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'REALITY REGULATION': A lecture by Sir Alan Moses

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Most of us like to declare an ability to tell the difference between right and wrong, and, if pressed by some hawk-eyed, cross-examiner like Steve Hewlett, the capacity to draw the line between good and evil. Many of you with your knowledge of Syriac and 2nd century CE Persian history might have a *penchant* for the certainties of the prophet Mani, professing a belief in a rigid dualism between good and evil, locked in an eternal struggle. For Mani and the followers of Manicheism, there are no 57 shades of grey, there are no shades at all and each question, each problem in life, must be resolved without regard for nuance or, heaven forfend, flexibility on a clear black line, drawn boldly and with conviction, between good and evil.

How comforting it is that the prophets, even those who had been flayed alive and decapitated, whose skin was then filled with wind and hung outside the gates of the great city of Jundishapur, like Mani, return to us in the 21st century to preach their straight and unyielding gospel, with nothing to blur or smudge the boundary of good and evil in that unlikely corner of a modern field, the revolutionary arena of press regulation. Press regulation does not promise to be fertile ground for Manicheism. Press regulation has, I suggest, more than a hint of the oxymoronic, on the one hand asserting that a worthwhile press must be freed from control of expressions of thought and of belief, whilst accepting submission to the control and authority of a regulator…yes, free, but only so far. And how far is that? How much is enough press regulation? This evening I want to consider the question of how far IPSO has gone and how far it will go in an attempt to begin to answer the fraught and controversial question: how much is enough regulation?

But I ought to make a confession at the outset: I shall only grope towards an answer although the tight-knit group of Manicheist critics are confident that they know the answer already. However halting the progress of others in seeking to achieve the purpose of press regulation, they *know* how it should be done.

After all, in a broad sense, theorists and practitioners can at least agree on an objective for press regulation: to protect the public from abuse…the abuse of inaccuracy and distortion, the abuse of intrusion or invasion into personal dignity, and of harassment. And while we at IPSO develop and practise a system designed to be practically effective in achieving that aim, I can surely sometimes be permitted an occasional sneaking envy for those who have the happy privilege of devising a system of regulation in *theory*.

Effective regulation requires enforceable powers. Enforceable powers require a legally binding contract enforceable in court. Effective press regulation will require a contract, an agreement between the regulated and the regulator. Press regulation requires powers to be conferred on the regulator which are enforceable in a court of law, and obligations or duties to be imposed on the regulated which are enforceable in a court of law. And that can only be achieved by a contract between those who choose to be regulated and the regulator. I say only…that is not accurate…there is another way of conferring powers and imposing obligations, and that is by legislation, by statute. Of course you could have a statute creating a regulator, but how do you impose and enforce obligations on the part of the press if you legislate?…only by licensing, by saying you must not publish save under license…and even the most rabid *dirigiste* regimes, who might, unlike any civilised democracy, regard licensing as acceptable, learn that that this simply will not work. And I sometimes feel, as IPSO goes about its work, that those who cry that its regulation does not go far enough, either structurally or in practise, will not spell out or face the stark truth, …that in relation to enforceable regulation of the press there are only three choices….no regulation, licensing under statute, or an agreement enforceable in a court of law. Even those who

argue for fiercer sanctions to persuade the press to submit to the system they advocate must recognise that any system which depends upon agreement and not compulsion does depend upon *persuasion,* persuading the press that it is in their own interests to agree, and not upon coercion.

A contract requires both parties freely, voluntarily, to agree to be bound by the terms set out in that agreement, and that sadly is a point where virtual reality must yield to reality. It is not enough to complain that the press refuses to agree to what the believers in ideal regulation want them to agree; they had to be persuaded to do so.

The protest that *you the press had failed to do what Leveson required,* although true, diverted attention from two important features, two undeniable features of what occurred after the first part of the inquiry was finished. The first is that the press, the vast majority of the press, did sign up, for the very first time, to an agreement with a putative regulator; there was, after

all, no obligation for them to sign up to anything, still less to submit to obligations which required them to obey the requirements of a regulator…it was, as it remains after the contracts have expired, a matter of choice…the second feature which follows from the first is that all those who signed up wanted to know, with some precision, what they were signing up to. If, as was the case, the vast majority had been neither the cause of the public outrage which led to the inquiry and were unlikely, save to a minor extent, ever to be affected by regulation, they were signing up for no other reason than a sense of loyalty and community, rare sentiments within the highly competitive and ferocious rivalry within the world of newspapers. All the more reason, then, that these high-minded, altruistic sentiments should not lead them to signing up for more than they had, quite literally, bargained.

