

Public interest journalism and privacy in the ECtHR case law: a critical appraisal

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ABSTRACT

The European Court of Human Rights ('ECtHR') jurisprudence on cases concerning the clash between the right to privacy and freedom of expression has grown considerably in the last two decades. The category of 'public interest', complemented by the status of 'public figures', is the cornerstone of the relevant ECtHR jurisprudence. This study examines how the contours of these vague concepts can be defined on the basis of case law, and what problems and inconsistencies arise from the Court's approach to these aspects. According to the conclusions of this paper, the public-interest category as applied by the ECtHR is excessively broad and, in its present form, does not serve as an adequate criterion for delineating the limits of the right to privacy. Moreover, the public figure category is also ill-suited to assist in defining the boundaries of free speech in these cases.

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Introduction

Clashes between the right to privacy and freedom of expression have been the subject of lively debate in the courts and academia in recent decades. This is especially true in today's technological environment, which presents new and very widely applicable opportunities for privacy invasion.¹ *Campbell v MGN*² was a landmark case in English privacy law two decades ago. European national laws are heavily influenced by the case law of the European Court of Human Rights ('ECtHR'), which was repeatedly referred to by

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¹Jacob Rowbottom, 'A Landmark at a Turning Point: *Campbell* and the Use of Privacy Law to Constrain Media Power' (2015) 7 *Journal of Media Law* 170.

²*Campbell v MGN Limited* [2004] UKHL 22, [2004] 2 AC 457.

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the House of Lords in this case, and ultimately *Campbell* itself ended up before the ECtHR.

In *MGN v the United Kingdom*,³ the ECtHR held that there had been no violation of Article 10 of the European Convention on Human Rights with regard to an order requiring the applicant company to pay damages for breach of confidence. It considered that the photographs published by MGN and objected to by the claimant had not been necessary to support the credibility of the information in the accompanying article, while the public interest had been satisfied by the publication of the core facts of the claimant's drug addiction and treatment.⁴

Since then, the ECtHR's jurisprudence has grown considerably, and the Court has typically ruled in favour of freedom of expression in similar cases. *MGN*, in line with other cases, relied primarily on the grounds of public interest to justify disclosure of essential information. The category of public interest, complemented by the status of public figure, is the basis of the relevant ECtHR jurisprudence. In this article, I will examine how the contours of these vague concepts can be defined on the basis of case law, and what problems and inconsistencies arise from the Court's approach to these aspects. The article presents the most important decisions by the Strasbourg court, before considering the interpretation of the concept of public interest, discussing the uncertainty and relevance of the public figure status, and drawing some general conclusions.

ECtHR case law relating to the conflict between the right to privacy and freedom of expression

In this section, I will briefly review the ECtHR's case law, highlighting some of its decisions which, taken together, illustrate the Court's approach to the protection of privacy under Article 8 of the Convention and outlining the balancing test to be applied in the event of a conflict between the right to privacy and freedom of expression.

Cases involving public figures and public interest information

First, I will look at decisions concerning public figures, in situations which the ECtHR considers to be related to information of public interest. In these cases, the scope for privacy protection is narrower, given that there may be elements of the private lives of such public figures that can be linked to public affairs, the disclosure of which may thus be considered to be in the public interest. However, the protection of the privacy of

³*MGN Limited v the United Kingdom* App no 39401/04 (ECHR, 18 January 2011).

⁴*ibid* para 147.

public figures does not cease to exist simply because these concerns are raised.

The first *Von Hannover v Germany* case marked a milestone in the assessment of photographs of public figures.⁵ Various photographs of the applicant, the Princess of Monaco, were published in tabloid magazines. Some were taken in the street, others in a restaurant, a third on a public beach, and some of them even showed her child. Regarding photographs taken in situations where the Princess had a legitimate expectation of privacy, such as in a restaurant, at lunch or on a beach, the ECtHR ruled that their publication would be contrary to Article 8 of the Convention, despite the fact that the Princess was photographed in public places. The Court stated that although public figures have less scope to expect the protection of their private life, their private sphere is still recognised and protected by law.⁶ The Princess, although a public figure, does not exercise public power and cannot inherit the princely throne. Since she is merely a celebrity, and the public discussion of certain aspects of her life does not contribute to democratic discourse, her private sphere is afforded greater protection than that of a politician holding public office.⁷ Although the public was evidently interested in the Princess's private life, there was no overriding public interest that would outweigh the Princess's rights to privacy in this situation.⁸ The images were published merely to satisfy the public's hunger for gossip.

Following the appearance of further articles in the tabloid press, in *Von Hannover (No 2)*,⁹ the Grand Chamber of the ECtHR found that the publication of a photograph attached to a newspaper article containing information of genuine public interest – showing the Princess walking with her husband during a winter holiday – did not infringe the Princess's right to privacy. This was because the article was about the health of the Princess's father, the Prince of Monaco, and the support his family members were giving him during his serious illness. The discussion of this topic was considered to be information of public interest, and there was no suggestion that the photograph had been taken by the reporter by harassment or covertly.¹⁰

*Von Hannover (No 3)*¹¹ was also based on a newspaper article, which included a picture of the Princess and her husband on holiday along with several photos of their holiday home in Kenya. A newspaper article accompanying the pictures said that it had become customary for the rich to rent out their holiday homes to paying guests. The Princess filed a lawsuit, but the

⁵*Von Hannover v Germany* App no 59320/00 (ECHR, 24 June 2004).

⁶*ibid* para 68.

⁷*ibid* paras 62–65.

⁸*ibid* para 77.

⁹*Von Hannover v Germany (No 2)* App nos 40660/08 and 60641/08 (ECHR, 7 February 2012 [GC]).

¹⁰*ibid* para 103.

¹¹*Von Hannover v Germany (No 3)* App no 8772/10 (ECHR, 19 September 2013).

German court eventually rejected her claim. In its judgment, the ECtHR found that the national court's decision – namely, that the subject of the article contributed to a matter of public interest – could not be considered unreasonable. The German courts also have taken into account the fact that the ECtHR considers the applicant to be a public figure who is not entitled to the same degree of protection of her private life as a private individual.¹²

The first *Von Hannover* ruling therefore established that privacy can be protected even in public places, in situations belonging to private life. The existence of a 'climate of harassment' is also an important aspect, tipping the balance in favour of the applicant.¹³ The individual's status as a public figure is also an important factor. However, while the first decision found it justified to limit the right to privacy only in the case of public figures who hold official (public) functions (which the Princess does not), in the subsequent two cases the ECtHR broadened the range of considerations to be taken into account. According to the logic of these later decisions, if the photographs can be linked to a matter of public interest, then even an event falling within the scope of private life may be disclosed.¹⁴ In doing so, the ECtHR essentially changed the approach it had set out in the first decision. Assessing the 'public figures' status of an individual and distinguishing between different public figures on the basis of their degree of influence on public affairs has hence become largely meaningless.¹⁵ The Princess's status did not change in the period between the judgments; she remained 'merely' a celebrity. Nevertheless, in the second and third cases, the ECtHR appeared to identify a connection between the photographs and a matter of public interest. However, this only became possible through a strained and unconvincing interpretation. It is unclear why, for instance, the actions of the Princess during her father's illness should be considered a matter of public concern. Such a broad interpretation of the public interest erodes the protection of privacy.¹⁶

In *Éditions Plon v France*,¹⁷ a newspaper published an article which revealed intimate information about an illness which President Mitterrand was suffering from and the way he handled his health issues. The article stated that the President had dismissed his doctor, choosing instead to be treated with 'alternative' medicine. As the doctor consequently considered that his reputation had been called into question, he published a book on

¹²ibid para 53.

¹³Kirsty Hughes, 'Von Hannover v Germany (2005)' in Paul Wragg and Peter Coe (eds), *Landmark Cases in Privacy Law* (Hart Publishing 2023) 197.

