

Regulation,
Regulators, and
the Crisis of Law
and Government

Leveson Reforms, Editorial Freedom, and Press Discussion of Ordinary Members of the Public

Policy Brief

Paul Wragg

FLJS

www.fljs.org

The Foundation for Law, Justice and Society

in association with **the Centre for Socio-Legal Studies**
and **Wolfson College, University of Oxford**

The Foundation for Law, Justice and Society

Regulation, Regulators, and the Crisis of Law and Government

This programme examines the regulatory system in the wake of the global financial crisis, assessing its current weaknesses, the role of legislative and judicial bodies, and identifying measures for future reform of both markets and regulatory regimes. It aims to shed light on the recent failures of regulators, often captive of the very industries they are meant to regulate, and examine ways to improve the accountability and effectiveness of the regulatory system.



Executive Summary

- In his Report, Lord Justice Leveson recommends the creation of a regulator with powers capable of preventing or else curing, through financial or other remedies, the ‘real harm caused to real people’ resulting from the ‘cultural indifference to individual privacy and dignity’ that he observes in problematic press behaviour.
- Amongst other things, Leveson recommends that the regulator should be able to fine members and/or compel them to issue apologies or corrections for breaches of a code of conduct to be drafted by the regulator. Such a code would include a clause against unjustified invasions of privacy.
- However, Leveson is also adamant that press partisanship — that is, editorial freedom to determine the tone, balance, and extent of coverage — should remain a vital part of press freedom.
- Typically, stories concerning ordinary members of the public (OMPs) involve matters of public interest. The UK and Strasbourg case law is clear that any such expression can only be interfered with in narrow circumstances.
- In light of these constraints, the regulator is faced with a daunting task in resolving the tension between legitimate press freedom and disproportionate invasions of privacy on matters of public interest involving OMPs.
- These difficulties invite a sceptical outlook on the capacity of the regulator to achieve the meaningful cultural change that Leveson advocates.
- Arguably, these issues become apparent when considering the recent high-profile example, not considered by Leveson, of Lucy Meadows, a transgender primary school teacher from Accrington, who was subjected to intense criticism by the *Daily Mail* in December 2012. By March 2013, and following a period of press attention during which she complained to the Press Complaints Commission of harassment, Miss Meadows had committed suicide.

Leveson Reforms, Editorial Freedom, and Press Discussion of Ordinary Members of the Public

Introduction

This policy brief is chiefly concerned with the capacity of Lord Justice Leveson's proposed regulator, once installed, to prevent, or compensate for, invasions of privacy and/or attacks on the dignity of ordinary members of the public ('OMPs'), i.e., people who have not courted press attention and are not generally known to the public. The purpose of the brief is to emphasize the difficulties that the regulator may face in protecting OMPs from press disregard for their privacy and dignity.

Amongst other things, Leveson recommends the creation of a regulator, tasked with devising an appropriate standards code (relating to [a] the conduct of journalists, including the collation of materials; [b] respect for privacy; and, [c] accuracy and the need to avoid misrepresentation) and capable of investigating breaches of this code either following complaint by an interested party (which may be a third party) or of its own volition, with the power to fine members up to 1 per cent of annual turnover (up to a maximum of £1 million) and the power to compel the publication of corrections or an apology. It is also recommended that an arbitration service be created for resolving civil legal disputes which would be 'fair, quick and inexpensive, inquisitorial and free for complainants to use'.

This brief draws upon two particular features of Leveson's Report. First, the concern expressed by him that 'real harm [is being] caused to real people' by the 'cultural indifference to individual privacy and dignity' that he observes in problematic press behaviour. This problematic behaviour includes, amongst other things, insensitive investigating and reporting, unfair representation of particular groups or issues, inaccurate reporting, as well as unethical and/or illegal methods of investigating

and/or reporting. Secondly, Leveson's consistent endorsement of press partisanship (i.e., editorial autonomy) as a vital feature of press freedom.¹ As will be discussed, these two features create a tension that is not easily resolved.

Two concerns, in particular, are expressed in this brief, which underpin a general scepticism about the prospects of the Leveson regulator achieving its ultimate ambition to cure or else penalize 'cultural indifference to individual privacy and dignity' where ordinary members of the public are involved. First, that the presence of a public interest deprives the individual of redress from the regulator despite a disproportionate interference with their private life and/or attack on their dignity. The concern here is that the public interest is used as a threshold point to determine whether to protect privacy interests or not. Secondly, that the apparent sanctity of press partisanship promotes an uncritical approach to the identification and valuation of the public interest in privacy-invading expression.

