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The clash between Press Freedom and Privacy of Public Figures: Have the UK Courts and the European Court of Human Rights established a clear and firm balance between these competing rights?

Introduction

The death of Princess Diana in 1997 in France[1], ironically "a country with some of the strongest privacy laws in Europe"[2] changed the British public perception about the role of the media and press freedom. There was a nationwide public outcry for tougher privacy legislations, control and sanctions against media houses that would violate the 'vaguely defined right to privacy'[3] of citizens.

In 2011, the Leveson Inquiry which was established to examine the culture, practices and the ethics of the British media as a result of a shocking phone hacking scandal with News International at the center once again brought the legal arguments surrounding press freedom and privacy to the forefront of the ordinary people[4]. At the Inquiry, the core participant victims argued inter alia that "the highly intrusive reporting or investigation into their private lives"[5] was unacceptable and that such reportages were not in consonance with the ethics of journalism and the principles of privacy under Human Rights Law. At the same time, the media argued

[1] '1997: Princess Diana Dies in Paris Crash' *BBC*, August 31 1997 < http://news.bbc.co.uk/onthisday/hi/dates/stories/august/31/newsid_2510000/2510615.stm > accessed February 10 2017.

[2] Toby Mendel, 'Freedom of Expression and the Right to Privacy' Article 19, September 23 1999 < https://www.article19.org/data/files/pdfs/publications/freedom-of-information-foi-vs.-privacy.pdf > accessed January 9 2017.

[3] James Michael, *Privacy and Human Rights: An International Comparative Study, with Special Reference to Developments in Information Technology* (Dartmouth 1994) 1.

[4] 'Press 'Need to Act' After Leveson', BBC, December 5 2012 < http://www.bbc.co.uk/news/uk-15686679 > accessed February 10 2017.

[5] 'Written submissions on the Law of Privacy on behalf of the Core Participant Victims' The Leveson Inquiry, 2011 < http://webarchive.nationalarchives.gov.uk/20140122145147/http:/www.levesoninquiry.org.uk/wp-content/uploads/2012/08/cpv-submission-on-the-law-of-privacy3.pdf > 3 accessed February 20 2017.

that such intrusive reporting was relevant and remained within the borders of press freedom, on the back of the widening "concept of public interest, and the promotion of freedom of speech."[6]

It's worth noting that, prior to the enactment of the Human Rights Act (HRA) 1998 which incorporated the European Convention on Human Rights (ECHR)[7] into UK's domestic law, there was no common law recognition of the right to privacy of individuals in the UK.[8] Section 2 of the HRA compels UK courts to ensure that their interpretation of domestic legislation is compatible with Strasbourg jurisprudence and the convention rights. Since Article 8[9] of the convention grants and protects rights to privacy of all individuals, by virtue of the Human Rights Act, the UK now fully recognizes right to privacy as a domestic human rights alongside Article 10[10] (which embodies press freedom) and the other convention rights. This means the conflict between Articles 8 and 10 have been brought home, by the incorporation of the ECHR into domestic law by the Human Rights Act.

The debate as to finding a fair and firm balance between privacy of public figures and press freedom in the UK lingers on. The complexity of establishing a balance does not just reside in

[6] Ibid. The discourse surrounding privacy and press freedom has not changed much post Leveson Inquiry. Professor of Journalism and former editor of Daily Mirror, Roy Greenslade in a 2016 article quoted Facebook's founder Mark Zuckerberg as saying the digital age has killed privacy, making it difficult for courts to even enforce injunctions - or gagging orders mostly sought by public figures. See; Roy Greenslade, 'Editors vs Judges: Which Right is Supreme - Press Freedom or Privacy? The Guardian, May 20 2016 < https://www.theguardian.com/media/greenslade/2016/may/20/editors-vs-judges-which-right-is-supreme-press-freedom-or-privacy > accessed January 5 2017.

[7] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR) 1950.

[8] Secretary of State for the Home Department v Wainwright and Another [2003] UKHL 5.

[9] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR) Article 8, 1950.

[10] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR) Article 10, 1950.

the fact that the two rights (Freedom of Expression[11] and Right to Privacy[12]) are important human rights, protected under the ECHR. But also, in the fact that despite the widespread call for privacy, there is no clear definition for what the right to privacy really entails.[13] Even though ECtHR has not been fully helpful in setting out the borders of the notion of 'private life' (right to privacy), the Court has shown in *Lingens*[14] and *Fressoz*[15] that "safeguarding the freedom of the media is of particular important for the maintenance of freedom of expression"[16] and that "the press must not over step the bounds set"[17].

The absence of defined limits for both opposing rights has created a conundrum: where does freedom of the press ends, and where does the right to privacy of public figures begin?

UK case law and the Strasbourg jurisprudence clearly indicate that, whenever there is a conflict between freedom of expression[18] and respect for a person's privacy[19], especially public figures, there is no established principle of default precedence[20]. The two rights must be closely considered to establish how they play out under a particular circumstance to give effect to which should be accorded the ultimate respect.[21] Lord Steyn reiterated this as: "First, neither

[11] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR) Article 10, 1950.