¹⁴ibid 200.

¹⁵Gavin Phillipson, 'Press Freedom, the Public Interest and Privacy' in Andrew T Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press 2016) 146.

¹⁶ibid 153.

¹⁷*Éditions Plon v France* App no 58148/00 (ECHR, 18 May 2004).

the details of the President's illness. Upon request from Mitterrand's heirs, national courts banned the book indefinitely arguing that it breached medical confidentiality. For the ECtHR, an indefinite ban on a book was a disproportionate measure and unnecessary in a democratic society. The ECtHR held that, as the President's death became more distant in time, the protection of the emotions of the deceased's relatives became less important. The more time elapsed, the more the public interest in understanding the history of President Mitterrand's two terms of office prevailed over the requirements of protecting the President's rights with regard to medical confidentiality.¹⁸

This decision is problematic. While it acknowledges that the relatives of the deceased President may have a legitimate interest in keeping private health data confidential, it indicates that the passage of time may weaken this interest. However, the time which elapsed between the publication of the book and the death of the President was only nine and a half months, a very short period. Since the President was, of course, out of office by then, it is difficult to see any important public interest behind the disclosure of the specific confidential information (though public interest can generally remain a relevant aspect even when the individual in question no longer holds public office), at least one that would have justified such a rapid publication.

In *Hachette Filipacchi Associés v France*,¹⁹ a few days after the murder of a French prefect, a weekly magazine published an article that was accompanied by a large photograph taken moments after the murder. It showed the prefect's lifeless body lying on the ground in a pool of blood, facing the camera. The applicant media company complained about the court's order requiring the publication of a statement that the photograph of the prefect had been published without his family's consent. The ECtHR considered that the distress caused to the prefect's relatives should have led journalists to exercise prudence and caution, given that he had died in circumstances which were traumatic for his family. The result of the publication of this image in a magazine had been to heighten the trauma felt by the victim's relatives in the aftermath of the murder.²⁰ Therefore, the national authorities had not breached Article 10. In its decision, the ECtHR struck the right balance between the protection of privacy and the public interest nature of publishing the image, although this was not especially difficult as the publication of the photograph did not in itself contribute to a public interest dispute.

In *Standards Verlags v Austria (No 2)*,²¹ a magazine published an article commenting on certain gossip relating to the marriage of the then Federal

¹⁸ibid para 53.

¹⁹*Hachette Filipacchi Associés v France* App no 71111/01 (ECHR, 14 June 2007).

²⁰ibid paras 48–49.

²¹*Standards Verlags GmbH v Austria (No 2)* App no 21277/05 (ECHR 4 June 2009).

President. The ECtHR found that the article failed to contribute to any debate of general interest, since it was nothing more than ‘idle gossip’ about the state of a public figure’s marriage or his alleged extra-marital relationships.²² According to the Court, ‘even public figures may legitimately expect to be protected against the propagation of unfounded rumours relating to intimate aspects of their private life’.²³

After the well-publicised sex scandal concerning Max Mosley, in *Mosley v the United Kingdom*,²⁴ the applicant alleged that the UK courts had violated their positive obligations under Article 8 to ensure respect for his private life, in particular by failing to require those intending to disclose private information to first notify the subject of that information. The ECtHR found no violation of Article 8, as a pre-notification requirement would inevitably affect political reporting and hinder serious journalism, which calls for the most careful scrutiny. In any case, the ECtHR accepted that the pictures and other details of Mosley’s sex life were not in the public domain and that there was no public interest in their publication.²⁵

In the ECtHR’s practice, the right to privacy, not only of political figures but also of other celebrities is more narrowly enforced when it comes up against freedom of expression.

In *Axel Springer v Germany*,²⁶ a well-known actor had been arrested at the Munich beer festival for possession of cocaine. A journalist from the applicant company declared that she had asked the police present at the scene whether the actor had been arrested and, if so, on what grounds. The police had confirmed that he had been arrested in possession of cocaine. The subsequent article was accompanied by three photos of the actor. The Grand Chamber of the ECtHR ruled that Germany had violated the applicant’s right to freedom of expression when it fined the magazine, and prohibited further publication of articles concerning the arrest of the actor. The Court stated that, ‘whilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures. A fundamental distinction needs to be made between reporting facts relevant to a debate in a democratic society, relating to politicians in the exercise of their official functions, for example, and reporting details of the private life of an individual who does not exercise such functions’.²⁷ It is worth emphasising that, despite the passing remark on politicians as forming a particularly important category of public figures, the person involved in this case was *not* a politician. Nevertheless,

²²ibid para 52.

²³ibid para 53.

²⁴*Mosley v the United Kingdom* App no 48009/08 (ECHR, 10 May 2011).

²⁵ibid para 89.

²⁶*Axel Springer AG v Germany* App no 39954/08 (ECHR, 7 February 2012 [GC]).

²⁷ibid para 91.

the ECtHR still ruled in favour of the applicant. In the decision, the Court established criteria which would serve as a guideline in future cases. These are: (1) the contribution of the publication to a debate of general interest, (2) how well known the person concerned is, and what the subject of the report is, (3) the prior conduct of the person concerned, (4) the method of obtaining the information and its veracity, (5) the content, form and consequences of the publication, (6) the severity of the sanction imposed.²⁸

Commentaries on these guidelines have largely welcomed the establishment of ‘systematic, consistent and transparent criteria’.²⁹ In its reasoning, the ECtHR distinguished between politicians in public office and other public figures, with the media acting as a public watchdog when it comes to raising issues of importance to democratic decision-making.³⁰ However, the media has no such role with regard to celebrities. In the absence of this role, the justification for the decision in this particular case is weak and restricts the actor’s right to privacy. The ECtHR even declared that: ‘the definition of what constitutes a subject of general interest will depend on the circumstances of the case. The Court nevertheless considers it useful to point out that it has recognised the existence of such an interest not only where the publication concerned political issues or crimes but also where it concerned sporting issues or performing artists’.³¹

It is interesting to ponder the question of whether the Court perceives a distinction between *public* interest and *general* interest and what justifies according the same narrow protection of privacy for athletes and performing artists as for political actors. Athletes and performing artists are less involved in matters of significant public concern, and the mere fact that their activities take place in the public eye can hardly justify eroding the protection of their private lives to the same extent as that allowed for politicians, even if the public is undoubtedly interested in these matters. Why did the ECtHR, for example, not mention scientists or writers? The fact that they are less ‘interesting’ to the public cannot be considered a reason for demarcation in principle.

In *Verlagsgruppe News and Bobi v Austria*,³² a magazine published images of the principal of a seminary where future priests were trained, accompanying an article which stated that he had had sexual relations with some of the seminarians. The photograph showed him with his hand between the legs of one of the seminarians, and two photographs showing another person about

²⁸ibid paras 89–95.

²⁹Dirk Voorhoof, ‘Freedom of Expression Versus Privacy and the Right to Reputation: How to Preserve Public Interest Journalism’ in Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford University Press 2017) 160.

³⁰*Axel Springer* (n 26) para 91. See Kirsty Hughes and Neil M Richards, ‘The Transatlantic Divide on Free Speech and Privacy’ in Kenyon (ed), *Comparative Defamation and Privacy Law* (n 16) 184–85.

³¹*Axel Springer* (n 26) para 90.