Publishers wanted to know what they were in for, and so they drafted the terms of an agreement which they understood the vast majority of publishers were prepared to live with, without the involvement of IPSO, which had not yet been formed. The publications prepared to submit to enforceable regulation came from a widely differing and above all competitive crew, of different sizes with different constituents and different interests. Submitting to enforceable regulation under contract was for the vast majority not triggered by anything they had done or brought upon themselves. The excesses of illegal process, the cruel invasions and bullying pre-judgment which had prompted the inquiry were miles away from anything in which the vast majority of publications, for example the magazines and local newspapers, had participated, let alone sanctioned or condoned. Yet they were persuaded that even in *their* cases it was in their interests to support and join a process designed to provide some protection for the public and build some authority for themselves.

The criticism that the vast majority of newspapers who had signed up, were not doing what Leveson wanted, overlooked the fact that they were, in an important respect, doing *precisely* what he wanted…choosing to enter into an enforceable agreement to a system of regulation which bound them to certain obligations. Choice lies at the heart of press regulation: a choice as to those obligations to which they would submit and which they would reject. In reality, it was for the press to say how far they were prepared to go.

The press has been prepared to go as far as an Editors' Code, a Code which set the standards they are prepared to abide by, and to submit to a set of regulations which the regulator IPSO operates by contract to police and monitor compliance with standards set out in the Editors' Code. The consequence of the fact that the enforceable powers of IPSO and obligations of those they regulate stem from contract is that any change has to be negotiated. It follows that if a regulator were able to change its own regulations unilaterally (without the agreement of the press), as our detractors insist IPSO should be able to do, its powers would not be

enforceable in a court of law. If the regulator then insisted on a front-page correction there would be nothing to stop an editor ignoring the requirement. This had been a fundamental flaw in the old informal arrangements with the PCC.

No agreement can be changed unilaterally…change of the rules, like any change of any contract, requires the consent of all the parties to the agreement; it requires negotiation and persuasion. It will not be achieved by accusing the other side of bad faith and chicanery.

Before and after I was appointed, I said that it did not seem to me that the rules were sufficient to achieve effective regulation. I was told in clear terms not only by members of the press but by IPSO's critics that those with whom I would have to negotiate would not agree; that there would be no outright refusal straightaway but that obfuscation and delay would prevent any serious change.

After a number of months of negotiation, substantial changes were agreed. Of course, I would have wished it to be speedier but when you recall that many of those who had to be persuaded to agree to change had already agreed to a detailed set of rules which were of little direct concern to them, it is not surprising that they needed substantial persuasion. But by a large majority they *did* bow to IPSO's judgment as to what changes were needed to be more effective.

Needless to say, before anyone had had the opportunity to read or consider them with care, the critics announced in those familiar crabbed tones that they were trivial. That is not true, they reinforced our independence, placing detailed rules for the consideration of complaints entirely within IPSO's own power, whereas before, the rules were either silent or part of the contractual terms. The changes were coupled with the announcement that the budget for the life of the contract with the press had been negotiated and fixed. No longer was it necessary to go cap in hand, as had previously been the case with the PCC, to ask, sometimes on

a monthly basis, for funds. We negotiated what was necessary to be effective for the full life of the contract until 2020, with consequential changes to the rules…we determined what our staff and our Board and our Complaints Committee should be paid without any outside influence; in short, we now have sufficient and effective financial autonomy…this was regarded as a core feature of independence in the Leveson report and it has now been achieved.

The changes have brought new powers to investigate where there has been no complaint. We have introduced a new sanction in relation to reporting. Every publication is required to report annually with information on its internal procedures for complying with the Editors' Code, the number of upheld complaints and the steps it has taken in response to those upheld complaints, with a view to avoiding similar breaches in the future. The new rule confers power on IPSO by way of sanction to require a publication over a fixed period to submit quarterly reports, containing more detailed information.

The most trumpeted and least effective set of rules were those which concerned a standards investigation designed to enable IPSO to launch an enquiry into serious breaches of the rules with the possibility, should such breaches be found, of fining a publication up to a million pounds – this was blazed across the press as an example of the gravity and rigour of the new system. This boast was matched by criticism that it was hedged about with an abundance of opportunity for any target of such an investigation to impede its progress. I myself never saw how much an investigation could be launched in any sensible way since on each occasion it would have been necessary for the appointments panel to appoint investigators before the inquiry could be launched, a process requiring advertisement, interview and appointment on each occasion. There were also byzantine evidential rules that permitted the target to refuse to hand over anything which might incriminate the publication being investigated.

The procedural rules *have* now been changed…there is now far less room for manoeuvre to delay an investigation, or question the power to launch it in any particular case. The guidance as to the financial sanctions comes from IPSO and not from the regulated.

