# Editor's Note

## Super Injunctions—Curiosity-Suppressant Orders Undermine the Rule of Law

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The term "super injunction" refers to an order restraining a person from doing something and, additionally, restraining that person from publishing, or informing others of the content of the order and of the fact that the order was made. The recent Trafigura affair brought this type of order into the open and has caused alarm about the implications of secret proceedings for the proper administration of justice. In an attempt to allay public concern the Lord Chief Justice, Lord Judge C.J., expressed surprise at suggestions that the super-injunction was a new order. He went on to explain that such orders were made in circumstances where secrecy was required in order to ensure that the administration of justice was not frustrated. As an example he mentioned the situation where a search or freezing order was made against one party and secrecy was ordered to ensure that others who were about to be subjected to similar orders were not alerted (Lord Judge C.J., Society of Editors Annual Conference, November 16, 2009).

There is indeed nothing of concern in the kind of situation mentioned by the Lord Chief Justice because secrecy in such cases is only temporary. Once all the intended parties have been served, the purpose of secrecy will have been achieved and all would be free to publicise the proceedings (see *LNS v Persons Unknown* [2010] EWHC 119 (QB), [137]–[142]). The situation which has given rise to public concern and alarm is quite different. It involves orders which restrain a person from publishing certain information and from publishing or communicating the existence of the order indefinitely. It is said that newspapers have been made subject to some 200 such orders in recent years, though given the secrecy shrouding such procedure it is difficult to have reliable information.

Before considering the legal basis and justification for super injunctions it is as well to remind ourselves of the principle that is undermined by such orders: that justice must be dispensed in the open. English law recognises that it is, "of

fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done''.[1] The publicity principle is one of the cornerstones of the administration of justice. ''Publicity'', Bentham wrote:

> ''[I]s the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.''[2]

Exposing the judicial process to public gaze is an important safeguard against bias, unfairness and incompetence. Lord Diplock observed that if:

> ''[T]he way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice.''[3]

Lord Woolf MR took this further when he said in *R v Legal Aid Board ex p Kaim Todner* [1999] 1 QB 966, at p 977:

> ''The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice.''

Publicity is indispensible in a system governed by the rule of law. There is no rule of law without an effective judicial system that is capable of enforcing rights. The effectiveness of the judicial system as the final guarantor of rights crucially depends on the extent to which it can command respect and confidence. However, respect and confidence can only be maintained and thrive where the administration of justice is transparent, comprehensible and accountable.

Transparency of court proceedings reduces the scope for ill-informed and malicious criticism of judicial decisions, thereby protecting the judiciary itself from obloquy. Publicity contributes to the determination of truth by encouraging people with relevant information to come forward and by discouraging falsehood.[4] By bringing into the open moral, social and legal issues, open justice promotes public debate that is so important to the democratic shaping of the law. Lastly, the sight of effective and fair proceedings tends to enhance public confidence in the administration of justice and thereby promote

[1] *R. v Sussex Justices Ex p. McCarthy* [1924] 1 K.B. 256 KBD at 259. See also *Scott v Scott* [1913] A.C. 417 HL at 477.

[2] Quoted by Lord Diplock in *Home Office v Harman* [1983] 1 A.C. 280; [1982] 2 W.L.R. 338; [1982] 1 All E.R. 532 HL at 537.

[3] *Attorney General v Leveller Magazine Ltd* [1979] A.C. 440 HL at 450; [1979] 1 All E.R. 745 at 750. See also *Home Office v Harman* [1983] 1 A.C. 280 HL at 303; [1982] 1 All E.R. 532; [1982] 2 W.L.R. 338.

[4] *R. v Legal Aid Board Ex p. Kaim Todner (A Firm)* [1999] Q.B. 966 CA (Civ Div) at 977; [1998] 3 W.L.R. 925; [1998] 3 All E.R. 541 at 549–550.

respect for the law and its institutions. Given these considerations, it is only to be expected that the principle of publicity should be regarded as indispensable in any well-governed democratic society. The European Court of Human Rights (ECtHR) has similarly recognised publicity of court proceedings as fundamental for the protection of litigants from the abuse of procedural rights which, in conditions of secrecy, may go unchecked.[5]

The principle that justice should be public has two distinct aspects: a public aspect and a party aspect. The public aspect implies that members of the public have a right to attend court proceedings, subject to practical limitations of space and good order, to inspect certain court documents and to publish what has passed in open court. Thus s.67 of the Senior Courts Act 1981 states:

> "Business in the High Court shall be heard and disposed of in open court except in so far as it may, under this or any other Act, under rules of court or in accordance with the practice of the court, be dealt with in chambers."