³²*Verlagsgruppe News GmbH and Bobi v Austria* App no 59631/09 (ECHR, 4 December 2012).

to kiss and embrace a seminarian. The publisher and the editor-in chief of the magazine complained about an injunction, upheld by the Austrian Supreme Court, prohibiting them from publishing the photograph of the principal in connection with allegations of him having made unwanted homosexual advances towards seminarians or engaged in sexual antics with seminarians. The ECtHR found no breach of Article 10. It was not in dispute that the applicants were entitled to disclose the principal's name,³³ but the protection of the rights and reputation of others takes on particular importance in the context of the publication of photographs which may contain very personal or even intimate information'.³⁴ Therefore, the ECtHR raised no objection to distinguishing between the publication of a text and that of a photograph.³⁵

In *Lillo-Stenberg and Saether v Norway*,³⁶ the applicants, a well-known musician and actress, complained about press invasion of their privacy during their wedding. Without the couple's consent, a magazine published an article about their wedding accompanied by six photographs. They showed the bride, her father and the bridesmaids arriving at the wedding venue in a rowing boat, the bride being brought to the groom by her father and the bride and groom returning to the mainland. The Supreme Court of Norway found against the couple. It considered that they had got married in a place which was accessible to the public, and that the article was neither offensive nor negative. The ECtHR agreed with the national court that 'a wedding has a public side. The Court agrees and finds reason to add that the publication of an article about a wedding cannot itself relate exclusively to details of a person's private life, and have the sole aim of satisfying public curiosity in that respect'.³⁷ The ECtHR added that no photographs of the actual marriage ceremony had been published. Such a situation would clearly have had more personal significance than the actual photographs published.³⁸ Accordingly, the Court found that Article 8 had not been breached.

The reasoning behind the decision is rather weak. Of course, a marriage has public consequences, and the fact of the wedding itself can hardly be denied to the public, but it is not clear why this implies the right to publish any photograph. Moreover, it is unclear why there should be a difference between pictures taken before and during the ceremony in terms of privacy protection. People entering into a marriage have as strong an interest in safeguarding their privacy before and after the wedding as they do during

³³ibid para 77.

³⁴ibid para 66.

³⁵ibid para 82.

³⁶*Lillo-Stenberg and Saether v Norway* App no 13258/09 (ECHR, 16 January 2014).

³⁷ibid para 37.

³⁸ibid para 42.

the ceremony. What is the justification for publishing the pictures other than sheer public curiosity? There is no public interest in publishing the photos.³⁹ It could also be argued that the images are anodyne, do not reveal any confidential information, and do not depict the people concerned in an awkward or embarrassing situation. However, accepting this argument would be to turn the privacy system on its head: if privacy is protected, then it is the intrusion into it that needs to be justified, not the right to protection. In other words, the media in this case should have had to justify that the publication of the images was in the public interest.

In *Ruusunen v Finland*,⁴⁰ the applicant, a former girlfriend of the Prime Minister at the time, wrote a book about their relationship which made references to their intimate interactions. The Finnish courts convicted the applicant for the dissemination of information violating personal privacy, but found only the references to the sex life and intimate events between the applicant and the former Prime Minister to be illegal speech. The ECtHR found no breach of Article 10. The Court agreed that ‘from the point of view of the general public’s right to receive information about matters of public interest, there were justified grounds for publishing the book’.⁴¹ According to the ECtHR, the national courts had appropriately narrowed down the scope of the problematic content in the book, which it considered to contain information falling within the core area of the private life of the Prime Minister.⁴²

The ECtHR’s decision did not address whether, from the standpoint of protecting privacy, it is relevant that such protection is enforced by means of criminal-law instruments. This is a notable omission, since the application of the state’s criminal authority must always be subject to stricter scrutiny in matters of freedom of expression.⁴³

Couderc and Hachette Filipacchi Associés v France concerned the conviction of the applicants following their publication of an article about the ‘secret’ (illegitimate) child of Albert, Prince of Monaco.⁴⁴ The article contained several photographs and intimate information. The French courts agreed with the Prince that the publication of the article had interfered with his rights to private life and to the protection of his own image. The ECtHR found that the French authorities had breached Article 10. The Court considered that although a birth is an event of an intimate nature, it also falls within the public sphere, since it is in principle accompanied by a public statement (the civil status document) and the establishment of a legal parent – child relationship.⁴⁵ Accordingly, a news report about a

³⁹Hughes and Richards (n 30) 189.

⁴⁰*Ruusunen v Finland* App no 73579/10 (ECHR, 14 January 2014).

⁴¹ibid para 49.

⁴²ibid paras 50–51.

⁴³Hughes and Richards (n 30) 186.

⁴⁴*Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECHR, 10 November 2015 [GC]).

⁴⁵ibid para 107.

birth cannot be considered, in itself, to be a disclosure which exclusively concerns the details of the private life of others.⁴⁶ Obviously, the article published information going far beyond the mere fact of the birth. Realising this, the ECtHR argued that there is a public interest value in the information about the existence of a child of the Prince, who was known at the relevant time to be single and childless. Although an illegitimate child cannot be heir to the throne, the Court considered the fact that the Prince's son was born out of wedlock to be irrelevant since – according to the ECtHR – at the time, the birth of this child ‘was not without possible dynastic and financial implications: the Prince was still unmarried and the question of legitimation by marriage could be raised, even if such an outcome was improbable’.⁴⁷ The ECtHR also emphasised the public role of the monarch, who embodies the unity of the nation, and so, ‘certain events affecting the members of the ruling family, while they are part of the latter's private lives, are also part of contemporary history’.⁴⁸

The decision is also open to criticism. Similarly to marriage, birth also has public domain consequences, but this form of publicity (issuing a birth certificate, the newborn's appearance in the state welfare system, etc) cannot be compared to media exposure. Of course, the fact that the father of the child is the Prince of Monaco is an important factor. Nevertheless, it was also well known that a child born out of wedlock could not be heir to the throne. Even if one accepts that the Prince's troubled private life may give rise to situations that lead to the disclosure of certain private circumstances being in the public interest, it remains unclear what the justification was for the publication of the pictures of the child and other confidential information about him (though this is a violation of the child's privacy, rather than the parent's). Ideally, a monarch sets an example for their people; accordingly, the same consideration applies as with certain other celebrities, that the individual is a ‘role model’, and that their followers must be made aware of their fallibility (see the House of Lords's reasoning in *Campbell*⁴⁹). Therefore, information reporting the birth of an illegitimate child is presumed to be in the public interest.

The ECtHR has ruled that the public interest nature of certain information may tip the balance in favour of freedom of expression in relation to events that would otherwise belong to private life.⁵⁰ The Court did not go so far as to say that information about important public officials is always in the public interest, but it did appear to limit the scope for the exercise of the right to privacy in their case.

⁴⁶ibid.

⁴⁷ibid para 108.

⁴⁸ibid para 112.

⁴⁹*Campbell* (n 2) [151], [163].

⁵⁰ibid para 89; see Kirsty Hughes, ‘The Public Figure Doctrine and the Right to Privacy’ (2019) 78 CLJ 70, 82.

The ECtHR's practice is inconsistent on the matter of how far it breaks down a publication into its constituent elements and when it considers a publication to be an integral whole. In *Couderc*, it did not separate the parts of the article, nor the images that accompanied them. The communication was assessed 'as a whole', and was therefore considered by the Court to be in the public interest in its entirety.⁵¹ It also noted that 'for an article to contribute to a debate of public interest, it is not necessary that it be devoted entirely to that; it may be enough for the article to be concerned with that debate and to contain one or several elements for that purpose'.⁵² In *Ruusunen*, in contrast, it separated the constituent parts of the publication and agreed with the national courts that some of those parts infringed privacy.

Prior to *Zu Guttenberg v Germany*,⁵³ the applicant politician, following a revelation that he had committed plagiarism, had resigned from his office and given up his seat in parliament. A magazine published an article concerning the politician's houses in Berlin and in the USA (the houses themselves did not relate to the applicant's resignation). He complained of a refusal by the German courts to prohibit any fresh publication of the impugned photos. The ECtHR declared the application inadmissible. It found that the German courts had struck a fair balance between the applicant's right to respect for his private life and the freedom of expression of the magazine.

