Balancing Freedom of Press against the Right to Privacy – are the Germans [still] so much better"[1]?

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When in 1990 professor Markesinis asked this rhetorical question calling for a 'legal transplant' of a right to privacy into the English law in order to protect the individual against the press many of his colleagues doubted that such a surgery "would make much practical difference"[2]. Fifteen years later, the yellow press is still making money by violating the privacy of their victims. Already a first glance at the *Sun* reveals how decisive the exposure of sexual affairs or other 'mishaps' of celebrities can be for the sale of a newspaper[3] especially if it happens through publication of pictures showing the respective individual in a compromising situation. However, with the Human Rights Act 1998 (HRA), English judges seem to finally posess a weapon with which to strike a balance between the individual's ancient desire to "be let alone"[4] and the duty of the press to impart information and ideas on issues of public interest[5]. Against this background it is worth comparing the recent decision of the House of Lords in

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[1] Markesinis B.S., *Our Patchy Law of Privacy – Time to do Something about It* [1990] 53 M.L.R. 802, 806
[2] Prescott P., *Kaye v Robertson – a reply* [1991] 54 M.L.R. 451, 455
[3] Cf. Fenwick H., *Privacy, the Media and the Human Rights Act* [1999] Journal of Civil Liberties 363
[4] Cooley T.M., *A Treatise on the Law of Torts*, 2nd ed. (Chicago, Callaghan, 1888) 29
[5] Cf. *Lingens v Austria* [1986] 8 E.H.R.R. 407, para 41

Campbell v MGN Ltd[6] with the landmark ruling of the German *Bundesverfassungsgericht* (BVerfG) in *Caroline of Monaco v Burda GmbH*[7] taking into account the methods applied by the Courts and their reasoning in order to determine whether the 'transplant' is still needed.

Both cases are suited for comparison, not only because they are just a few years apart, but also because they demonstrate how the courts strike a balance between the conflicting fundamental rights on a similar factual basis.

1. The problem and its solution

On the one hand, the supermodel Naomi Campbell was seeking damages for breach of confidentiality because the *Mirror* has published several articles containing photographs of her leaving a self-help group meeting of Narcotics Anonymous. On the other hand, the BVerfG was faced with the question of whether the pictures of princess Caroline of Monaco published in various magazines of the respondent were violating her right to privacy.

The method applied by the justices of the House of Lord seeks to satisfy two main requirements. First of all, the protection of Ms Campbell's right to the respect of her private life must have been "sufficiently important to justify limiting the fundamental [*sic*!] right to freedom of expression".[8] Consequently, she must have had a reasonable expectation of privacy.[9] According to Lord Hoffman, an item information is to be considered private where a person would expect to be able to control dissemination of it.[10] If this information, when made public, "would be offensive and objec-

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[6] [2004] U.K.H.L. 22
[7] BVerfGE 101, 361; translated in: Markesinis B.S., *Always on the Same Path, Essays on Foreign Law and Comparative Methodology*, Vol. 2 (Oxford, Hart Publishing, 2002), 375
[8] fn 6, para 115
[9] Ibid. para 21
[10] Ibid. para 51

tionable to a reasonable man of ordinary sensibilities"[11] then the first requirement would be fulfilled. Secondly, in deciding which right is to prevail the Court would undertake the 'dual perspective approach', *i.e.* slip into the shoes of Ms Campbell and MGN respectively in order to determine whose right could be restricted in a more rational, fair and not arbitrary way.[12] With a majority of three to two, the House of Lords found that while Ms Campbell's right to privacy was severely affected by the publication of the photographs in question, press freedom would not have suffered a disproportionate restriction as the photos were not strictly necessary for the publication of the articles.