The words "in court" mean "in open court", at a place which the public and the press are entitled to attend (see also CPR r.39.2 and CPR r.32.2).[6] Although publicity is fundamental to the proper administration of justice, exceptions may be made when justice so requires, as CPR r.39.2 makes clear. The party aspect of the publicity principle finds expression in European Convention on Human Rights (ECHR) art.6(1), which also makes room for exceptions. It states that everyone is entitled to a public hearing but goes on to say that judgments:

> "[S]hall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Thus, both under English law and under ECtHR law exceptions are allowed. CPR r.39.2(3)(g) states that a hearing may be in private if the court considers this is necessary in the interests of justice. Other subrules list the following situations as justifying curbs on publicity: where publicity would defeat the object of the hearing; the hearing involves matters relating to national security; it involves confidential information which may be harmed by publicity; a private hearing is necessary to protect the interests of a child or a protected party; a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing. Finally, CPR r.39.2(4) states that the court may order that the identity of any party or witness must not be disclosed if it considers this necessary in order to protect the interests of that party or witness.

As these legislative provisions show, there are circumstances in which publicity may be cut down. However, they also suggest that some degree of transparency must be maintained because the exceptions mentioned in the rules envisage only limited or partial derogation from publicity. As already noted,

[5] *Axen v Germany* (A/72) (1984) 6 E.H.R.R. 195 at [25] ECtHR.
[6] *R. v Lewes Prison (Governor) Ex p. Doyle* [1917] 2 K.B. 254 at 271.

where publicity would defeat the object of a hearing by alerting a party to an impending search or freezing order, an embargo may be placed on publicising the order. But this embargo will last for a short time only, because once all the intended parties have been served the proceedings may become public. Where proceedings involve matters relating to national security, or confidential information, or patented industrial processes, only the information deserving protection would normally be screened from the public, not the entire legal process, and certainly not the fact that a process has taken place. Thus, for example, in patent litigation the technical details of a disputed process would not be discussed in open court and would be omitted from the judgment that is handed down in public. But other parts of the proceedings and of the judgment will be made public. Similarly, the identity of a witness or a party may be kept secret to protect the party or the witness, but again, the proceedings and the judgment would be otherwise open to public view. What the English administration of justice has not allowed is for the entire legal process to be conducted out of the public view and for its very existence to be kept permanently secret under pain of contempt.

Yet it seems that such a process is now taking root. If accounts in the media are correct, a pattern of completely secretive proceedings is developing, which appears to take the following form. An applicant—fearing that a media organisation is about to publish information that is confidential, or private, or defamatory—seeks an interim injunction restraining publication. Having convinced the judge that an order suppressing publication is justified, the applicant seeks a further restriction in the form of an embargo on the existence of the order. In support of the embargo the applicant maintains that if it became known that the applicant obtained a restraining order, public curiosity would be stimulated and others may succeed in discovering and publishing the very information that the court order seeks to protect from the public gaze. Accordingly, the applicant argues, it is essential for the effectiveness of the restraining order that the respondent should also be restrained from publishing or communicating to others the existence of the order or that the proceedings have taken place. It seems that the court has accepted this type of argument in a considerable number of applications and has forbidden publication of the existence of the proceedings or their nature.

The phenomenon that people's curiosity is excited when they learn that something is kept secret from them is as old as the story of the Garden of Eden, though nowadays it tends to be described as the ''Barbara Streisand effect''. As soon as it became known that the famous actor asked Google to remove from their site the coastal photograph on which her house could be identified, large number of hits were registered as people tried to view the pictures, which until then attracted little interest. The super injunction seeks to counteract this phenomenon by shrouding the entire legal proceeding in secrecy so that no one would know that there is something that they are not allowed to know. In essence, therefore, a super injunction is a curiosity-suppressant order, as it tries to ensure that there is nothing to attract attention.

As will have become clear, curiosity-suppressant orders are different in kind from other measures taken to protect interests from damaging publicity; unlike

other measures, it is of the essence of such orders that no hint should escape that court proceedings have taken place. If the number of such orders runs now into hundreds, one wonders why so little is known about the law governing the grant of such orders. How come there is no known authoritative court ruling justifying, explaining or describing the legal principles at work?