In the wake of the ECtHR ruling, it is not clear to what extent the publication of photographs of a former public figure's property contributes to public debate. By themselves, these images do not contribute to the discussion of public affairs. Of course, it can also be argued that they do not cause actual harm or detriment to the person concerned, but the right to privacy does not merely protect an individual against actual harm or detriment, but also gives them the right to remain out of the public eye. However, identifying the properties in which an individual resides can in itself easily lead to adverse consequences for them.

In *Dupate v Latvia*,⁵⁴ the applicant was a lawyer, and her partner was the chairperson of a political party and the face of an advertising campaign for a nationally available celebrity-focused magazine. The case concerned photos that were surreptitiously taken of the applicant leaving a maternity ward, and their subsequent publication with an accompanying article. The applicant alleged that the dismissal by the Latvian authorities of her complaints about the publication of the covertly taken photos of her and her newborn baby had violated her rights. The ECtHR again considered that the birth

⁵¹*Couderc* (n 44) paras 102, 106.

⁵²*ibid* para 110.

⁵³*Zu Guttenberg v Germany* App no 14047/16 (ECHR, 18 July 2019).

⁵⁴*Dupate v Latvia* App no 18068/11 (ECHR, 19 November 2020).

of the child ‘did touch on a matter that had a public side’.⁵⁵ However, the contribution such an article makes to matters of general importance is lower compared to articles advancing political or other public debate.⁵⁶ As a result, the applicant’s right to private life was breached.

I consider the ECtHR’s assessment in this case to be correct. In this decision, the Court duly considered that the published photographs did not contribute to a debate of public interest.

Criminal procedures

In reporting on crimes that engage the interest of the public and the media, the question of the limits of the right to privacy also clearly arises, whether political figures, other celebrities, or private individuals are involved in the case. It has been argued that reporting on such matters serves a legitimate social purpose in the public interest.⁵⁷

In *Egeland and Hanseid v Norway*,⁵⁸ two newspapers published photographs of an individual who had, immediately before the images were taken, been convicted of triple homicide. In the pictures, he is seen after the decision, emotionally broken and sitting in a police car. The ECtHR held that the sanction imposed for publishing the photographs did not violate Article 10, even though the serious crime and the circumstances of the conviction could reasonably have attracted public interest, because the life-situations depicted in the images are regarded as falling within the protected private sphere, even in the case of an offender.

*Flinkkilä and Others v Finland*⁵⁹ concerned the conviction of the applicants, working for two nationally distributed magazines, for publishing information concerning the girlfriend of the then-National Conciliator. The impugned articles focused primarily on the private and professional consequences for the National Conciliator of an altercation that had taken place outside his home between himself, his wife and his girlfriend. One article was accompanied by a photograph of his girlfriend, whose name was given in full. The Finnish courts found that the articles had breached the girlfriend’s right to private life. The ECtHR held that there had been a violation of Article 10. The Court took into consideration the facts that she was involved in a public disturbance outside the family home of her lover, a senior public figure who was married, and that later, criminal charges were preferred against both of them. Therefore, while she remained

⁵⁵ibid para 53.

⁵⁶ibid.

⁵⁷Rebecca Moosavian, ‘Deconstructing “Public Interest” in the Article 8 vs Article 10 Balancing Exercise’ (2014) 6(2) *Journal of Media Law* 234, 248.

⁵⁸*Egeland and Hanseid v Norway* App no 34438/04 (ECHR, 16 April 2009).

⁵⁹*Flinkkilä and Others v Finland* App no 25576/04 (ECHR, 6 April 2010).

a private person, she can reasonably be considered to have entered the public domain.⁶⁰ As the disclosure of the National Conciliator's identity in the applicants' reporting had a direct bearing on matters of public interest, and as his girlfriend had taken an active and willing part in the events leading to his conviction and dismissal, her involvement in the events was thus a matter of public interest.⁶¹

In the already mentioned *Axel Springer* case, the ECtHR noted that the articles concerned 'the arrest and conviction of the actor X, that is, public judicial facts that may be considered to present a degree of general interest'.⁶² According to the Court, the public has an interest in being informed about criminal proceedings, whilst the publication should also observe the presumption of innocence.

In *Van Beukering and Het Parool BV v the Netherlands*,⁶³ the applicant journal published an article on a rap artist, who stabbed three persons with a knife, killing one and seriously injuring the others. While the article did not state his full name, it was accompanied by a portrait image of him. The Dutch courts expressed the view that publishing the image was neither necessary for the expressiveness of the article, nor proportionate to the aim pursued, namely informing the public. The ECtHR found no breach of Article 10. The Court agreed with the national authorities that freedom of expression did not outweigh the perpetrator's right to respect for his private life, because in publishing portraits of persons suspected of criminal acts reticence is appropriate.⁶⁴

According to one critic, in this case the ECtHR erred by failing to apply the criteria laid down in *Axel Springer* consistently: it should have taken into account the public interest nature of the article and the suspect's previous role in public life.⁶⁵ Nevertheless, it is indisputable that individuals who operate in the public sphere must also be afforded protection for their private lives, even if they become suspects in investigations of serious criminal offences. The publication of their photographs in such cases contributes little to the public debate.

The ECtHR attempts to strike a balance between the public interest and the protection of individuals' private lives in such cases, but it does not necessarily do so on the basis of sufficiently strong arguments. Obviously, even the perpetrators (or suspects) of the most serious crimes retain some right to privacy (*Egeland and Hanseid*, *Van Beukering*), but it is not clear why information about crimes by public figures deserves more publicity

⁶⁰ibid para 83.

⁶¹ibid para 85.

⁶²*Axel Springer* (n 26) para 96.

⁶³*Barbara van Beukering and Het Parool BV v the Netherlands* App no 27323/14 (ECHR, 20 September 2016).

⁶⁴ibid para 35.

⁶⁵Voorhoof (n 29) 169–70.

(Axel Springer), or why a violation by an actor belongs in the public domain. Moreover, if, as the ECtHR states, ‘the public has an interest in being informed about criminal proceedings’, should a distinction be made between crimes committed by private individuals and those committed by public figures? It would be clearer if the ECtHR were to argue that, as a general principle, it is important for citizens to observe the functioning of the justice system and to be assured that crimes carry serious consequences for the perpetrator. This aspect, however, does not take into account the status of the perpetrator (suspect) and would, where appropriate, provide stronger protection for the privacy of well-known people than is currently the case.

Private persons involved in public interest stories

Private individuals can also find themselves in situations where they become of interest to the media for a while. In their case, the ECtHR is more lenient when it comes to restrictions on freedom of expression.

The applicant in *Peck v the United Kingdom*⁶⁶ unsuccessfully attempted to commit suicide and then wandered the streets in a deranged state with a knife in his hand. Shortly before this happened, a CCTV system had been installed by the local council, which recorded the event. The applicant was recognisable from the pictures, although the failed suicide attempt itself was not visible. The municipality wanted to publish the recordings in the media to justify the installation of CCTV cameras, which the applicant unsuccessfully objected to. For this reason, the ECtHR found that, although he had been in a public place, he was not a public figure and that the disclosure of the recording of him violated his privacy.

*Hájovsky v Slovakia*⁶⁷ concerned a television report by an investigative reporter who – pretending to be a potential surrogate mother – had recorded her meetings with the applicant, who was covertly searching for a surrogate mother. This was followed by the publication of an article in a newspaper which contained additional information on the applicant’s private matters as well as photographs of him from the report that were taken without his consent. The action for the protection of his personal integrity which he brought against the publisher was dismissed by the Slovakian courts. The ECtHR held that there had been a violation of Article 8, finding that the national court’s assessment of the applicant’s prior conduct, its failure to consider the manner in which the photographs had been taken and, most importantly, its failure to assess the contribution to the public interest debate of broadcasting non-blurred images of the applicant were

⁶⁶*Peck v the United Kingdom* App no 44647/98 (ECHR, 28 January 2003).