[12] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR) Article 8, 1950.

[13] Niemietz v Germany (Application No. 13710/88) 16 EHRR 97, 29.

[14] Lingens v Austria (Application No. 9815/82) 8 EHRR 407.

[15] Fressoz and Roire v France (Application No. 29183/95) [1999] ECHR 1.

[16] Howard Davis, *Rights Law Directions (Directions series)* (3rd, OUP Oxford, Oxford 2013) 346.

[17] Sürek v Turkey (No. 1) (Application No. 26682/95) [1999] ECHR 51, 58.

[18] Ibid, 10.

[19] Ibid, 11.

[20] Re S (FC) (A Child) [2004] UKHL 47, 17.

[21] Ibid.

article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary."[22]

Julian Petley captured this as, "as far as the ECHR is concerned, neither the right to free speech nor the right to respect for personal privacy is absolute. Where the demands of two or more articles of the Convention are in conflict, courts must undertake what is called an "intense focus" on the comparative importance of the specific rights being claimed"[23].

Despite freedom of expression not being absolute[24], for any restriction of freedom of expression to be justified, it "must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved"[25].

Equally, the importance of individuals' right to privacy, including public figures cannot be undermined, despite the fact that the media may want to scrutinize the lives of public figures to the delight of their inquisitive readers. As Lord Woolf put it;

> "[W]here an individual is a public figure he is entitled to have his privacy respected in the appropriate circumstances. A public figure is entitled to a private life. The individual, however, should recognize that because of his public position he must expect and accept that his actions will be more closely scrutinized by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media"[26].

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[22] Ibid.

[23] Julian Petley, 'Privacy: Watchdogs Turned Attack Dogs' [2011] 22(3) British Journalism Review 36,38.

[24] Eric Barendt, *Freedom of Speech* (2nd edition, Oxford University Press 2005) 7.

[25] Reynolds v Times Newspapers Ltd and others [1999] 4 All ER 609 (HL).

[26] A v B & C [2002] EWCA Civ 337, 11 (xii).

As stated, privacy is protected as a human rights under the European convention's jurisdiction and conflicts between privacy and freedom of expression arise in two folds. The first rarely involves privacy as a protected human right and freedom of expression. It usually surrounds the interference of privacy interest by several State actors—such as, illegitimate surveillance of individuals[27]. The second and more common conflict between privacy and freedom of expression which this paper will seek to evaluate occurs where non-State actors like the media, journalists and writers publish matters which their subjects deem private and the authors claim the matter is of public interest or the individuals involved have forfeited their right to privacy by virtue of being public figures[28].

Against this background, this dissertation will attempt to critically examine how the two important and often diametrically opposed are balanced at both the domestic and European levels, evaluating the difficulty surrounding the balancing exercise.

Charter One (1) of the paper will consider 'Public Figure' and 'Public Interest' for the purpose of clarity. It will also consider the importance and limits of the two convention rights, Articles 8 and 10 under both UK and Strasbourg jurisprudence.

Charter Two (2) will evaluate the clash between freedom of the press and the right to privacy as well as how the UK courts and the ECtHR have sought to settle the clash, looking at the landmark cases of Von Hannover[29] and Campbell[30]. The paper will further argue as part of Charter Two (2) that, the case by case balancing approach in dealing with the clash has been inconsistent and has therefore failed to provide the needed legal certainty.

At Chapter Three (3), the paper will recommend or suggest a balancing approach which if heavily developed and adopted by the courts can eliminate the legal inconsistency and uncertainty. It will conclude that, the absence of this legal certainty does not only make it

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[27] Ibid (n2).

[29] Von Hannover v Germany (Application No. 59320/00) [2004] ECHR 294.

[30] Campbell v MGN Ltd [2004] UKHL 22.

difficult in scholarship to establish the borders of these important rights but it makes it impossible for UK's press to self-regulate their conducts which are capable of infringing on the privacy of public figures.

Chapter One

Who is a Public Figure?

The ECtHR and the UK Courts have not provided an exhaustive list of the sort of people who are to be termed public figures. Similarly, the courts have failed to provide a specific definition—obviously, because such a fixed definition would be weakened by the fact that the sphere of public figures constantly changes as the world and the media evolve[31].

However, the European jurisprudence has provided a general definition of those who fall within the category of public figures. Per Resolution 1165 of the Parliamentary Assembly of the Council of Europe on the Right to Privacy, public figures are "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 in any other domain."[32] This definition has been heavily relied on by the ECtHR in the cases of Axel Springer v Germany[33] and Von Hannover v Germany[34], serving as a clear departure from the distinction the court drawn in an earlier case[35] between public figures as "politicians and other such public officials and others"[36].