The reason for this dearth of information seems to be bound up with the risk of adverse costs orders in this type of litigation. It appears that applications for super injunctions are made by applicants with deep pockets against media organisations, such as newspapers. Although such orders are interim only, pending the outcome of the claim for a permanent injunction, in practice they amount to a knock-out blow to the respondent who will be undertaking a prohibitive costs risk if it took the case all the way to trial. Respondents are deterred by the risk of losing on the merits and having to pay the claimant's costs, especially where the applicants are represented on a conditional fee basis, in which case a losing defendant may end up having to pay twice the claimant's costs as well at their own lawyers' fees. Since an adverse costs order could well run into many hundreds of thousands of pounds and more, media organisations have concluded that it makes no economic sense to defend their right to publish—let alone the public interest in publicity. It would therefore appear that such orders have succeeded not only in suppressing curiosity but in stifling the respondents' cases altogether.

This hypothesis about the dearth of case law on super injunctions provides only a partial explanation because there is still the possibility that some applications for an injunction failed in the first place and there would have been no obstacle to publicising them, as happened in the recent case of *LNS v Persons Unkown* [2010] EWHC 119 (QB), discussed below. Be that as it may, the fact remains that there was no jurisprudence in this area until a few weeks ago, when judgment was given in the last mentioned case. The reason for this is rooted in the nature of the process. The term ''jurisprudence'' denotes a body of learning built up from a number of judicial pronouncements on a particular issue resulting in a coherent principle or set of principles. But no jurisprudence, no systematic legal approach, can develop where judicial pronouncements are secretive, where legal representatives cannot advance arguments by reference to how other similar applications were decided, and where judges themselves cannot be assisted by the accumulated wisdom of their predecessors. The inevitable effect for curiosity-suppressant orders is that they retard the development of a principled approach. They are in this respect fundamentally different from any other order intended to protect interests from publicity or, indeed, from any other court process.

It is therefore inevitable that the principles governing the grant of super injunctions should be opaque, if they exist at all. Their application in individual cases has not been revealed, nor has it been reviewed on appeal (as far as it is possible to discover). No one knows how many such orders have been made and in what circumstances. We cannot judge what effect such proceedings have had on the rights of respondents to publish, or on the public interest to be informed about matters of consequence. While the public at large—and quite possibly much of the judiciary too—remain ignorant of the law and

practice informing the exercise of this far-reaching discretionary power, first instance judges conceivably continue in this secretive activity without effective appellate review, let alone public scrutiny. Curiosity-suppressant orders seem to have succeeded not only in granting effective protection from publication but also in frustrating the rule of law. For in a system governed by the rule of law the law itself has to be known, the process by which it is made and applied has to be transparent so that public debate can take place about objectives that the law serves and the measures taken to achieve them.

This is not to say that law should not grant effective protection to interests such as privacy, confidentiality, national security and freedom from falsehood. However, any legal measure to protect rights or interests must itself be compliant with the rule of law. Court orders that do not comply with the rule of law undermine the entire democratic edifice and their own legitimacy. There is already a variety of ways in which important interests can be protected from harmful publicity, such as the suppression of the identity of a litigant, or of sensitive information, or the holding some parts of the proceedings behind closed doors, or handing down a redacted judgment. In circumstances where such measures are insufficiently effective we need to confront the question of whether the private interest in the suppression of information can ever justify secretive court proceedings of the kind discussed here. It may be doubted whether the court should have the power to forbid publicising the existence of legal proceedings, other than for a short period, given the harm that such orders do to the rule of law.

Just how emboldened applicants have become and the extent of the threat to the rule of law may be gauged from the decision in *LNS v Persons Unknown* [2010] EWHC 119 (QB), which concerned the footballer John Terry. The applicant applied for an ex parte order which effectively sought not only a secret injunction, but also sought to do so without giving anyone affected the right to be heard. The nature of the order sought was set out by Tugendhat J:

> ''16. The following derogations from open justice, the requirements of fairness, and Art 6, are sought in the draft order: (1) a private hearing, (2) anonymity for the persons involved in the Relationship, (3) that the entire court file should be sealed pursuant to CPR5.4C(7), (4) that the order should prohibit publication of the existence of these proceedings, and that it should do so not just until service of the proceedings, or until a return date, but that it do so ''until after the conclusion of the trial of this claim or further Order in the meantime'', (5) that (notwithstanding the provision of CRP PD 25 para 9.2), the applicant shall not be required to provide any third party served with a copy of the order a copy of any materials read by the judge and/or a note of the hearing.
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> 17. There are further derogations from the CPR sought in the draft order as follows: (a) that the order shall be made until trial or further order (whereas in orders made without notice CPR PD para 5 provides that there must be a return date); (b) that time for service of the Claim Form pursuant to CPR 7.5 and CPR 7.6(1) be extended ''generally until 21 days after the identification of the Respondent(s) by the Claimant''.

