference

part 1

1. To inquire into the culture, practices, and ethics of the press, including:

(a) contacts and the relationships between national newspapers and politicians, and the conduct of each;

(b) contacts and the relationship between the press and the police, and the conduct of each;

(c) the extent to which the current policy and regulatory framework has failed including in relation to data protection; and

(d) the extent to which there was a failure to act on previous warnings about media misconduct.

2. To make recommendations:

(a) for a new more effective policy and regulatory regime which supports the integrity and freedom of the press, the plurality of the media, and its independence, including from Government, while encouraging the highest ethical and professional standards;

(b) for how future concerns about press behaviour, media policy, regulation and cross-media ownership should be dealt with by all the relevant authorities, including Parliament, Government, the prosecuting authorities and the police;

(c) the future conduct of relations between politicians and the press; and

(d) the future conduct of relations between the police and the press.

part 2

3. To inquire into the extent of unlawful or improper conduct within News International, other newspaper organisations and, as appropriate, other organisations within the media, and by those responsible for holding personal data.

4. To inquire into the way in which any relevant police force investigated allegations or evidence of unlawful conduct by persons within or connected with News International, the review by the Metropolitan Police of their initial investigation, and the conduct of the prosecuting authorities.

5. To inquire into the extent to which the police received corrupt payments or other inducements, or were otherwise complicit in such misconduct or in suppressing its proper investigation, and how this was allowed to happen.

6. To inquire into the extent of corporate governance and management failures at News International and other newspaper organisations, and the role, if any, of politicians, public servants and others in relation to any failure to investigate wrongdoing at News International

7. In the light of these inquiries, to consider the implications for the relationships between newspaper organisations and the police, prosecuting authorities, and relevant regulatory bodies – and to recommend what actions, if any, should be taken.

Annex 2

Wikipedia

Wikipedia is a free, collaboratively edited, and multilingual Internet encyclopedia supported by the non-profit Wikimedia Foundation. Its 23 million articles, over 4.1 million in the English Wikipedia alone, have been written collaboratively by volunteers around the world. Almost all of its articles can be edited by anyone with access to the site, and it has about 100,000 active contributors. As of December 2012, there are editions of Wikipedia in 285 languages. It has become the largest and most popular general reference work on the Internet, ranking sixth globally among all websites on Alexa and having an estimated 365 million readers worldwide. In 2011, Wikipedia received an estimated 2.7 billion monthly page views from the United States alone.

Wikipedia was launched on January 15, 2001 by Jimmy Wales and Larry Sanger. Sanger coined the name Wikipedia, which is a portmanteau of wiki (a type of collaborative website, from the Hawaiian word wiki, meaning "quick") and encyclopedia. Wikipedia's departure from the expert-driven style of encyclopedia building and the presence of a large body of nonacademic content have received extensive attention in print media. In 2006, Time magazine recognized Wikipedia's participation in the rapid growth of online collaboration and interaction by millions of people around the world, in addition to YouTube, MySpace, and Facebook. Wikipedia has also been praised as a news source due to articles related to breaking news often being rapidly updated.

The open nature of Wikipedia has led to various concerns, such as the quality of writing, the amount of vandalism and the accuracy of information. Some articles contain unverified or inconsistent information, though a 2005 investigation in Nature showed that the science articles they compared came close to the level of accuracy of Encyclopædia Britannica and had a similar rate of "serious errors". Britannica replied that the study's methodology and conclusions were flawed, but Nature reacted to this refutation with both a formal response and a point-by-point rebuttal of Britannica's main objections.

Annex 3

The John Peter Zenger Case (1735)

An important step in providing legal protection for the freedom of the press[1]

In a court case in 1670 a jury remained resistant to cruel pressure to change their decision, William Penn a leading Quaker and eventual founder of Pennsylvania State in the USA, was finally acquitted and released from jail. This set the precedent that juries can nullify the law and also cannot be considered to bring a wrong verdict. The not guilty verdict destroyed the Act making the Church of England the only legal religion and thereby gave an impulse to increased religious freedom in England. It also re-established freedom of speech, the right to peaceful assembly and use of habeas corpus.

America extends the principle

Several years later, the provision of trial by jury within the colonies in North America, resulted in many jurors not enforcing the acts of Parliament but instead protecting the freedom of individuals. In the context of establishing press freedom a notable example was the case of John Peter Zenger (1697 - 1746) who was born in Germany and who was the publisher of a newspaper in New York, the New York Weekly Journal. Editions of the newspaper contained criticisms of Sir William Cosby (1690–1736) who was born in Ireland and who was serving as the British royal governor of New York. Zenger was accused of seditious libel and put in jail in 1734. In order to ensure prejudice against him without his having been tried, his bail was set far too high for his friends to be able to afford to release him. This punishment continued 9 months to 1735 when the trial started.