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[31] András Koltay,'Elements of Protecting the Reputation of Public Figures in European Legal Systems' [2013] 3 ELTE Law Journal, 53, 58.

[32] Parliamentary Assembly of Council of Europe, Right to Privacy (1998), Resolution 1165,7.

[33] Axel Springer v Germany (Application No. 39954/08) [2012] ECHR 227.

[34] Von Hannover v Germany (No 2) (Applications Nos. 40660/08 and 60641/08) [2012] 55 E.H.R.R. 15.

[35] Von Hannover v Germany (Application No. 59320/00) [2004] ECHR 294.

[36] Media Lawyer, 'Strasbourg's Pendulum Swing 'Widens Definition of Public Figure' Society of Editors, May 2 2013 < https://www.societyofeditors.org/parliamentary-and-legal/02-may-2013/Strasbourgs-pendulum-swing-widens-definition-of-public-figure> accessed March 4 2017.

In the UK, the Parliamentary Assembly of the Council of Europe's definition was applied in the recent case of *JIH*[37] and it was relied on by the House of Lord in the landmark case of *Campbell*[38] due to the mirror principle found at Section 2(1) of the Human Rights Act 1998.[39]

Public figures like any other persons do not have an absolute right to privacy, neither do such figures absolutely forfeit this right by virtue of their status since the core values protected by Article 8 do not contain anything to indicate that they are not applicable to Public Figures.[40] Whether public figures ought to be accorded a right to privacy or not when privacy clashes with freedom of expression has depended on a key balancing exercise; weighing public interest against privacy interest of public figures.

[37] JIH v News Group Newspapers Ltd [2010] EWHC 2818 (QB), 40.

[38] Campbell v MGN Ltd [2004] UKHL 22.

[39] Roger Masterman, 'Are UK Courts Bound by the European Court of Human Rights?' Durham University Law School Research Briefing No. 10 <https://www.dur.ac.uk/resources/law/research/AreUKCourtsboundbytheEuropeanCourtofHumanRights.pdf > accessed June 11 2017.

[40] Michael G. Doherty, 'Politicians as a Species of 'Public Figure' and the Right to Privacy [2007] 1(1) Humanitas Journal of European Studies 35, 38.

What is Public Interest?

The phrase public interest is "notoriously vague"[41] and there is no precise definition as to what it actually means. Though it remains a principal defence in restricting publications on the grounds of privacy invasion, it has been described as "little more than an attempt to give respectability to voyeurism and pornography."[42]

Strictly speaking, the term "Public Interest" is used by the ECHR to justify interference with just two rights, which are, Article 1 of Protocol No 1 (right to peaceful enjoyment of possessions) and Article 2(1) and (4) of Protocol No 4 (liberty of movement and freedom to choose residence if one is lawfully within a territory). The other rights (from Article 8 to 11), are limited by a range of other specified legitimate purposes, such as to uphold the rights and freedoms of others[43], protect the reputation of others or a specific group[44], protecting public safety,[45] preventing crime,[46] benefit the public in general or identifiable individuals and other legitimate purposes. It is the majority of these legitimate purposes that have been termed as "Public Interest."[47]

Even in the absence of a vivid definition for "Public Interest", the courts have through case law established that the defence of public interest is restricted to issues which have some genuine political, legal, constitutional, social or economic relevance and it therefore applies when a

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[41] Ibid (n2) 7.

[42] Conor Brady, 'Responsibility in Coverage and the Public Interest" in Marie McGonagle (ed), *Law and the Media: The Views of Journalists and Lawyers* (Round Hall Sweet & Maxwell 1997) 4.

[43] Articles 8, 9, 10, 11 and Art 2(2) of Protocol No 4.

[44] Article 11.

[45] Ibid (n43).

[46] Ibid.

[47] Aileen McHarg, "Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights" [1999] 62 (5) The Modern Law Review, 684.

publication in question contributes to a debate in a democratic society.[48] However, this does not mean that unless a publication is of "Public Interest", then there should be a restriction. The UK courts have said the presence of "Public Interest" simply calls for "a narrow construction on any limitations on freedom of expression"[49] and that whether or not the material has any particular worth should not even be considered if there was no reasonable expectation of privacy.

[48] Steve Foster, 'Reclaiming the Public Interest Defence in the Conflict Between Privacy Rights and Free Speech' [2014] 19(2) Coventry Law Journal. See also: Ibid (n35), 69.

[49] Mosley v United Kingdom (2011) 53 EHRR 30,114.

Freedom of Expression (Article 10): Definition, Importance and Limitations

In order to be able to critically evaluate the clash between Freedom of Expression and the Privacy of public figures—and also examine whether the UK Courts and the ECtHR have been able to establish a clear and firm balance between these competing rights, this section will examine the right of Freedom of Expression within the ECHR's jurisprudence.

