Leveson and the pressing need for reform of the Inquiries Act 2005

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by

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As the front pages slowly cease to be dominated by the Leveson inquiry into the role of the press and police in the phone hacking scandal, questions about its progress and legacy begin to surface. I am sure many, like me, will have watched with glee its early stages. We shared the slow-motion replays of the pie-thrower being attacked by Rupert Murdoch's "tiger wife". We snickered with Jeremy Hunt as he denied hiding behind a tree to avoid journalists, merely moving "to a different part of the quadrangle, where there may, or may not, have been trees". How we marvelled at the pageantry of the whole affair, as famous faces filed past, their phones hacked and their testimonies tongue-in-cheek. However, some serious issues inherent in inquiries themselves have been amplified by the scale of Leveson and its popular exposure. These are questions which must be addressed while the new form of inquiries are still relatively embryonic, and change is possible. If these concerns threaten to drain the entertainment from the whole affair, I assure you it is alive and well on YouTube.

Undoubtedly, anecdotes, such as those above, prevail in the public psyche over developments with less populist appeal, leading some to conclude that the inquiry lacks gravitas. However, that the inquiry was televised and widely reported is one of its redeeming features. The reporting of occasional blunders by those giving testimony underlines the accessibility of the proceedings. Inadvertently providing humour and opening participants to ridicule are but unintended consequences of open justice, and, but for want of tighter security, should not serve to discredit the conduct of the inquiry itself.

However, in the shadow of this discussion, the question all too rarely asked is not whether justice was seen to be done, but rather what form of justice these new inquiries can provide at all. Formally, the Leveson inquiry is classed as a public inquiry under the Inquiries Act 2005, which aims to provide a framework for inquiries ordered by Ministers when an issue is seen to be of "public concern". This act replaced the Tribunals of Inquiry (Evidence) Act 1921, which previously governed the majority of such enquiries. The 1921 Act required that, following a vote of both Houses to set them up, all inquiries were independent of Parliament and had the powers of the High Court. However, practical problems arose. The Bloody Sunday Inquiry, held under the 1921 Act, was set up in 1998, and yet evidence taking did not conclude until 2004. The opening speech by counsel alone was 42 days long. The

sheer scale of this inquiry and its £192m price tag sparked questions as to whether the 1921 provisions were still appropriate. Indeed, the 2005 Act specified one of its key aims was to deliver results within a reasonable timescale and at a reasonable cost, with the Ministry of Justice noting in their memorandum to the Justice Select Committee, that one of the key departures in 2005 from the 1921 Act was the introduction of "pragmatic control measures"[1]. These seem to have worked- the Leveson inquiry, though not yet nearing its conclusion, came in at a comparatively small £3.9m when costs were last published in June 2012.

Although this central aim seems to have been achieved, what has been sacrificed is more worrying. Under the 1921 Act, inquiries were set up by a resolution in both Houses, allowing, as Dr Robert Kaye notes "a fiction that inquiries into Government conduct were held on behalf of parliament." However, he continues, "Under the new Act, public inquiries into Government are conducted for Government and report to Government." [2] This is due to the fact that, under the 2005 provisions, not only has the requirement for a resolution been dropped, but the powers a Minister can hold over an inquiry have increased. Under the new Act, a Minister has the power to conclude an inquiry before it reports, to restrict attendance at an inquiry or the publication of evidence, and in certain cases to decide which findings should be withheld in the public interest. This raises clear issues regarding the separation of powers. As the subject matter of public enquiries are necessarily important issues to qualify as of "public concern", it is likely that if any question of ministerial or governmental wrongdoing were to arise, that the initial investigation would be tied up with the vehicle of the public inquiry. This circular control is clearly problematic.

This problem has not gone unnoticed. A high-profile campaign was started by the family of Patrick Finucane, a Belfast solicitor killed by loyalist paramilitaries in 1989. This case remains controversial as an inquiry had been ordered to investigate possible state collusion. However, the family, backed by groups such as Amnesty International and the Northern Ireland Human Rights Commission, refused to co-operate with an inquiry under the 2005 Act, as this would allow ministerial control of which information was withheld. On 12 October 2011, Owen Paterson, the Secretary of State for Northern Ireland, stated in the Commons that the government had apologised to the family for state collusion in Patrick's murder.[3] A review is forthcoming, which is much less widespread than a full public inquiry, but the family are still campaigning as they find this unsatisfactory. Whatever the outcome of this case, clearly here the mechanism for open public inquiry has failed. The stalemate hit between the Government and the Finucane camp seems insurmountable while the 2005 provisions remain, and it is telling that so little time has elapsed before an ideological problem regarding the separation of powers has become manifest in reality.

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[1] *Memorandum to the Justice Select Committee: Post-legislative assessment of the Inquiries Act 2005*, Ministry of Justice, October 2010

[2] http://www.publicinquiries.org/introduction/the_inquiries_act_2005

[3] Hansard house of Commons debates, 12 Oct 2011 : Column 335

To return to the fact that the Leveson inquiry has been conducted conspicuously in the open, it is likely that this has been influenced by the nature of the ongoing debate. However, the integrity of inquiries cannot depend on a code of honour among Ministers that they will allow all inquiries to be thus televised and reported, and will not utilise the control available to them. Even if every Minister complied, and the powers in the 2005 Act were used only for good, the fact that the executive alone can restrict the reporting of public inquiries possibly investigating their own acts, remains a blight on a sophisticated legal system. The presence of these provision is harmful even without any suggestion of any actual abuses of the power. Lord Saville of Newdigate, who chaired the Bloody Sunday Inquiry, stated that the Inquiries Act 2005 “is likely to damage or destroy public confidence in the inquiry and its findings".[4] One of the key functions of the public inquiry is to inspire public confidence that issues involving possible state collusion can be investigated with a degree of independence. A public inquiry which inspires no confidence in the public is thus a useless vehicle, effectively leaving the people without a satisfactory advocate in matters of public concern.

This is not to recommend a return to the 1921 provisions, nor to suggest that the necessary degree of independence requires inquiries to operate entirely without limits. Indeed, the functions to withhold certain information and to conclude an inquiry before it reports will often be in the public interest. These functions set out in the 2005 Act would be more appropriate in the hands of an independent body or safeguarded by a requirement for parliamentary approval. Change is necessary as the role of the public inquiry remains central to modern issues. The more swiftly this Act can be amended, the more effectively that open justice will be achieved, and the more likely it is that public confidence in this most crucial of arenas can be salvaged.

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[4] Lord Saville of Newdigate cited in *Public Inquiries,* 2011 p.25