Press partisanship

Arguably, the failure to specify or clarify the value of partisanship within the Report is a significant impairment to the realization of a reformed press. As a result, the regulator is left unaided in how to resolve the two competing priorities that the Report clearly articulates: the need to improve journalistic standards whilst preserving the sanctity of press partisanship. This is problematic not least because partisanship is such a nebulous concept and is not defined in the Report.

Partisanship may manifest itself across a broad spectrum of journalistic behaviour and editorial judgement. Most obviously, it applies to the decision to report on a particular matter and the tone, prominence, and extent of coverage. Thus, partisanship may result in misleading reporting not only through the use of inaccurate information but

also through the biased or bigoted depiction of (ostensibly) accurate information and/or accompanying opinion. Trenchant criticism may also be defined as partisanship. Similarly, partisanship may manifest in hostile or persistent attempts to obtain an interview. Sensationalized reporting in which the extent of coverage or level of criticism is disproportionate to the public interest at stake may also be regarded as an aspect of partisanship.

Whilst Leveson is clear that inaccurate journalism ought to cease and hostile or persistent attempts to obtain an interview might be the subject of a complaint to his proposed regulator, he is more ambiguous on the position of these other instances of partisanship, particularly excessive criticism and disproportionate reporting on matters of public interest (where the intrusion into privacy and dignity is greater than the public interest at stake). The regulator therefore faces the immediate and daunting task of identifying, in either precise or broad terms, the circumstances in which tolerance of press partisanship is unnecessarily indulgent and those in which editorial autonomy is sacrosanct.

To some extent, these issues are exemplified by the *Daily Mail's* treatment of Lucy Meadows. In December 2012, Richard Littlejohn, the outspoken columnist, published an article concerning the decision by St Mary Magdalen's primary school in Accrington to notify parents in a newsletter of teacher Nathan Upton's forthcoming gender reassignment to become Lucy Meadows.

Alongside a pointed refusal to acknowledge Miss Meadows as female, Littlejohn attacked both the school and Meadows, in particular, for the 'devastating effect' that the surgery would have on her class:

Why should they be forced to deal with the news that a male teacher they have always known as Mr Upton will henceforth be a woman called Miss Meadows? ... The school shouldn't be allowed to elevate its 'commitment to diversity and equality' above its duty of care to its pupils and their parents. It should be protecting pupils from some of the more, er, challenging realities of adult life, not forcing them down their throats. These are primary school children, for heaven's sake. Most of them still believe in Father Christmas. Let them enjoy their

*childhood. They will lose their innocence soon enough.*²

There followed a period of intense media interest during which Miss Meadows complained of press harassment and, on 19 March 2013, she was found dead in her home. Immediately afterwards, a campaign was launched demanding that Littlejohn be sacked for his rough treatment of Miss Meadows.

Yet it is doubtful whether the proposed Leveson regulator could have prevented or else provided compensation for the obvious intrusion into Miss Meadows' private life and attack on her dignity resulting from either the original *Daily Mail* article or subsequent press coverage that resulted from it, as I will now discuss.

Privacy and the public interest

As is well-known, the House of Lords decision in *Campbell v MGN*³ established the misuse of private information tort by which an individual may apply to court for an injunction to prevent private information being disclosed, or damages where that information is already in the public domain. There are two parts to the test: first, the individual must establish that the publication (or intended publication) discloses information raising a reasonable expectation of privacy. Secondly, and only once the first part is established, the court must determine whether the public interest in the expression outweighs the claimant's privacy interest.

Newspaper stories concerning OMPs typically involve an element of public interest and may include some degree of criticism (which may appear excessive) and/or coverage that seems disproportionate — in tone, balance, or degree — to the public interest at stake.