The ECHR's Article 10 guarantees the right of Freedom of Expression to all within the jurisdiction of the convention, including everyone within the borders of the UK. Since Article 10 is a qualified right[50], it comes in two parts, namely Article 10(1) and 10(2). The first part sets out the right which individuals within the convention's jurisdiction enjoy as; "[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."[51]

The second part which is Article 10(2) follows the convention's usual pattern of qualified rights and sets forth the limitations. It states that; "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."[52]

[50] Ibid (n24).

[51] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR) Article 10 (1), 1950.

[52] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR) Article 10 (2), 1950.

Article 10(1) clearly mentions that everyone has the right to Freedom of Expression. However, Article 10(1) read in conjunction with Article 10(2) indicates that, this right is not absolute and therefore the protection given to this right must always be balanced with others, in order to establish which should be given precedence at any point in time. And as such, the ECtHR's jurisprudence has developed a complex general approach over the years which must be used to assess the limitation of Freedom of Expression.[53]

Per this balancing approach which will be discussed later in detail in relation to right to private and family life (Privacy), the Court's first approach deals with the exclusion of certain expressions from the protection of the convention as these expressions negate the core values of the convention. For instance, it has been well established that 10(1) does not protect expressions which incites violence[54], incites racial[55] or religious hatred[56] and also expressions which deny important historical truths like the Holocaust[57]. The ECtHR reiterated this as; "[t]here is no doubt that any remark directed against the Convention's underlying values"[58] would be protected by Article 10. This would be removed by Article 17 (Prohibition of Abuse of Rights).

The second approach considers protected expressions which ought to be restricted under Article 10(2) and these expressions are those which do not undermine the fundamental values of the convention but ought to be restricted for one of the listed reasons including, "for the protection of the reputation or rights of others". According to Strasbourg's jurisprudence, restrictions on protected expressions are only legitimate when specified in law[59], aimed at

[53] David John Harris, Michael O'Boyle, Colin Warbrick and Ed Bates, *Law of the European Convention on Human Rights* (2nd edition, Oxford University Press 2007) Chapter 11.

[54] Ibid (n17).

[55] Glimmerveen and Haqenbeek v. the Netherlands (Application Nos. 8348/78, 8406/78) [1979] ECHR 8.

[56] Norwood v the United Kingdom (Application No. 23131/03) November 16 2004.

[57] Garaudy v France (Application No. 65831/01) June 24 2003.

[58] Gündüz v Turkey (Application No. 35071/97) December 4 2003, 51.

[59] Herczegfalvy v Austria (Application No. 10533/83) [1992] ECHR 58, 94.

protecting one or more of the specified values or interests and when necessary in a democratic state.

In spite of the need to restrict Freedom of Expression when necessary, The ECtHR has abundantly reiterated that Freedom of Expression is an important right of a democratic society, the bedrock of every democracy. The court has stated that, "[f]reedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man…"[60]

It has also established that Freedom of Expression does not only entail the right to publish information that are favorably received but covers those that would shock and disturb a sector of the population. The court captured this as;

> this right to freedom of expression applies 'not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society."[61]

This therefore indicates that, publications or expressions which are protected under Article 10 cannot be restricted merely because they put a person's private life (especially a public figure) in the public domain but the value of the publication (public interest value) must be weighed against the privacy interest of the person, under the ECtHR's "fair balancing test"[62] to establish which among the clashing rights ought to take priority.

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[60] Handyside v United Kingdom, (Application No. 5493/72) [1976] ECHR 5, 49.

[61] Ibid.

[62] Eric Barendt, 'Balancing Freedom of Expression and Privacy: The Jurisprudence of the Strasbourg Court' [2009] 1(1) Journal of Media Law 50, 57.

Right to Privacy (Article 8): Definition, Importance and Limitations

As clearly outlined above, Freedom of Expression is an important human rights in the ECHR's jurisprudence. Even though it is not an absolute right[63], being one of the necessary pillars that make up the foundation of a democratic society[64] illustrates its importance. Similarly, the importance of the right to Privacy cannot be undermined, the reason why the clash between these two key human rights is inevitable. More also, the reason why there is the needed for 'balancing' between these competing rights.

The right to Privacy, in full known as the 'right to private and family life' is guaranteed by Article 8[65]. Article 8(1) states that; "[e]veryone has the right to respect for his private and family life, his home and his correspondence." And Article 8(2) provides that "[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"

Until UK's 1998 HRA, the convention rights where not directly enforceable in the UK and since "English law did not entertain actions for interference with privacy unless the interference amounted to one of the established causes of action in tort or equity,"[66] the right to privacy did not exist in the UK[67].

[63] Ibid (n24).

[64] Puja Kapai and Anne S. Y. Cheung, 'Hanging in a Balance: Freedom of Expression and Religion' [2009] 15 Buffalo Human Rights Law Review 41, 5.

[65] Ibid (n10).

[66] Malone v Metropolitan Police Commissioner (No.2) [1979] 2 All ER 620.

[67] Kaye v Robertson ([1991] FSR 62.