⁶⁷*Hájovsky v Slovakia* App no 7796/16 (ECHR, 1 July 2021).

flawed.⁶⁸ The ECtHR noted that the applicant had not been a public or newsworthy figure, and had not sought any public exposure.⁶⁹

In these cases, the ECtHR's balancing exercise is fundamentally acceptable, as it has afforded protection to the private lives of the individuals concerned, who were not public figures.

*Bild GmbH & Co KG v Germany*⁷⁰ concerned a court ruling ordering a news website to take down CCTV footage of a police arrest carried out at a nightclub in Bremen unless it blurred the face of one of the police officers involved. The ECtHR held that there had been a violation of Article 10. The ECtHR held that, without evaluating the contribution of the publication to a public debate, the domestic courts had stated in a general reasoning that neutral coverage of the police intervention, although it might not depict the police officer in a negative way, could not be considered to be portraying a general aspect of contemporary society, and thus would be unlawful. The Court considered that this line of reasoning could lead to an unacceptable ban on any future publication of unedited images of police officers performing their duties, without their consent.⁷¹

In these cases, the ECtHR has correctly defined the balance between the right to privacy and freedom of expression. Although individuals can also be involved in public affairs,⁷² the extent to which their rights are protected is greater than that of public figures.

Public interest in publishing private information

In its practice, the ECtHR takes several aspects into account when balancing competing rights. The main argument in favour of restrictions of privacy is the existence of a public interest behind the disclosure, but the application of this category in practice is not consistent. This section will examine the problems associated with certain elements of the criteria applied by the Court.

Free speech justifications and the right to privacy

Several arguments can be advanced in support of the protection of freedom of expression. These arguments in the legal literature can be grouped into three categories: the search for truth through free debate, participation in

⁶⁸ibid paras 34–49.

⁶⁹ibid paras 34–35.

⁷⁰*Bild GmbH & Co KG v Germany* App no 9602/18 (ECHR, 31 October 2023).

⁷¹ibid para 45.

⁷²*Bladet Tromsø and Stensaas v Norway* App no 21980/93 (ECHR, 20 May 1999); *Bergens Tidende v Norway*, App no 26132/95 (ECHR, 2 May 2000).

democratic decision-making and the guarantee of individual autonomy.⁷³ These legal justifications also have practical significance, because one of the fundamental questions in determining the limits to freedom of expression is what interest does the speech in a particular case serve that is recognised and protected by the legal system.

Theories that prioritise the search for truth are not suitable for restricting the right to privacy over the right to freedom of expression. While disclosures that reveal certain events in a person's private life to the public do present reality, it remains unclear why anyone should have a stronger right to access this information than the individual seeking to safeguard their private sphere.⁷⁴

In what will be referred to hereinafter as the 'democratic justification', the primary purpose and significance of freedom of expression is to enable citizens to participate in the discussion of public affairs and in informed decision-making thereon.⁷⁵ The essence of the right in this reasoning lies in creating the opportunity for democratic (self-)government and decision-making. Such participation must be effective, which can only be guaranteed by the establishment of certain speech-restrictive rules. A distinction must be drawn between opinions on the basis of their content: opinions that are engaged in political debate (broadly construed to encompass all matters of public interest) enjoy heightened protection, whereas those that do not contribute to the debate on public affairs may be more readily restricted.

According to individualist justifications, freedom of expression is a means to develop and fulfil the personality, in order to achieve individual autonomy. Freedom of expression cannot merely be a right deriving from a particular chosen social order: its value is not exclusively and not primarily derived from the democratic system, but from a more universal necessity for respect for the individual. This desire is morally based and is innate in humans, rather than being subordinated to any other goal. However, the personality of the individual can only be fulfilled in her social existence, in her relations with other members of the society, and individual capacities can only be developed in social life. The value of individual autonomy is thus difficult to separate from the aspiration to democratic self-government.⁷⁶ Furthermore, the exercise of individual autonomy (if it is realised through speech) can infringe the freedom and autonomy of others. Such harm

⁷³See, eg, Eric Barendt, *Freedom of Speech* (2nd edn, Oxford University Press 2005); Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press 2015); Kevin Saunders, *Free Expression and Democracy* (Cambridge University Press 2017).

⁷⁴Hughes (n 50) 93–94.

⁷⁵Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper 1948); Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Oxford University Press 1960).

⁷⁶Robert C Post, 'Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse' (1993) 79 *University of Colorado LR* 1109, 1120.

must be tolerated to a certain extent, thereby placing the speaker in a more favourable position.

According to Paul Wragg, even speech that violates privacy can contribute to individual fulfilment, for both the speaker and his audience, and so it may be protected unless it causes serious harm. He argues that revealing confidential information plays an important role in shaping public opinion, and that much of this information involves celebrities, and suggests that members of society can improve as a result of access to this information (by learning something valuable that they can apply to their own daily lives, such as that cheating, misconduct, etc is morally wrong). According to Wragg, the value of freedom of expression in relation to private life is not restricted to participation in democratic processes, but also contributes to the personal development of the members of the audience. However, based on democratic justifications, the freedom of such speech, if the private life fact disclosed by the speech is not related to public affairs, would not be justified at all, because speech that violates privacy cannot be considered to be in the 'public interest'. This is a contradiction in terms, because the fulfilment of the individual is in itself a public interest, approached from the theoretical underpinnings of freedom of expression, and hence guaranteeing it is necessary for democratic self-government.⁷⁷

The ECtHR and the national courts' jurisprudence primarily, and emphatically, protects 'political speech' – that is, expressions connected with public affairs – and regards individual autonomy as a comparatively weaker justification for the protection of speech.⁷⁸ From the overview of the ECtHR's case law, it is apparent that on occasions when the Court finds in favour of Article 10, it sometimes goes to considerable lengths to demonstrate that the disclosure in question is of public interest and relates to a matter of public concern, thereby invoking the democratic justification for freedom of expression. However, the democratic justification offers little basis for undermining celebrities' right to privacy or for publicising politicians' private lives when, notwithstanding the Court's strenuous efforts in its reasoning, the disclosure cannot genuinely be linked to any matter of public concern. In Gavin Phillipson's view, the democratic justification is ill-suited to supporting the freedom to publish information infringing upon the private sphere, since such disclosures generally either fail to contribute to democratic decision-making or do so only to a degree that is negligible in comparison with the harm they inflict.⁷⁹

Kirsty Hughes challenges Wragg's assertion that speech concerning private life genuinely contributes to individual fulfilment (as the audience's

⁷⁷Paul Wragg, 'The Benefits of Privacy-Invasive Expressions' (2013) 64 NILQ 187.

⁷⁸Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press 2006) 50, 71.

⁷⁹Gavin Phillipson, 'Leveson, the Public Interest and Press Freedom' (2013) 5 Journal of Media Law 220, 237.

personal development is impeded by the privacy-invasive celebrity culture) and questions whether, even if it did, this would amount to a sufficiently weighty justification for restricting the right (as prioritisation of the audience's development over the dignity and self-growth of the privacy seeker is questionable).⁸⁰ I interpret Wragg's theory as not excluding the protection of private life, but rather being concerned with reshaping the criteria used in the balancing exercise. In the type of balancing exercise that he considers desirable, the protection of individual autonomy rather than the public interest predominates. Thus, not every disclosure is deemed to be 'of public interest' merely because it supports an individual's (ie a member of the audience's) personal growth and development, and the public interest is not a significant criterion in this context. Wragg's theory would render the distinction between public figures and private individuals unnecessary. On this point, it should also be noted that the ECtHR has significantly broadened its interpretation of the category of public figures to the point that its application has become almost meaningless (see later). In fact, even when embracing and applying the democratic justification, it would be appropriate to abandon this category and focus solely on whether the confidential information disclosed by a publication relates to a matter of public concern.⁸¹

According to Wragg, for example, the *Axel Springer* or the *Von Hannover (No 2)* decision would have been better justified if the ECtHR had considered the communication to be protected on the basis of its contribution to the fulfilment and personal development of the members of the audience of the speech (individuals can improve as a result of access to confidential information by learning something that is important for their daily lives).⁸² This does not mean, of course, that the private sphere must always be subordinated to free speech; Wragg also sees the need to balance the conflicting interests and to restrict speech that causes harm to the individual.⁸³

The ECtHR will, in all likelihood, continue to rely on the democratic justification; nonetheless, it would be desirable for it to apply this approach consistently, with stronger regard for the right to respect for privacy.