Leveson's valuation of press partisanship echoes similar statements in the Strasbourg case law. The European Court of Human Rights (ECtHR) has consistently stated that journalistic freedom includes 'possible recourse to a degree of exaggeration, or even provocation'.⁴ In this regard, it has been said that 'journalists cannot be expected to act with total objectivity'.⁵ It has also been said that this includes discussing and disseminating information even

when it is strongly suspected that the information is false. These statements of principle accompany the familiar doctrine that:

*'it is ... incumbent on [the press] to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog.'*⁷

It is also well-established that Art. 10 protects 'not only the substance of ideas and information but also the form in which it is conveyed'.⁸

Similarly, the case law (both domestic and at Strasbourg) also emphasizes the limited capacity to interfere with speech concerning a matter of public interest. It is, for example, well-established that there is 'little scope' to restrict political expression (or other discussions of public interest); that exceptions to this rule should be 'construed strictly' by the domestic courts; and any interferences with such expression should be convincingly established.⁹ The Supreme Court has similarly stated that where the publication concerns a matter of public interest, Article 10(2) 'scarcely leaves any room for restrictions on freedom of expression'.¹⁰

This narrow approach can also be seen in the Press Complaint Commission's (PCC) approach to adjudication, in which the existence of a public interest in the story often features as a reason not to penalize the newspaper concerned, regardless of whether the relevant clause in the PCC's Code of Practice contains an explicit public interest exception or not. This can be seen, for example, in the PCC's approach to Clause 12 (discrimination), which states that 'the press must avoid prejudicial or pejorative reference to an individual's race, colour, religion, gender, sexual orientation or to any physical or mental illness or disability'.

The PCC's previous adjudications relating to Clause 12 in the context of transgender complainants are not particularly favourable, and complaints about insensitive disclosures in discussions concerning a matter of public interest have been dismissed. For example, in *A woman*,¹¹ the subject of a story

entitled, 'Girl cop has truncheon op to become a PC! ... as male cop worker goes the other way and gets his own personal loo' complained that the publication of her personal circumstances, her photograph, name, employment details, and partial address was intrusive and that her health had suffered as a result of both the article and persistent attempts by the reporter to obtain an interview. In dismissing the claim, the PCC relied on its previous rulings that 'the reporting of facts relating to the appearance of individuals is not intrinsically intrusive' and that the publication of photographs taken in public did not breach the Code of Practice. Neither did it find the expression to be pejorative or prejudicial nor intrusive or discriminatory. Similarly, in *A man*¹² and in *Ms Keira McCormack*,¹³ the PCC went further to find that the respective discussions of transgender procedures were matters of public interest by virtue of the public nature of the respective complainants' employment: in *A man*, the complainant was an employee at a state mental hospital (but, it was alleged, he had had a relationship with Peter Sutcliffe prior to his procedure); in *Keira McCormack*, the complainant was a rape counsellor. In neither case is the relevance of the complainants' transgender procedure obvious either in the offending report or the PCC's decision, yet it may be said that the editorial decision to focus on this particular aspect falls within the domain of press partisanship.

In keeping with these PCC decisions, the domestic case law evidences a generous approach to the definition of public interest in privacy-invasive expression. Thus, it has been said that newspapers have a freedom to criticize 'the conduct of other members of society as being socially harmful, or wrong'.¹⁴ The Court of Appeal recently endorsed this view, describing it as 'powerful'.¹⁵ This reasoning has either been applied directly or otherwise mimicked in other recent decisions.¹⁶ It has also been said that newspapers are entitled to set the public straight where a public figure acts inconsistently with a previous statement about their private life. There is no apparent threshold to this right, as demonstrated in *Ferdinand v MGN Ltd*: since Premier League footballer Rio Ferdinand had given the impression in his autobiography that he no longer cheated on his wife, the press were entitled to correct this misinformation on discovering that Ferdinand had had an affair.¹⁷ The Court in that case (as in others)

also endorsed the media's right to criticize 'role models' who fail to live up to expected standards of behaviour (defined by the courts as a public figure holding 'a position where higher standards can be rightly expected by the public').¹⁸ The domestic courts employ the Council of Europe's broad definition of a public figure: 'persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or any other domain.'¹⁹

These cases seem to establish that, as a result of being a public figure, an individual may be entitled only to a reduced or modest level of privacy (although most likely only if they are deemed to be a 'role model')²⁰ but also that critical discussion of a public figure is a legitimate discussion of public interest. This follows from the judicial view that commentary on a public figure's suitability for their role is a matter of public interest. In *Ferdinand* it was stated that:

*'While I accept that the subjective perception of a journalist cannot convert an issue into one of public interest if it is not ... the Court's objective assessment of whether there is a public interest in the publication must acknowledge that in a plural society there will be a range of views as to what matters or is of significance in particular in terms of a person's suitability for a high-profile position'*²¹