Following Princess Diana's death in 1998 and calls for "protection of privacy, and in particular that of public figures, to be reinforced at the European level by means of a convention"[68], the Council of Europe's Parliamentary Assembly adopted a new resolution, the Declaration on the Mass Media and Human Rights which defined the right to Privacy as: "[t]he right to live one's life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection from disclosure of information given or received by the individual confidentially."[69]

Since the right to Privacy is not also absolute, it must be evaluated against other rights such as Freedom of Expression when they clash. In principle, any restriction on Article 8 must meet the ECtHR's three-part test for the restriction to be lawful. For a restriction to be lawful, it must be "necessary in a democratic society", the ground must be justifiable, relevant and sufficient and it must be proportionate to the legitimate aim pursued.[70]

Though the nature of the convention, an international treaty is such that the wording prohibits public authorities which private press and journalists are excluded from its definition from unlawful interference of the guaranteed rights, it is an established principle that, the convention also imposes a positive obligation on states to ensure the rights granted are respected and enjoyed[71]. The ECtHR has mentioned that a contracting state is not only obliged not to interfere with the private life of individuals, the state also carries a positive obligation through its public

[68] Parliamentary Assembly of Council of Europe, Declaration on Mass Communication Media and Human Rights (1970), Resolution 428, 1 < http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15842&lang=en> accessed April 14 2017.

[69] Parliamentary Assembly of Council of Europe, Declaration on Mass Communication Media and Human Rights (1970), Resolution 428 < http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15842&lang=en> accessed April 14 2017.

[70] Sunday Times v. United Kingdom (Application No. 6538/74) 2 EHRR 245, 62.

[71] Jean-François Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights* (Council of Europe, 2007), 7.

authorities to; take steps to ensure that the enjoyment of the guarantee rights is effective[72], to take steps to ensure that the enjoyment of the right is not interfered by other private individuals[73] and to ensure that private individuals take the necessary steps to make sure that other private persons effectively enjoy the rights granted by the convention[74].

In spite of the non-absoluteness of the right to Privacy, it remains an important convention right built around the component of 'reasonable expectation'[75] and mostly antagonized with the popular public interest defence. The courts have stated that the law should protect individual's privacy when such persons reasonably expect that the related information would not be disclosed[76]. For instance, the UK's House of Lord agreed that, a patient, in this case a public figure (Naomi Campbell) had a reasonable expectation that information on her medical treatment would not be disclosed and such should be the case[77].

This reasonable expectation of privacy does not cover the innocuous daily activities of public figures. And Lady Hale captured this when she said the reasonable expectation of privacy concept does not come into play when a celebrity "pops out to the shops for a bottle of milk.[78]" On the back of the same idea, an injunction sought for by Sir Elton John against the Daily Mail was refused, because the court said information about Sir Elton John 'leaving his car and going to his front gate' could not reasonably be expected to fall within the borders of privacy[79].

[72] Golder v The United Kingdom (Application No. 4451/70) [1975] ECHR.

[73] Lender v Sweden (Application No. 9248/81) [1987] ECHR 4, 84.

[74] David John Harris, Michael O'Boyle, Colin Warbrick and Ed Bates, *Law of the European Convention on Human Rights* (3rd edition, Oxford University Press, 2014), 504.

[75] Halford v United Kingdom (Application No. 20605/92) [1997] ECHR 32, 45. See also Ibid (n36) 51.

[76] Campbell v MGN Ltd [2004] UKHL 22, 21.

[77] Campbell v MGN Ltd [2004] UKHL 22.

[78] Campbell v. MGN Ltd [2004] UKHL 22,154.

[79] John v. AN Ltd [2006] EWHC 1611 QB, 15.

Chapter Two

Balancing Freedom of Expression and Right to Privacy: The Courts' Approach and the Criticism of Lack of Firmness and Legal Certainty

Journalists and proponents of Freedom of Expression have long argued in relation to 'Public Figures' that, the public have a right to know, sometimes confusing public interest with what's of interest to the public. The 'Public Figures', the hunted, have always claimed the opposite—expecting to have even the tiniest detail of their 'private' lives protected, under the umbrella of the 'right to Privacy.'

Tasked with what ought to be the middle ground or prevail in this conflict of rights cases, a sort of 'cat and mouse chase' is the courts. When it comes to the conflicts between Articles 8 and 10, it has been said that the conflict cannot be easily resolved by the straightforward approach used to "determine when a public interest legitimately restricts the exercise of a fundamental right."[80] Here and as already mentioned, it's mostly a conflict between non-State actors, the Press, and citizens, 'Public Figures'. Therefore, it makes no sense when seeking to settle such conflicts to ask whether there is "a compelling or substantial state interest in protecting privacy rights when they conflict with freedom of expression".[81]

In this regard, the ECtHR adopts a case by case balancing approach, by weighing privacy rights against Freedom of Expression, using a "fair balancing" test[82] which both Professor Eric Barendt and Professor and Lorenzo Zucca have argued as "incoherent in principle, and very difficult to apply in practice"[83] as the process seems to assume that the values underlying these two competing rights are the same in a democratic state.