I believe the changes which have now been agreed and are in force are those needed to make IPSO more effective. And whilst no doubt they will continue to be subject to scrutiny, criticism grows increasingly remote from the reality of day-to-day regulation, from real protection of a public in IPSO's daily dealings with the vast majority of the press: 86 publishers, over 1,100 print titles, 1,500 websites and 90% of national newspapers measured by coverage, almost all local newspapers and all the major magazine publishers.

In 2015 we received 12,276 inquiries, but only a third of these could possibly have formed the basis of a finding that the Code had been breached…complaints that the colour supplement had not been delivered, whilst deeply felt, were outside our jurisdiction and it hardly helps the public to have to send the by no means miniscule numbers of complaints about the Guardian back to the Guardian.

In 2015, 45 cases were upheld, although this represents a much larger number of complaints because for any one article there may be hundreds or thousands of complaints. Sixty-one cases were resolved to the satisfaction of the complainant with the help of IPSO's mediation between publication and complainant…a total of 106 compared to the 137 complaints found not to have been in breach…201 were resolved directly with a publication. There is a danger in a misleading focus on numbers. The number of complaints upheld, as opposed to rejected, is, in a superficial way, used as some measure of success…it is no more a gauge than the number of acquittals in criminal trials, or the number of refusals in claims for judicial review.

It has become clear that there has been a dramatic improvement in the time it takes for a newspaper to deal with and resolve a complaint with a member of the public. The newspaper has a maximum period of 28 days to attempt to resolve a complaint of a breach of the Code directly with the complainant; in the days of the PCC where there was no fixed time limit, when the PCC had no powers enforceable in a court of law, and was owed no legally enforceable obligations by the newspapers, publications believed that they had only to obfuscate and draw out the complaint for it finally to go away. Time, and delay, as they have now learnt, merely corrode and gnaw away at the public's grievance…speedy resolution on the other hand can bring a welcome and not oppressive satisfaction.

It is also important not to overlook the power that has never before been available, the power to dictate which correction should be published, the words which should be used, where the correction should be put and how it should be presented, in which font size and with which headline. We have, in the past, not always got it right in how a ruling is published….we failed to specify the font size of the headline when we compelled the newspaper to print our 300-word upheld adjudication on a particularly foul set of insults to a parliamentary candidate by Rod Liddle in the Sun…when he tried to correct it he only made it worse and the final correction was too small.

But we are learning our lessons, and when we are told that our nine front page notices of correction are inadequate, it is as well to recall that never before have there been any front page corrections dictated by a regulator…ever. For the first time newspapers are required under their imprint, under their banner in their daily or Sunday edition, what we the regulator require them to print…the correction is not their story - it is ours. The daily process, still important, still significant and startling, of filling blank pages with stories to complete a newspaper, be it to your taste or not, is now subject to compulsory intervention by us at IPSO…a legally enforceable process of regulation.

But if we concentrate too much on the resolution of complaints, we divert attention from the developing functions of the true regulator that IPSO has become, setting up and conducting a pilot scheme for arbitration to which all the national newspapers we regulate belong, sending out each week *private advisory notices,* which daily protect those who do not wish to speak to or be approached by the press. They work, in reality. Our standards section receives and scrutinises the annual statements which each publication is required to submit. For the first year, September 2014-December 2014, every publication submitted a report as required. For the following year, January-December 2015, there are only four magazines and two other stragglers as of today. And I expect them to be brought into line soon… All the national press we regulate have complied. We should not forget that this process of accountability with each newspaper required to report to us has not previously taken place. The very fact of having to give an account is novel and is salutary; they are answerable to us for the number and type of breaches, for what they have done to avoid repetition and for their internal structure for dealing with them. They are published and can be found for each publication, large or small, on our website. This a realistic process of giving account; free from a defensive secretive approach that attack and confrontation in regulation is bound to engender. It is easy to say as an ideal that we would like publication of every allegation of breach, whether upheld or whether settled. But if that was the requirement the incentive to refuse to settle would be paramount, the urge to prevaricate and obfuscate would return and where then would the public be served?