Of course, this statement suggests that debate about an individual's suitability for a role is reserved for high-profile positions, such as England football captain. In *McKennitt v Ash*²² (Court of Appeal) the term 'role model' was applied to more mundane roles, such as 'headmasters and clergyman, who according to taste may be joined by politicians, senior civil servants, surgeons and journalists'. These positions suggest a certain level of seniority is required, however, the reasoning in the later case of *Spelman* suggests it is the issue at stake rather than the profile of the position itself that dictates the relevance of discussing a public figure. In *Spelman* the Court concluded that the press could not be prevented from revealing that the son of MP Caroline Spelman had been banned from professional rugby for a period of time as a result of taking prohibited substances. Two distinct aspects of the public

interest emerge: first, that there was a specific public interest in discussing the effect of representing England at an early age (regardless of Spelman's relative obscurity as a sportsman)²³ and that there was a broader public interest in discussing his school's role in his progress (and his troubles) since 'public debate about how such institutions perform their functions with regard to children is important'.²⁴

Conclusions and implications

When considering the merits of a complaint, Leveson's proposed model of a regulator will consider whether the behaviour breaches its code of conduct in order to determine if an apology, correction, or penalty is appropriate. In doing so, it may take into account its own previous rulings and court decisions involving the misuse of private information tort.

It should be noted that the PCC's decisions are not binding on court decisions although they are regarded as persuasive. Leveson's regulator may choose to follow a similar approach. Consideration of how the regulator might decide a case such as Lucy Meadows' treatment by the *Daily Mail* provides insights into the prospective difficulties that an OMP might face.

There are a number of arguments drawn from the established case law that, when combined, support the view that the *Daily Mail* article on Miss Meadows concerned a matter of public interest that outweighed considerations of invasion of privacy. As noted above, the PCC has previously ruled that 'the reporting of facts relating to the appearance of individuals is not intrinsically intrusive'. Miss Meadows ought to have been able to establish a reasonable expectation of privacy in the information disclosed in the article, although this cannot be assumed. It is debatable whether the article reveals any information that is essentially private. Even if Miss Meadows could have established the existence of a reasonable expectation of privacy, the privacy claim might have been afforded a low valuation. The intrusiveness of the *Daily Mail's* behaviour to obtain the story is unknown. OMPs may be more sensitive to a feeling of intrusion caused by unwanted press

attention than a celebrity or other more established public figure. This may be taken into account by the courts, although the case law does not indicate particular sensitivity to this issue.

As a teacher, Miss Meadows could be termed a 'role model' or public figure, and therefore the discussion of her suitability for the role has legitimacy despite the fact that there is no suggestion of impropriety in her behaviour (whereas there was in *Ferdinand* and in *Spelman*). Alternatively, it could be said that it is the school's actions that constitute the issue of public interest (i.e., should a school notify parents of a teacher's gender transition through a newsletter?) and that, whilst the discussion of Miss Meadows is only tangential to that broader discussion, it is within a newspaper's editorial prerogative to determine the form of their contribution to that debate.

The case law relating to privacy is entirely fact-sensitive and, to some extent, the predictability of outcomes is affected as a result. However, the recent case law provides such flexibility for a newspaper to concoct a credible public interest argument, particularly where public figures are involved and discussions arise about the suitability of a particular individual for a particular position of employment.

Moreover, the treatment of press partisanship as a vital function of media freedom complicates matters. In Lucy Meadows' case, many readers may have found Littlejohn's viewpoint more troubling than the information revealed in the story. Here, though, the regulator is in an invidious position because the offensive opinion expresses a particular viewpoint, and as a result it may be difficult for the regulator to condemn the newspaper's insensitive reporting without appearing to penalize the partisan view that has been expressed. Penalizing the newspaper may

give the impression of requiring due impartiality, which obviously conflicts with the principle of partisanship. It is therefore difficult to foresee how Leveson's regulator will achieve his ambition of changing the problematic culture he observes in certain quarters of the press.

OMPs may be particularly vulnerable to the problematic behaviour that Leveson identifies — blagging, cajoling, or threatening in order to obtain an interview or private information, etc — since they are likely to have (a) less experience of or exposure to journalistic norms and (b) fewer resources to obtain advice (legal or otherwise), let alone initiate legal action in order to protect their interests. Moreover, even if they have access to a free service, they may not complain for fear of intimidation, retaliation, and so on, all of which Leveson recognizes in his report. The onus in such circumstances would be on the regulator to intervene, possibly unprompted by the individual concerned, and we should query how readily the regulator would be able to do so. The defence of press partisanship may also influence the regulator's approach to intervention.