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[80] Eric Barendt, 'Balancing Freedom of Expression and Privacy: The Jurisprudence of the Strasbourg Court' [2009] 1(1) Journal of Media Law 50, 52.

[81] Ibid.

[82] Ibid.

[83] Ibid. See also; Lorenzo Zucca, *Constitutional Dilemmas* (Oxford University Press, 2007) Chapter 4.

The landmark case of *Von Hannover*[84] illustrates the balancing approach the ECtHR adopts when Article 8 and Article 10 clashes in relation to the 'Press' and a 'Public Figure', and evaluating this case elucidates the inconsistencies and the problems associated with the ECtHR's "fair balancing test." In *Von Hannover*, Princess Caroline of Monaco claimed at the ECtHR that the failure of German courts to stop tabloid magazines from publishing a number of photographs of her captured without her consent amounted to disregard for her Article 8 right, the right to privacy. The domestic German courts had ruled that Princess Caroline, an undeniable public figure (*par excellence*) was to tolerate publications of photographs of herself from her daily life, and not just when she was engaged in official duties.

The ECtHR ruled that, in that particular case, the "decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest."[85] And concluded that, if a publication was of genuine interest to the public, "impart[ing] information and ideas on matters of public interest"[86], which was not the case, then the right to privacy of the individual concerned must be expected to be waived for such matter. It further reiterated that publications to feed mere curiosity of readers regarding the private life of the applicant could not be regarded as contributing to any debate of general interest to society[87].

In *Von Hannover*, the court considered the below factors during its balancing of Article 8 against Article 10[88]; (ii) How well known the applicant is as well as the subject matter of the

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[84] Ibid (n35).

[85] Ibid (n35) 76.

[86] Observer and Guardian v. the United Kingdom (Application No. 13585/88) [1991] 14 EHRR 153, 59. See Also; Ibid (n35) 63.

[87] Ibid (n35) 65.

[88] Harriet Brown, 'Privacy v the Right to Freedom of Expression: Clarification from the ECHR' February 2012 <http://www.farrer.co.uk/Global/Briefings/10.%20Media%20Group%20Briefing/Privacy%20v%20the%20right%20to%20freedom%20of%20expression%20Clarification%20from%20the%20ECHR.pdf > accessed August 16 2017.

report; (ii) Prior conduct of the applicant; (iv) Content, form and consequences of the publication; and (v) Circumstances under which the photos were taken or obtained. Though the applicant was undoubtedly a "Public Figure," the court's restrictive definition of a "Public Figure" by reference to public function—and stating that, the applicant did not "perform any function within or on behalf of the State of Monaco or any of its institutions"[89] despite representing the Royal Family of Monaco at some charitable and social functions placed her in a category as a wholly private person. It is argued that, "[t]his lead the Court to conclude that the public had no legitimate interest in knowing where Princess Caroline is and how she behaves generally in her private life."[90]

In Judge Cabral Barreto's concurring opinion, he disagreed with the assessment of the status of the applicant, saying; "[t]he applicant is a public figure, even if she does not perform any function within or on behalf of the State of Monaco or one of its institutions."[91] He relied on the definition of paragraph 7 of Resolution 1165[92] and added, "It is well known that the applicant has for years played a role in European public life, even if she does not perform any official functions in her own country." [93] The court saying Princess Caroline was not a public figure deviates from its own case law[94] and it's inconsistent with the definition provided by the Parliamentary Assembly of the Council of Europe[95].

It must be noted that, the ECtHR's traditional fair balancing test developed in its early cases of

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[89] Ibid (n35) 8.

[90] Michael G. Doherty, 'Politicians as a Species of "Public Figure" and the Right to Privacy' < http://www.sbc.org.pl/Content/11963/doherty.pdf > accessed June 10 2017.

[91] Concurring Opinion of Judge Cabral Barreto, Ibid (n36) 2.

[92] Ibid (n32).

[93] Ibid (n35) 8.

[94] Ibid (n14) 42.

[95] Ibid (n32).