Zenger was defended by Andrew Hamilton (1676 - 1741) who was born in Scotland and at that time a Philadelphia-based lawyer. Hamilton undertook this work on an entirely voluntary basis. He did not address his defence to the handpicked judges but rather to the jury. It was clear that the law had been broken but Hamilton argued that the law itself was a reflection of the corruption of the government and he summed up stating that the press has,

"a liberty both in exposing and opposing tyrannical power by speaking and writing the truth."

Zenger on his part simply told the truth, admitting he knew that the articles carried in his newspaper were critical and broke the law.

The judge instructed the jury to pass a verdict of guilty. The jury ignored the judge's instruction because what was stated in the articles was considered to be factual and therefore not libelous. They also considered the sedition law to restrict free speech and therefore was a threat to all freedoms.

The nullification of poor laws

This case established, as the jury in the Penn case of 1670 had done, that juries have the power to nullify poor laws through a not guilty verdict.

It also established the precedent of the fundamental unimpeded right of people to publish the truth as opposed to misrepresentations of the facts. It therefore established a more precise legal definition of libel, thus libel only exists when falsehoods are perpetrated whereas the truth can never be libelous.

When the English Bill of Rights was added to the American Constitution, the first Amendment was augmented to include the government's duty to defend the freedom of the press.

The jury system has delivered and defended important freedoms

The jury system can be seen to have made very important contributions to what many consider to be fundamental tenets of democracy. These include freedom of speech and to information, freedom of

the press, free assembly, freedom of religion and above all freedom of juries to defend the freedom of individuals against arbitrary legal enforcement by nullifying laws.

The track record of juries as an independent institution

Juries have therefore had an important role in preventing governmental oppression by remaining independent and, on the basis of their conscience, being moved to refuse to commit themselves to supporting unjust convictions.

The track record of juries is that they have withstood the test of time and have been outstandingly successful in delivering on the original intention of their design to prevent arbitrary decisions from destroying individual freedom.

Not only have juries as an institution defending individual freedom on a case by case basis proven to be successful, some of the most important legal precedents in the defence of freedom have come from trials where there was a jury present. Many of these precedents have become embodied in law and conventions such as in human rights conventions so their origination as a jury inspired creation has often been forgotten.

It is essential however, to remain aware of this track record and to acknowledge that juries have been a consistent force in establishing a widening defence of individual freedom. Juries are the only surviving institution which has this specific authority, fortunately accompanied by the undying motivation of jurors as members of the community to carry out their duties in an impartial manner.

Based upon their outstanding contributions during centuries of existence, independent juries have justified, beyond any reasonable doubt, their taking up a status of being a universal human right.

The thin red line

The last bastions of defence of the individual freedom of the people of this country remain the judiciary and juries. In this combined function the independence and impartiality of judges are vital. The community conscience, in the form of the jury, takes on the role, albeit on a smaller scale to that which Parliament should exercise, of preventing excesses against individual freedom based upon the free exercise of their conscience. These two fundamentally important institutions occupy a reduced terrain which recent governments, judging from their proposals, wish to turn into a wasteland.

The Leveller's had no doubts as to the vital importance of the role of trial by jury. They consistently reaffirmed the importance of trial by jury as a fundamental tenet in defending the individual against arbitrary decisions. They also underlined the importance of sustaining the situation of all, including government, as being equal before, and submitting to, the rule of law upheld by an independent judiciary.

Real preferences expressed lead to real success

As in the 1670 Penn case in the United Kingdom, the Zenger case also demonstrated that the free expression of preferences was upheld at two levels. One was the upholding of the preferences of Zenger against the preferences of the state. The other was the community conscience, as represented by the members of the jury, upheld a preference for what they considered to be common expectations of the right to publish the truth. They considered the law on this question to be unfair. Like the Penn case the jury effectively forced their preferences of what constituted normal expectations of behaviour onto the state.

The jury system in the Penn and Zenger examples, and indeed, ever since the specific preferences of the community have been reflected automatically in the law in cases of nullification and without the intermediation or involvement of politicians, political parties, Parliament, government or legislative acts. In a marked contrast to general elections and Parliamentary activity, juries have been an outstanding example of the way in which the expression of real preferences have enabled the effective defence of individual freedom.

[1] Reference: McNeill,H.W., "*The Briton's Quest for Freedom ... Our unfinished journey*", Chapter 13, "*Trial by Jury - 337 years on*". pp:119-124, Hambrook Publishing Company, 2007, ISBN: 978-0-907833-01-7