Does the right to privacy come into play at all in all these cases?

How far does the right to privacy extend, which is covered by Article 8 of the Convention as an interest to be protected? I have presented a number of cases where it could be argued that the images in question are harmless and insignificant, to the extent that their publication does not even affect

⁸⁰Hughes (n 50) 96–98. See also Fenwick and Phillipson (n 78) 683–88, 792–94; Phillipson (n 15) 141.

⁸¹See also Hughes (n 50) 96.

⁸²Wragg (n 77) 206–207.

⁸³*ibid* 202, 207; for more information, see Paul Wragg, *Free Speech Theory: A Radical Restatement* (Hart Publishing 2025) chapter 10.

the right to privacy, thus falling outside the scope of Article 8. According to Phillipson, the ECtHR would have been more consistent in its decision making if it had referred to this in similar cases, rather than trying to justify that the disclosure was in the public interest.⁸⁴

The cases concerned are the three *Von Hannover* cases (in the first of which the Court ruled in favour of the protection of privacy), *Lillo-Stenberg* and *Zu Guttenberg*. In these, the images that were published did not depict the applicants in humiliating or undignified situations, nor did they afford the public any unduly substantial additional information. Nonetheless, I would reject their exclusion from the scope of Article 8. On the one hand, it is impossible to determine with precision when an image is harmless, so such a distinction can scarcely be made consistently; on the other hand, even a so-called harmless image may inflict harm: a public figure may quite rightly find it intolerable that their everyday actions are closely followed by photographers, and – even if those actions do not technically constitute harassment – the mere presence of the photographers may feel intrusive, as one may legitimately expect a wedding to remain a private affair, and feel aggrieved at seeing their own home pictured in newspapers. It is not the protection of the right to privacy, but the restriction of it that must be duly justified.

Public/general interest speech

As noted earlier, the ECtHR justifies the protection of freedom of expression primarily on the grounds of its role in ensuring a free and wide-ranging debate on public affairs. Speech is protected principally when it contributes to a debate on matters of public interest. The primacy of the democratic justification of freedom of expression means that the most highly protected speech is that which promotes and supports democratic decision-making. However, the ECtHR does not limit the scope of these debates to questions of political relevance.⁸⁵ The distinction drawn in the first *Von Hannover* judgment between speech ‘in the public interest’ and speech that merely ‘interests the public’ – a distinction that was in any event rather rudimentary – was not maintained by the ECtHR in later rulings, when it substantially broadened the concept of public interest.

Moreover, in subsequent decisions, the Court has not always necessarily referred specifically to the public interest, but instead to some kind of ‘general’ interest. In any event, these two terms presumably denote the same concept.⁸⁶ In these decisions, photographs that were found to be irrelevant to public affairs [*Von Hannover (No 2)* and (*No 3*)], as well as images

⁸⁴Phillipson (n 15) 153.

⁸⁵Moosavian (n 57) 245.

⁸⁶Paul Wragg, ‘A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley* and *Terry*’ (2010) 2 *Journal of Media Law* 295, 298–99.

unconnected with the individuals' public or official activities (*Axel Springer* and *Lillo-Stenberg*), were nonetheless classified as speech of general interest. In the *Von Hannover* cases, the court supported this by arguing that the article containing the pictures concerned a matter of public interest, but this was a rather far-fetched argument. As Phillipson notes, if the right to privacy can be restricted in order to allow Princess Caroline to be seen by the public while she is skiing, then it is hardly a real right.⁸⁷ In *Lillo-Stenberg*, the ECtHR held that there was an element of general interest in the article about the applicants' wedding.⁸⁸ In *Von Hannover (No 3)*, in contrast, the Court held that the publication of the photographs would be unlawful only where the link between the contested image and the accompanying text was wholly artificial and arbitrary.⁸⁹ In other words, a skilled journalist should have no problem linking any picture to a matter of public interest, and the ECtHR does not regard this as a problem. Similarly, in *MGN*, the ECtHR did not dispute that the disclosure of details about Naomi Campbell's drug addiction and treatment was protected by the right to freedom of expression. It could have been legitimately contended, however, at least in principle – since the claimant ultimately did not invoke it before the British court – that one should ask what justifies the publication of these fundamental facts relating to the case, and whether any public interest underlies their publication.⁹⁰

This concept of the public interest departs in some respects from the democratic justification for freedom of expression. The public interest thus interpreted (as a general interest) is essentially a category without substantive limits and as such, under the current interpretation of the Court, is not suitable to be the decisive criterion for balancing the right to privacy against freedom of expression. It follows from this that if the ECtHR wishes to remain faithful to its principles, it must either accept Wragg's proposal and in future derive the protection of such speech from an individualist foundation, or endeavour to define intelligible boundaries for 'public interest speech'.

Article 8 vs Article 10

The right to freedom of expression and the right to privacy are rights of equal value in the Convention. The protection of the former should not take priority over the latter, and if they conflict, balancing is necessary. A similar requirement exists with respect to national laws.⁹¹ However, the ECtHR's

⁸⁷Phillipson (n 15) 153.

⁸⁸*Lillo-Stenberg* (n 36) para 37.

⁸⁹*Von Hannover (No 3)* (n 11) para 50.

⁹⁰See Gavin Phillipson, 'Campbell v Mirror Group Newspapers (2004)' in Wragg and Coe (eds), *Landmark Cases in Privacy Law* (n 14) 179–80; Paul Wragg, 'Protecting Private Information of Public Interest: Campbell's Great Promise, Unfulfilled' (2016) 7 *Journal of Media Law* 225, 226.

⁹¹Phillipson (n 90) 173; Hughes (n 50) 84.

practice might suggest that if the speech in question is in the public interest, this automatically favours freedom of expression as a stronger right. However, this is a fundamentally flawed conception.

Any conflict between the two rights should always require a balancing act, but this is typically not performed when the speech is found to be in the public interest.⁹² At times, it may appear that, in the ECtHR's case law, the protection of speech in the public interest operates as the general rule, with the protection of privacy being only an exception. However, under the proper interpretation of the Convention, the presence of a public interest is merely one significant consideration in the balancing exercise, and if that interest is weak or tenuous, the protection of privacy ought to prevail over freedom of expression.⁹³ The quality of the public interest in each instance (how strong or weak it is) is not really examined by the ECtHR. If the Court identifies a public interest behind the publication of information that is at odds with right to privacy, it is likely to rule in favour of freedom of expression,⁹⁴ except for the most serious privacy infringements⁹⁵ and communications affecting the privacy of private individuals.⁹⁶ Wragg argues, however, that the Court's scrutiny of a disclosure's public-interest character – and thus the assessment of its value – is inherently 'paternalistic, idiosyncratic and unprincipled' (since we do not have independent means of determining the value of speech to the audience), and is therefore to be avoided.⁹⁷ A further problem, already mentioned, is that the concepts of public and general interest in ECtHR practice are vague, and thus in their present form are inherently unsuitable to support a proper balancing exercise.