Handyside[96] and *Sunday Times*[97] follow a pattern: when an applicant invokes a right, the state has to show that the interference with the right was proportionate to achieving the required justifiable aim. Under the traditional approach, if Article 8 was invoked, the state had to justify its interference (failure to protect Article 8). This means, if a media organization brought a claim that a national court had ruled in favour of Article 8, a disregard for the organization's Article 10 rights, the invoked right would be Article 10 and it would be up to the State to justify that the position taken by the national court was proportionate, etc. If the state failed to justify the interference, then Article 10 would win. Clearly, "[it]t would be wrong for the Court's approach, and the result of the balancing, to depend on which particular Article of the Convention has been relied on in the application before it."[98]

Therefore, the court's "fair balancing" test adopted in *Von Hannover* departed from this, as it weighed the competing rights against each other to establish which ought to prevail in a particular case. An obvious difficulty with this approach also is, there seems to be the assumption that the two competing rights, Articles 8 and 10, are of the same value in a democratic society when in fact there is "a strong disagreement over the values of privacy and freedom of expression."[99]

In *Von Hannover*, comparisons of the applicant's status and performance of her function was made with politicians, and the case seems to erect the notion that, there's "a category of public figures (entirely comprised of public office holders) and everyone else is in the category of private individual"[100]—a puzzling categorization which the court failed to provide reasons to

[96] Handyside v UK (Application No. 5493/72) [1976] 1 EHRR 737.

[97] Sunday Times v UK (Application No. 6538/74) [1979] 2 EHRR 245.

[98] Ibid (n62) 58. See also; Opinion of Judge Schaffer in Pfeifer v. Austria (Application No 12556/03) [2009] 48 EHRR 8, 5.

[99] Eric Barendt, 'Balancing Freedom of Expression and Privacy: The Jurisprudence of the Strasbourg Court' [2009] 1(1) Journal of Media Law 50, 71.

[100] Michael G. Doherty, 'Politicians as a Species of 'Public Figure' and the Right to Privacy [2007] 1(1) Humanitas Journal of European Studies 35, 44.

justify it.[101] Based on Von Hannover, a politician would almost always be a public figure[102] and therefore couldn't even rely on that case to mount a right to privacy cloak around any action such as an extra-marital affair if it compromised his ability to perform his public duties.

One of the foundations on which the decision of *Von Hannover* rests, apart from labelling the applicant as not being a "public figure par excellence" was the distinction the court made between publications that contribute to a debate of general interest (public interest) and those that merely satisfy the curiosity of readers[103]. The problem is, irrespective of how private or intimate an information is, the Court's ruling suggests that "once information crosses over into the realm of what is properly (if not necessarily respectably) "newsworthy", it will very quickly attract the traditionally heightened protection extended by the Court to political and journalistic speech."[104]

Before the ECtHR's *Von Hannover* judgement, the House of Lords in the UK was faced with a similar dilemma, to strike a balance between Article 8 and 10 in the landmark case of *Campbell*[105]. In that case, Ms. Naomi Campbell was photographed coming out of Narcotics Anonymous (NA) meeting, which the Mirror Newspaper published with an article alongside the headline "Naomi: I'm a drug addict." The article contained information relating to Ms. Campbell's treatment for drug addiction in very general terms as well as the number of NA meetings she had attended.

After balancing Article 8 rights of Ms. Campbell, a 'Public Figure' against the Article 10 rights of the newspaper, the court ruled that there was a violation of Campbell's right to privacy as the publication was intrusive, involving information as to Ms. Campbell's medical condition and treatment. The Court to an extent relied on a hierarchy of protected expressions, placing

[101] Michael Sanderson, 'Is Von Hannover v Germany a Step Backward for the Substantive Analysis of Speech and Privacy Interests' [2004] 6 European Human Rights Law Review, 634.

[102] Ibid (n35) 63.

[103] Ibid (62) 65.

[104] Ibid (n99) 644.

[105] Ibid (n37).

the greatest weight on political speech, followed by artistic speech and finally, commercial publications providing details of the lives of celebrities, which the Mirror's article was found to fall within[106]. Interestingly, Lord Hoffman, dissenting, placed a higher value on Article 10 during his balancing exercise and noted that "practical demands of journalism 'mean that some latitude must be given' to editors in determining how to balance competing rights of privacy and freedom of expression,"[107] a margin the ECtHR had earlier granted to journalists and Editors in *Fressoz*[108] but failed to weightily consider in *Von Hannover*.

[106] Ibid (n38) 148.

[107] Ibid (n38) 162.

[108] Fressoz and Roire v France (Application No. 29183/95) [2001] 31 EHRR 28, 54.

Chapter Three

The Difficulty and Lack of Certainty and Consistency in the Balancing Exercise: What is the Way Forward?

Though both the majority and minority carried out persuasive balancing exercises and analysis, they reached different conclusions. The fact that the Lords could not reach a unanimous decision with one of then, Lord Hope, a major Law Lord dissenting clearly "suggests that editors are likely to have a difficult time in applying the tests set out in the case."[109] This difficulty creates a lack of certainty which makes it problematic for the press to self-regulate.

The Lords arguably applied a fair balancing test and reached two different conclusions: one which has Article 8 prevailing (the majority) and another Article 10 prevailing--confirming that the strong disagreement in value placed on privacy rights of 'Public Figures' and Freedom of Expression. Beyond this, the Court offered a straight forward approach to dealing with Articles 8 and 10's clash which is the objective test of 'reasonable expectation of privacy'[110]. However, this objective test which could have created the needed legal certainty because of its straightforwardness was ineptly discussed, and in the followed up ECtHR's case of *Von Hannover*, it was still not given the needed prominence.