The judge on to explain:

> ''20. The overall likely effect of the order sought appeared to me to be as follows. The applicant was likely to notify a limited number of media third parties promptly. . . . In my view, on the information now before me, the applicant is unlikely ever to serve the Claim Form on any respondent. . . . There is no provision for a return date. Since service on the Respondent is unlikely, it follows that no trial is likely to be held. Unless a third party is prepared to take the risk in costs of applying to vary this order, this interim application is likely to be the only occasion on which the matter comes before the court. The real target of this application is the media third parties who are not respondents. The only third parties who will ever hear of the proceedings are those whom the applicant chooses to notify. According to the terms of the draft order, no one else will have any means of discovering that an order has been made at all. The third parties who will be notified will be told nothing by the applicant about the grounds for the claim, or any possible defence to it. If they want to know more, they will be at risk as to costs in making an application to the court. In short, the effect of the interim order sought is likely to be that of a permanent injunction (without any trial) binding upon any person to whom LNS chooses to give notice that the order exists.''

Tugendhat J. did ''not recall any order that has been made with derogations as comprehensive as those sought in this case'', but the applicant's counsel informed him that there may have been some. This disparity of perception alone should get alarm bells ringing for it would appear that the secrecy surrounding such proceedings has allowed practitioners active in this field to acquire an information monopoly over this jurisdiction.

In the event, Tugendhat J. held that an injunction was not necessary or proportionate having regard to the level of gravity of the interference with the applicant's private life. In the present context it is unnecessary to go into the reasons behind this ruling. What is however important are the judge's views on secret justice.

Tugendhat J. alluded to the conflict between the principle of open justice and the need for an effective remedy against misuse of private information. However, he explained that there was no presumptive priority between ECHR rights and that derogation from Art.6 and open justice must be justified on the particular facts of the case, in accordance with the intense scrutiny required. And it is not just open justice that is in issue: it is the right of a person affected by a court order to be heard before the order is made. He drew attention to CPR PD 25 para.4.3(3), which states that ''except in cases where secrecy is essential, the applicant should take steps to notify the respondent informally of the application''. He went on to state that:

> ''109. Secrecy may be essential in the case of a respondent who, if tipped off, is likely to defeat the purposes of an application by publishing the material before he can be shown to have had notice of the injunction, or before it can be granted. It is less easy to show the need for such secrecy

> where the person targeted by the application is a national newspaper. There may be a need to work out ways to address the problems which arise in such cases, but giving privacy claimants comprehensive derogations from Art 6 and Art 10 cannot be the answer.'' (see also [138]-[139]).

Tugendhat J. was aware that in some circumstances an applicant with a legitimate concern may be deterred, in the absence of complete secrecy, from seeking relief lest he draws unwanted attention to his affairs ([117]). Nevertheless, he said that:

> ''141. If there ever has been an order which prohibits the disclosure of the fact an the order has been made, and which is expressed to run (as is sought here) for a period which is to continue after service on the respondent, and without a return date, then no example has been cited to me by Mr Spearman. I am not aware of what justification there might be for such an order, although I cannot exclude that there might be a justification in some case. But the grounds for applying for such an order would have be set out in the evidence. No grounds are given in the evidence in this case.''

Although this judgment does not wholly shut down the jurisdiction to make secret curiosity suppressing orders, it makes it very much more difficult to obtain them. As long as the possibility of such orders remains it is necessary to have an open debate about their justification and about necessary checks and balances.

For it is unacceptable that first instance judges should be able to grant secret orders which are never revealed and which in practice are beyond effective appellate control. If such orders are ever to be made, consideration should be given to limiting their duration, so that when they have expired they may become public and subject to the normal process of debate. Where more than a limited embargo is sought, the order should be subject to a compulsory appeal process, at the applicant's expense, so that the Court of Appeal could review the exercise of the power to grant such orders and build up a coherent and transparent body of principle. It is possible that the long overdue reform of the rules of costs will make it easier for respondents to mount a more effective resistance to super injections, but in the meantime we should not tolerate the undermining of the rule of law by a Kafkaesque process that is inimical to the rule of law and contrary to democratic principles.