The Court also takes into account the category of public figures in its assessment. It differentiates between them based on their status as public figures as opposed to than private individuals, which results in them being granted varying degrees of protection for their private lives. This principle was expressed in *Couderc* as follows: 'Thus, depending on whether or not he or she is vested with official functions, an individual will enjoy a more or less restricted right to his or her intimacy: in this regard, the right of public figures to keep their private life secret is, in principle, wider where they do not hold any official functions ... and is more restricted where they do hold such a function'.⁹⁸ However, the Court has not actually applied this distinction in practice, or at least not consistently, so that

⁹²Wragg (n 90) 226–27.

⁹³Wragg (n 77) 198.

⁹⁴*Axel Springer* (n 26); *Lillo-Stenberg* (n 36); *Couderc* (n 44); *Von Hannover (No 2)* (n 9); *Von Hannover (No 3)* (n 11).

⁹⁵*Hachette* (n 19); *Mosley* (n 24).

⁹⁶*Peck* (n 66); *Hájovsky* (n 67).

⁹⁷Wragg (n 90) 242.

⁹⁸*Couderc* (n 44) para 119.

celebrities and ‘sporting issues or performing artists’ have been treated in the same way as politicians. The category of the public figure has become almost unfathomably broad in the Court’s jurisprudence, and has become detached from the democratic justification of freedom of expression which, in principle, guides the ECtHR in matters of freedom of expression, similarly to how the concept of public interest has also evolved (see above).

In Wragg’s view, neither the category of public interest nor the category of the public figure is suitable as the main criterion for determining the balance between the right to privacy and the right to freedom of expression. In his view, the impact of the communication on the person concerned is the first question to be examined. If the speech causes significant harm to the person about whom it discloses confidential information, it may be restricted.⁹⁹ While this is indeed an important consideration, a narrower interpretation of the concept of public interest – one that is closer to the democratic justification – would also contribute to achieving a more appropriate balance between the two rights.

The media as public watchdog

One of the main functions of the media, which also follows from the democratic justification for the freedom of expression, is to monitor elected officials, the government and generally those in power (including influential individuals, businesses and institutions).¹⁰⁰ The ECtHR thus often refers to the media as the public watchdog when justifying the protection of its freedom.¹⁰¹ Nevertheless, in the context of the protection of privacy, it is difficult to argue that all the information that the ECtHR considers to be disclosable actually contributes to this oversight of those in power. The role of the watchdog is difficult to identify in relation to celebrities, who arguably have no real power.

As Phillipson notes, the media’s position, that everything they publish is inherently and by definition a matter of public interest (meaning that they alone determine what constitutes public interest and may report on it entirely freely), is untenable.¹⁰² The Leveson Report, which examined the functioning and regulation of the British press – and which was prompted by serious intrusions into privacy by the media – also concluded that ‘a press that is free and nothing else will not necessarily enhance democracy’.¹⁰³

⁹⁹Wragg (n 90) 242–49.

¹⁰⁰Voorhoof (n 29) 167–70; Moosavian (n 57) 249; Hughes (n 50) 95.

¹⁰¹*Lingens v Austria* App no 9815/82 (ECHR, 8 July 1986) para 44; *Jersild v Denmark* App no 15890/89 (ECHR, 23 September 1994 [GC]) paras 31, 35; *Bladet Tromsø* (n 72) paras 59, 68; *The Observer and The Guardian v the United Kingdom* App no 13585/88 (ECHR, 26 November 1991) para 59(b); *The Sunday Times v the United Kingdom* App no 13166/87 (ECHR, 26 November 1991) para 50(b); *Dalban v Romania* App no 28114/95 (ECHR, 28 September 1999) para 49; *Bergens Tidende* (n 72) paras 49, 57; *Thoma v Luxembourg* App no 38432/97 (ECHR, 29 March 2001) para 45; *Goodwin v the United Kingdom* App no 17488/90 (ECHR, 27 March 1996) para 39.

¹⁰²Phillipson (n 79) 236.

The ECtHR has also stated in this regard that ‘the public interest cannot be reduced to the public’s thirst for information about the private lives of others, or to an audience’s wish for sensationalism or even voyeurism’.¹⁰⁴ In other words, the public interest is not synonymous with the unrestricted freedom of the media.

The doctrinal justification for the privileging of press freedom rests on inherently unstable foundations. While there is evidence in the Strasbourg case law of a differentiated approach to Article 10, particularly in cases where the Court has emphasised the importance of the watchdog role of the media in examining instances of interference with press freedom, the ECtHR has not formulated a concrete distinction between freedom of the press and freedom of expression in the context of the limits to speech.¹⁰⁵ In other words, the scope of the right to privacy is not narrower when confidential information is disclosed by the media than it would be if it were disclosed by any other party (even though it is most often the media that does so). Thus, the watchdog role – which is of great importance in matters of public affairs – can only be fulfilled by the media to a limited extent when it comes to disclosures affecting private life.

‘Public figures’ as a special category in the right to private life

As we have seen, case law considers the status of the individual seeking to protect their private sphere to be an important factor in deciding whether their right to privacy outweighs free speech considerations. However, such differentiation by status is problematic in several ways. The category of the public figure, which provides the theoretical basis for reduced protection of private life, has become detached from the democratic justification of freedom of expression. Firstly, holding public office does not necessarily imply having an influence over important decisions concerning public affairs. Secondly, according to the ECtHR, athletes and performing artists or, in fact, any well-known individual who appears in the media, are considered public figures. The boundaries of the category are not only vague, but practically non-existent. Furthermore, even individuals who hold important decision-making positions retain a right to private life, although this categorisation does not assist in determining the precise extent of that right. Moreover, individuals who do not appear in the public eye at all may nonetheless participate in the determination of important public affairs (such as political advisers, reclusive business people, etc).

¹⁰³The Right Honourable Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press* (HC 2012) vol I, 56.

¹⁰⁴*Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App no 931/13 (ECHR, 27 June 2017).

¹⁰⁵Wragg (n 77) 205.

In fact, it may be worth abandoning this approach and disregarding the individual's status when determining the boundaries of the right to private life. This is where the criterion of the public interest and the notion of public affairs would come into play. However, their content is likewise uncertain in the ECtHR's case law and similarly lacks a sufficiently close connection to the democratic justification for freedom of speech. In the following section, I will examine those considerations shaped by case law that are linked to public figure status and which may serve as a basis for narrowing the scope of the right to privacy.

Seeking publicity

According to the ECtHR's case law on privacy, the fact that an individual has previously entered the public eye of their own volition must be taken into account as a factor that reduces the scope of their private sphere. In other words, their (public) activity prior to the appearance of a disputed communication about them is an important criterion for determining their status as a public figure.¹⁰⁶ Those who appear in the public eye are considered to have given an implied waiver of full protection for their private life.¹⁰⁷ However, the mere fact that a person has cooperated with the media in the past should not serve as an argument to deprive them of any protection of privacy.¹⁰⁸

Phillipson argues that this approach is wrong. The fact that an individual has previously shared confidential information voluntarily with the media cannot diminish their control over similar information disclosed against their will. Everyone is free to decide what to share and with whom, and privacy includes control over information that is confidential to them.¹⁰⁹

The second and third *Von Hannover* and the *Axel Springer* judgments may give the impression that appearing in the public eye grants the media a general authorisation to disclose any future information. This argument would even make it unnecessary to examine the public interest nature of the information in question or its connection with a public matter. However, there is nothing in the Convention to suggest that the application of Article 8 can be restricted for such a reason.¹¹⁰ Naturally, an individual's prior conduct may be a relevant consideration in matters of public interest, but not when removed from that context.

¹⁰⁶*Axel Springer* (n 26) para 92; *Von Hannover (No 2)* (n 9) para 111; *Hachette* (n 19) paras 52, 53.

¹⁰⁷*Axel Springer* (n 26) para 101.

¹⁰⁸*ibid* para 92; *Lillo-Stenberg* (n 36) para 38; *Von Hannover (No 2)* (n 9) para 111; *Egeland and Hanseid* (n 58) para 62.