Though a case by case balancing approach is unavoidable as it "will never be easy to define in concrete terms the situations that correspond to this legitimate expectation,"[111] as Judge Cabral Barreto noted, "whenever a public figure has a "legitimate expectation" of being safe from the media his or her right to private life prevails over the right to freedom of expression or the right

[109] Ruth Boardman, 'Naomi Campbell Privacy Case' May 17 2004 < https://www.twobirds.com/en/news/articles/2004/naomi-campbell-privacy-case >accessed July 27 2017.

[110] Ibid (n38)135.

[111] Ibid (n89).

to be informed."[112] This simplifies the rule--it's straightforward and creates the needed legal certainty but in both landmark cases, the Courts failed to give it an in-depth reasoning and discussion.

[112] Ibid.

Conclusion

Though the wording of Articles 8 and 10 are straightforward, the non-absolute nature of the two rights and the conflict between them have placed both the ECtHR and UK's domestic Courts at the center, tasked with settling the clash. The Courts have on numerous occasions reiterated the pivotal role both rights play in a democratic state and in building the identity of individuals[113]. The ECtHR has established and insisted that freedom of expression is the fountainhead of every democratic society.[114] Similarly, the Court has repeated that, the right to privacy is fundamental to a democratic society[115] and that even those who put themselves out there in public, "Public Figures" have a right to privacy[116].

The one sided argument by the media on the back of Article 10 that "their readers are entitled to know everything about public figures"[117] have long been rejected. And it has been established that, the competing nature of freedom of expression and the right to privacy inherently demands that the two rights should be balanced[118]—what has become the duty of the courts. The challenge, therefore, has been finding a balance between these two equally important right, which none has primacy over the other[119].

[113] Ibid (n59).

[114] Ibid (n60).

[115] Ibid (n35) 42. See also; Ibid (n32) 10.

[116] Ibid (n26). See also Ibid (n35) 64.

[117] Ibid (n32) 8. See also: Ibid (n26).

[118] Ibid.

[119] Ibid (n30) I38.

This paper has considered the "fair balancing" test[120] which was adopted by both the ECtHR and UK's House of Lords in the landmark cases of *Von Hannover*[121] and *Campbell*[122]— arguing that the balancing has not been firm and consistent to create the needed legal certainty to ensure self-regulation of the media. The paper has reasoned that, for instance, the courts in their attempt to balance the two rights have treated both rights as having equal value in a democratic society when there is a strong disagreement as the value of each right[123].

Also, it has been said that, the balancing has not been firm as the conclusion of the landmark cases did not fall on the back of solidly evaluated reasons. For example, the ECtHR in the case of *Von Hannover* disagreed that the applicant was a "Public Figure" despite all indications that she was and yet failed to convincingly grant reasons to support its position, except to create two confusion category of public figures, one made up of public office holders and everyone else being a private individual[124].

It's must be noted that, balancing two important rights is not an easy task and the application of the ECtHR's familiar proportionality test has not been useful in this area as this test becomes helpful in straightforward cases when "only one Convention right is in play."[125] The courts have therefore dug their hands into evaluating different confusing components, to strike a balance, without giving attention to its own simple and straight forward principle of "expectation of privacy" which can settle the balance easily between freedom of expression and the right to privacy of public figures and help create the needed consistency and certainty.

In fact, Judge Cabral Barreto noted the simplicity and straightforwardness of the "expectation of privacy" test when he opted for it, and said "[i]n my view, whenever a public figure has a

[120] Ibid (n62).

[121] Ibid (n35).

[122] Ibid (n30).

[123] Ibid (n63) 71.

[124] Ibid (n87) 44.

[125] Ibid (n30)140.

"legitimate expectation" of being safe from the media his or her right to private life prevails over the right to freedom of expression or the right to be informed." [126]Judge Zupančič also noticed the confusion in the balancing test used in *Von Hannover* and stated that even though he agreed with the outcome of the case, he would suggest a different balancing test. He put as; "The question here is how to ascertain and assess this balance. I agree with the outcome of this case. However, I would suggest a different determinative test: the one we have used in *Halford v. United Kingdom*, judgment of 25/06/1997, Reports 1997-III, which speaks of "reasonable expectation of privacy."[127]

What has been vividly established so far at the domestic and European courts is that the conflict between freedom of expression and privacy can only be resolved by a fair balancing exercise. Though the courts have tried to balance the two, the leading cases so far have not been helpful and even if one agrees with the outcome of the two cases, the route the courts took in reaching their decisions have been widely criticized as unsatisfactory[128]. In the future, the court should consider developing its "expectation of privacy" test as this is clearer and consistent with the ECtHR's own case law.

[126] Ibid (n90).

[127] Concurring Opinion of Judge Zupančič, Ibid (n36).

[128] Ibid. See also Ibid (n32).

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