In most cases of this type, there will be some public interest dimension to the story, even though that aspect may well be disproportionate to the sense of intrusion experienced by the member of the public. Yet legally and politically, the regulator may struggle to justify interferences with expression concerning a matter of public interest. Expressing viewpoints, even deeply unpopular ones, on a matter of public interest falls squarely within the domain of press partisanship — a concept that Leveson endorsed as a vital feature of press freedom.

Notes

- 1 See, e.g., Leveson Report, Part A, Chapter 2, [2.26]; Part B, Chapter 2, [5.7]; Part B, Chapter 3, [2.4]; Part B, Chapter 4, [3.3]-[3.5]; Part F, Chapter 6, [9.56]; Part I, Chapter 2, [2.16]; Part I, Chapter 8, [3.32]; Part I, Chapter 8, [3.48]-[3.50]; Part I, Chapter 8, [5.40].
- 2 Littlejohn, R. 'He's not only in the wrong body...he's in the wrong job', *Daily Mail* (21 December 2012).
- 3 [2004] UKHL 2 AC 457.
- 4 *De Haes v Belgium* (1997) 25 EHRR 1, [46]; *Prager and Oberschlick v Austria* (1995) 21 EHRR 1, [38].
- 5 *Selisto v Finland* (2005) EMLR 8; (2006) 42 EHRR 8, [63].
- 6 *Salov v Ukraine*, n 41, [113].
- 7 See, e.g., *Observer and Guardian v UK* (1991) 14 EHRR 153, [59].
- 8 *Nilsen and Johnsen v Norway* (2000) 30 EHRR 878, [43].
- 9 See, e.g., *Salov v Ukraine* (2007) 45 EHRR 51, [104].
- 10 *In Re Guardian News and Media Ltd* [2010] 2 WLR 325, [51].
- 11 <http://www.pcc.org.uk/news/index.html?article=MjA5Mg>
- 12 <http://www.pcc.org.uk/news/index.html?article=NDI1Nw>
- 13 <http://www.pcc.org.uk/case/resolved.html?article=NjEyNw>
- 14 *Terry v Persons Unknown* [2010] EMLR 16, [104].
- 15 *Hutcheson v News Groups Newspapers Ltd* [2011] EWCA Civ 808, [29].
- 16 *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB); *Goodwin v News Group Newspapers Ltd* [2011] EWHC 1437 (QB), [133]; *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB), [78]; *McClaren v News Group Newspapers Ltd* [2012] EWHC 2466 (QB), [19]; *Spelman v Express Newspapers Ltd* [2012] EWHC 355 (QB), [105].
- 17 *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB), [84]-[86].
- 18 *A v B plc* [2003] QB 195 [11(xi)].
- 19 Council of Europe under Resolution 1165 of 1998.
- 20 See, e.g., *Ferdinand*.
- 21 *Ferdinand*, [64].
- 22 [2008] QB 73 CA, [62].
- 23 *Spelman v Express Newspapers* [2012] EWHC 355 (QB), [72].
- 24 *Spelman*, [105].



The Foundation

The mission of the Foundation is to study, reflect on, and promote an understanding of the role that law plays in society. This is achieved by identifying and analysing issues of contemporary interest and importance. In doing so, it draws on the work of scholars and researchers, and aims to make its work easily accessible to practitioners and professionals, whether in government, business, or the law.

Paul Wragg is a lecturer at the University of Leeds, having previously lectured at Durham University and having also taught at the University of Birmingham. He is a qualified solicitor and practised across the country prior to his academic career. His research interests lie in free speech theory and its application to contemporary legal problems, particularly the judicial treatment of privacy and the media. He was shortlisted for the Society of Legal Scholars Best Paper Prize in 2012 and, in the same year, was appointed as an Academic Fellow of the Honourable Society of the Inner Temple.

For further information please visit our website at www.fljs.org or contact us at:

The Foundation for **Law, Justice and Society**

Wolfson College
Linton Road
Oxford OX2 6UD

T · +44 (0)1865 284433

F · +44 (0)1865 284434

E · info@fljs.org

W · www.fljs.org

The logo for the Foundation for Law, Justice and Society (FLJS). It features the letters 'FLJS' in a large, bold, sans-serif font. A small '+' sign is positioned between the 'J' and 'S'. The logo is rendered in a light orange color against a dark red background.

www.fljs.org