¹⁰⁹Phillipson (n 15) 150.

¹¹⁰Hughes (n 50) 91.

If the information disclosed in a case relates to a matter that has already been made public, this factor may also justify a diminished protection of private life. In *Plon*, for example, the ECtHR took into account the fact that the information disclosed was in practice largely no longer confidential,¹¹¹ while in *Ruusunen*, the ECtHR also took into account the fact that most of the information disclosed was already widely known.¹¹² This argument is similar to the ‘implied waiver’ argument: the prior disclosure of information hardly provides a solid basis for a restriction of an individual’s right to privacy, given that a possible earlier violation cannot legitimise a new one. This argument may only be valid if the previous disclosure was made with the consent of the individual concerned. Furthermore, an earlier public disclosure and discussion of the information in question did not necessarily cover all relevant details, meaning that a subsequent disclosure may reveal previously unknown information the publication of which, in itself, may constitute a violation of rights.

Role models

Public figures, especially athletes and celebrities, serve as role models for many people. As a result – as the argument goes – their slip-ups, transgressions and behaviour in interpersonal relationships (such as marital infidelity) belong in the public domain, because their fans and followers have a right to know about their moral character. As role models, they have higher moral standards to live up to and less privacy to claim. The behaviour of a known person – as a role model – can influence the behaviour of others, so it is right to form an opinion on the personality of the person concerned, even on the basis of information that is confidential to them. This consideration was also raised in *Campbell*.¹¹³

On the one hand, this approach is simplistic and assumes that those who sympathise with or idolise a celebrity are unable to separate someone’s sporting or artistic achievements from their moral shortcomings or transgressions. On the other hand, there is an internal contradiction here, as highlighted by the reasoning in *Axel Springer*. The ECtHR in this case stated that ‘the [German] Court of Appeal referred not only to the existence of X’s fan clubs, but also to the fact that his admirers could have been encouraged to imitate him by taking drugs, if the offence had not been committed out of public view’.¹¹⁴ This argument overlooks the fact that if the drug use had not been reported in the media, the fans would not have known about it, and would thus not have been able to imitate the actor they admired.

¹¹¹*Plon* (n 17) para 53.

¹¹²*Ruusunen* (n 40) para 50.

¹¹³*Campbell* (n 2) [151], [163].

¹¹⁴*Axel Springer* (n 26) para 98.

(However, it is also true that in the age of social media, there is very little chance that a similar story would not have come to light without the contribution of traditional media.) On the other hand, if this circumstance becomes known about the individual, their admirers may even regard it as a model to follow.¹¹⁵ In a strange twist, the reasoning goes on to state that ‘whilst it can be said that the public does generally make a distinction between an actor and the character he or she plays, there may nonetheless be a close link between the popularity of the actor in question and his or her character where, as in the instant case, the actor is mainly known for that particular role. In the case of X, that role was, moreover, that of a police superintendent, whose mission was law enforcement and crime prevention. That fact was such as to increase the public’s interest in being informed of X’s arrest for a criminal offence’.¹¹⁶

It directly follows from this that, had the actor portrayed a negative character (for example, a criminal), his private life might have been afforded greater protection. However, it is also not clear why celebrities in general are expected to adhere to higher moral standards (while adherence to the law can certainly be expected). Nor can it be established that the role model argument is sufficiently connected to the public interest to justify overriding the protection of privacy, even if one finds some value in knowing that a ‘role model’ has broken the law or acted in an immoral way.

Preventing the public from being misled

Another line of reasoning that is closely related to the role model argument and which is recognised in practice as limiting the protection of privacy, holds that the private lives of public figures may be subject to public scrutiny in order to prevent the public from being misled. This consideration was also raised in *Campbell*.¹¹⁷ Public figures seek to present themselves in a favourable light and they accordingly readily conceal their legal transgressions, moral faults, and the like. This could be regarded as hypocrisy. One of the media’s tasks is to show these figures as they really are, with all their weaknesses and flaws. This approach is akin to the search-for-truth justification for freedom of expression, most famously articulated by John Stuart Mill.¹¹⁸ He argued that the free exchange of ideas contributes to finding the truth. It is true that the disclosure of private information (if it is accurate) increases our knowledge about the person concerned. However, Mill did not mention utterances that infringe upon the private sphere, and his theory is applicable primarily to the debate on public affairs. Furthermore, he did

¹¹⁵Hughes (n 50) 90.

¹¹⁶*Axel Springer* (n 26) para 99.

¹¹⁷*Campbell* (n 2) [149].

¹¹⁸John Stuart Mill, *On Liberty* (John W Parker and Son 1859); see also Moosavian (n 57) 247.

not consider expressions that cause harm to others to be protected by the freedom of expression.¹¹⁹

The search for the truth can primarily provide a basis for justifying the protection of expressions in relation to matters of public affairs. Furthermore, the category of public affairs should be narrower than what follows from the interpretation of the public interest or general interest category used by the ECtHR today. In other instances – where the disclosure of private information is not linked to a debate on public affairs but purely satisfies the audience’s appetite for information – it is unclear why anyone should have a stronger right to form an accurate picture of well-known individuals’ private lives than those individuals have to control the public disclosure of confidential information about them.¹²⁰

The argument of avoiding misleading the public, moreover, makes the category of public figure unnecessary in privacy cases, at least if it is applied in a principled way. As Hughes observes, there is nothing about hypocrisy that is exclusively characteristic of public figures. Furthermore, the possibility of hypocrisy does not tell us anything about whether a matter is private or not; on the contrary, someone may feel compelled to be hypocritical precisely because the matter in question is very private.¹²¹

Given that there is no compelling argument to suggest that public figures’ efforts to present themselves in a favourable light differ in any respect from those of any other individual – especially since anyone may freely share content about themselves in public – there is no strong reason to assume that public figures have relinquished their right to control the disclosure of their private details. Consequently, invoking public-figure status when defining the limits of the right to privacy cannot be justified. The situation is analogous to the argument advanced in UK jurisprudence, which holds that the private lives of public figures may be subject to public scrutiny because the public has a right to criticise them. The right to criticise extends to the formation of opinion, not to the disclosure of factual but confidential information.¹²² One might argue that informed criticism requires knowledge of the facts, but accepting this argument would effectively dismantle the protection of private life and render the publication of any information justifiable.

Some conclusions

The ‘public-interest’ category as applied by the ECtHR is excessively broad and, in its present form, does not serve as an adequate criterion for delineating the limits of the right to privacy. A more robust protection of privacy is

¹¹⁹For a recent interpretation of Mill’s theory, see Wragg (n 83).

¹²⁰Phillipson (n 15) 157.

¹²¹Hughes (n 50) 92–93.

¹²²Phillipson (n 15) 157–61.

necessary, especially in cases where it cannot be demonstrated convincingly that the information at issue relates to any significant public affair. Although the outcomes of the ECtHR decisions discussed above are not necessarily wrong, their reasoning often lacks persuasive force. The task of identifying the public (or general) interest in individual cases demands greater care. While there is a stronger case for assuming that information concerning political actors is of public interest, politicians also retain a right to privacy. Similarly, the freedom to publish ‘celebrity gossip’ is intrinsically difficult to justify. Public interest remains an important concept – assuming, as the Court does, that we rely on the democratic justification for freedom of expression – but, in its present interpretation, it fails to provide adequate protection for the private sphere.

Moreover, the public figure category is ill-suited to assist in defining the boundaries of free speech in these cases. First, it does not acknowledge – or at least not to the degree required – that individuals within this category also possess a right to privacy. Second, treating both politicians and celebrities alike as public figures undermines the democratic justification, which would otherwise reserve heightened free speech protection for matters that are genuinely related to public affairs. Third, the distinction between public figures and others offers no solution when a private individual, rather than a public figure, becomes involved in a public matter.

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