Our standards department exemplifies what distinguishes a body which merely deals with complaints and a proper regulator. Its aim is to draw on our experience of complaints, consider those issues which are of widespread significance and prove most intractable…the unnecessary identification of trans-gender, the use of language which lacks proper sensitivity, the extent to which the reporting of inquests into a suicide is excessive and in breach of the Code, patterns which require further debate and consideration at meetings between our standards section, those concerned to protect minorities who wish to explain and

protect their interests and representatives of the press. By these means IPSO, through its standards arm, can provide a growing resource for journalists and those affected by what may often be abusive insensitivity as to how best to treat others with respect and dignity. It is, of course, true that newspapers assert the right to show whatever lack of taste or decency they wish; there is no rule within the Code which requires either taste or decency. No-one who cares about journalism, who wishes to see the press survive, really wants a press tiptoeing about with dainty feet so as to avoid trampling on some well-cultivated bed of taste or decency. We have never had such a press…do not be fooled by nostalgia for a golden age that has never existed, but occasionally, just occasionally, readers, if not editors, may learn from a Roman poet: "*Quid rides? Mutato nomine de te fabula narratur*" …what are you laughing at? Just change the name and the story is about you.

Unattended language can be as dangerous as unattended luggage. So often, cruelty and the abuse arises out of unimaginative ignorance and the forum our standards section provides between trans-gender groups, those concerned with youth justice and others who seek to protect minorities who value their difference, provides a powerful means of improving respect and understanding and feeding, with its experience of our work, into improvements in the Editors' Code.

That title forms a suitable post for whipping. The very name *Editors'* Code jars for those who regard most but not all editors as second only to the true pantomime villain, the newspaper proprietor. If it is the Editors who themselves set the standards by which newspapers agree to abide, they must self-evidently, so it is alleged, afford inadequate protection.

In my salad days, when I was green in experience of press regulation, I thought: should not the regulator be in charge of setting the standards? After all, many, if not most of the statutory regulators, doctors, nurses, midwives, vets, lawyers, set the standards and then police them. But that type of regulator is miles away from press regulation which depends not on policing some statutory gateway into entry

into a profession, but on the voluntary submission to a set of standards and to a set of rules by which they are to be monitored. There is no profession of journalism or editorship which permits standards of entry or, perhaps more importantly, expulsion.

I admit I am far less sure as to who should *own* the Code. My and the Chief executive's membership of the Editors' Code Committee, with David Jessel, from IPSO, and two other independents, gives the opportunity of seeing how it works in practice. There will be a new round of consultation starting, I hope, at the end of this year, since the previous round of consultation which resulted in changes this year was not one in which IPSO, as yet unformed, had participated. The standards cannot be changed without IPSO's consent.

My experience has made me far more agnostic as to whether there should ever be anything other than the Code of the Editors; it is after all *they* who are responsible for what appears in the newspaper, for the content, for what they put in and equally important what they omit, for the taste, the bias, the unfairness, the bullying, and the cruelty OR for the persistent investigation in the face of obstruction and protest from the powerful, from government, from the police and from community representatives (I am thinking of Andrew Norfolk's resolution for four years in the teeth of obstruction at Rotherham), for the sympathy, for the revelation which can change people's minds and change people's hearts, in short, the tone and taste of the story. It is therefore, perhaps, and please note my continuing uncertainty, appropriate that Editors' should set the standards. If the standards are those for which the Editors are themselves responsible, there is far less room for recalcitrant manoeuvre when IPSO can say "you set the rules, you obey them".

But does IPSO's regulation go far enough? How will its effectiveness be recognised, when both those it regulates and the vast majority of those it does not

(including the Guardian and the Financial Times) refuse to join a regulator who seeks recognition from the Charter recognition body? Recognition of a regulator is designed to give some assurance to the public that the aims and objectives of the regulator are being fulfilled. The public is in a difficult position to judge; someone must do so on their behalf. There can, or at least should be, no objection to the principle that the public needs to be told how a regulator is doing; is it doing any good? Now the last thing I or IPSO wants to do is to enter into what I have more than once described as the theological debate about the Charter and the Charter Recognition body. I refer to them only to emphasise that the debate and working out of how recognition might be achieved, what the consequences as a practical matter of not belonging to a recognised regulator will be, if any, have gone on and on and I fear will go on and on. They are fascinating…to some people. But in the meantime somebody has to get on with the reality of press regulation. It is perhaps better to focus on the purpose of recognition, to ensure that what is recognised is a body that is working…to recognise something that is not, in reality, performing the function of regulation seems a curious triumph of form over reality. Is *virtual* regulation as opposed to the reality of regulation what the public really deserves or needs?

But we *need* and the public *deserves* an independent assessment. Sir Joseph Pilling, the former permanent secretary at the Northern Ireland office, has been appointed by IPSO's independent Appointments Panel to conduct an independent assessment of what we have done and what we ought to be doing, which will be published as his report.

You can foresee, already, the yelps of criticism should there be the slightest suggestion from Sir Joseph that IPSO is anything other than the failure they predicted.

Sir Joseph will independently scrutinise what we actually do. Daily complaints are scrutinised by complaints officers, summarised in a report and, save for those where there can be no question of a breach, circulated amongst all 12 of the Complaints Committee each week. Their written comments are then themselves circulated…where no agreement is reached or the case has some implication of significance it is remitted to the monthly Committee Meeting for resolution.

It is at these meetings that it is possible to observe how achingly difficult some of the judgements prove to be. There is frequently no clear answer as to whether the process of writing what is so accurately described as a *story* in a newspaper amounts to inaccuracy or distortion, whether it fails to draw a clear line between fact and opinion, whether the process of subterfuge is justified and proportionate, whether indeed it *is* subterfuge, whether there is a reasonable expectation of privacy, whether the circumstances are private at all, whether a bogus issue of public interest has been created, or whether there is a genuine issue to be aired which trumps the breach of privacy, the extent to which any identification of one who is under 16 may be in the public interest, and whether the report of a public inquest, of evidence in a public court, should nonetheless be suppressed in the interest of protecting those most closely concerned from intrusion into their grief, or of protecting others who might seek to copy a method too closely described in a public court.

Forgive the breathless summary, *there are no clear-cut and certain answers even in an ideal world of wholly good and rational men* …although others who do not have to make the decision will tell you it is all too obvious…to the disappointed complainant, to the recalcitrant newspaper, both furious that their obvious answer has not been acceded to by the Complaints Committee, there is a clear black line which, according to which the side you are on, has plainly been crossed…or not. After all, everyone agrees that there is a line….it is finding it which is the problem. The anger of the disappointed complainant is matched in righteous indignation only by the pomposity of the letters from their lawyers and the sensitivity and

thinness of the skin of a newspaper found to be in breach. There is nothing, I suggest, that a newspaper or its editor dislikes more than to be compelled to publish a correction of a story which it has judged to be legitimate.

This is no bad thing. The newspapers' resistance and reaction are understandable. It underlies the significant nature of the power that IPSO now exercises.

Accusations of lack of independence become almost as monotonous as they are ill-founded. But I am, perhaps, permitted to sound a trumpet call *piu forte* on behalf of others. It is ignorant and absurd to call our decisions other than the product of hard-fought conscientious and reasoned debate, whether conducted by those who fall within what are so misleadingly described as the majority lay members of the committee, or those who are nominated by the different sections of the press. I have spent more than twenty years arguing with fellow judges as to the conclusions which should be reached and what reasons might justify those conclusions. The reports of our complaints executive, the final discussions and decision-making of our committee of 12, yield nothing in the exercise of independent judgement when compared to judges. But if I were them I *would*, in a measured and temperate way of course, deeply resent anyone who suggested to the contrary, that somehow this process was tainted by the control of those we regulate. You may not agree with the result but the process by which it is reached daily by staff, weekly or monthly by committee, is a proper example of measured and proportionate independent regulation.

None of this is likely to, nor I believe, can, guarantee that the abuses of the past will not be repeated in the future…the moment I announce a triumph, you can guarantee disaster will follow. But what I do believe is that dogma, the belief that there is good regulation and there is evil regulation, the Manicheist view of regulation, is wrong and will not succeed in the primary aim of regulation which is

to provide some protection for the public and, in the long term, moderate the behaviour of the regulated.

And I also believe that we still need newspapers, and printed newspapers with their geography, their serendipity and their smell… perhaps, as the Guardian said on the tragic demise of the printed Independent, more than ever…we need verifiable reliable sources of news and we need journalism…and that is not the same as the outpourings of flatulent trolls who feel free to disseminate whatever they like, but say nothing. Regulation needs to do what it can to underline the importance and authority of journalism…of course there is a price to pay, the cost is that newspapers will do what they have always done, pander to the prejudice of their reader whose tastes and interests in stories it is their skill to anticipate...that is, after all, what we both love and loathe about them…if they repeat what we think they are respectable and worthy, then we will read them and support them. If they publish what we find trite or even hateful, above all what we ourselves do not accept or believe, we will condemn them. Our views of the newspapers depend upon our own views...and they are as crooked as the *crooked timber of humanity from which no straight thing was ever made*. When you look at the ideal of virtual regulation and compare it with the reality of regulation, it is as well to remember Montaigne: *the taste of goods or evils doth greatly depend on the opinion we have of them,* because, after all, we have to admit, we love a story, we love a story because it excites, amuses and titillates our fancy, we love stories which cultivate our own prejudices and our own beliefs, above all we love stories because they are not boring…and there we find the source of the problems with which we at IPSO daily wrestle ….nobody promised that the truth would be interesting.