On the other hand, the BVerfG relied mainly on a personal and a spatial criterion to strike a balance between the conflicting rights. Because the princess enjoyed 'royal fame' and the public regarded her pictures as important and worthy of note just because she was seen, the Court regarded her as an "absolute person of contemporary history".[13] Thus, the public had a "justified interest in learning if such persons, who are often regarded as idols or examples, bring their functional and personal behaviour convincingly into line".[14] Concerning the spatial aspect the BVerfG recognised the existence of three spheres of personality, namely, the 'intimate', the 'private' and the 'individual' spheres.[15] While the 'intimate' sphere enjoys absolute protection, infringements of other spheres are justifiable only where there is a special public interest. However, the justices were prepared to extend the protected area also into public places when the individual had withdrawn into a 'secluded space' in order to be on his own in a manner recognisable to others.[16] Since the pictures were showing Caro-

[11] Ibid. para 94
[12] Ibid. para 115
[13] fn 7, 386
[14] Ibid.
[15] Ibid. 379-380
[16] Ibid. 386-387

line in public places which were not secluded, the BVerfG upheld the decision of the lower instance.

2. Different starting point

When he was speaking about the importance of legal language, the well-known legal philosopher H.L.A. Hart held that "the suggestion that inquiries into the meanings of words merely throw light on words is false".[17] Indeed, looking at the terminology used by the House of Lords already the first step in weighting privacy against journalistic freedom and seems to differ significantly from the approach taken by the German justices. Although the Lords reiterated on various occasions that both rights were of equal value[18], they still emphasised the 'fundamental' importance of press freedom while nearly reducing the right to privacy to an exception, the latter requiring justification[19]. In contrast, the wording used by the BVerfG conveyed that the protection of a person's private sphere of life is of 'special importance' (*besonderer Stellenwert*) when the two legal interests are weighed against each other.[20]

This different approach is not surprising if one considers the cultural and historical background of both jurisdictions. As a consequence of the Nazi atrocities during the second world war, Germany strove to respect and protect human rights which became the headstone of German post-war constitutional history. United Kingdom, on the other hand, who was basking in pride of having fought a 'righteous war' was under less pressure to reform its attitude towards civil liberties. As a matter of fact, despite its important role in creating the European Convention on Human Rights (ECHR), the UK was anxious about incorporating it into domestic law and as Lord Chancellor Jowitt put it, the cabinet was "not prepared to encour-

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[17] Hart H.L.A., *The Concept of Law* (Oxford, Claredon Press, 1961) V
[18] fn 6, paras 55, 113
[19] Cf. Ibid. paras 115, 154
[20] Cf. BVerfGE 101, 361, para 29

age our European friends to jeopardise our whole system of law, which we have laboriously built over centuries, in favour of some half-backed scheme to be administered by some unknown court"[21]. Regarding the relationship between press freedom and privacy the starting point in this 'laboriously built system of law' prior to the enactment of the HRA was that "the right of freedom of expression [was] a right based on a … higher legal order foundation."[22]

This position which can be found in numerous recent English dicta of the highest authority[23] is reflected not only in the terminology used by the House of Lords in *Campbell*. By recognising "the importance of allowing a proper degree of journalistic margin to the press to deal with a legitimate story in its own way"[24] all five justices (of whom two thought that this factor was decisive in favour of MGN) transferred the previous case-law in a softened form into the post-HRA era. Indeed, out of the total of nine judges who were considering the *Campbell* case, five decided in favour of MGN.

3. Reasonable expectation of privacy

Despites these striking discrepancies, there are significant analogies between the means applied by both Courts in balancing the fundamental rights. A closer look at the English precondition of 'reasonable expectation of privacy', for instance, reveals that in the judgement of the BVerfG there is a corresponding set of criteria. While the Lords considered information as private where dissemination could be controlled by an individual, this notion of control was caught by the German idea of different spheres of privacy. In the German perception, a person would have abso-

[21] Bingham T., *Time to incorporate the European Convention of Human Rights*, [1993] 109 L.Q.R 390, 394
[22] *Reynolds v Times Newspapers* [1999] 4 All E.R. 609, 629
[23] Cf. *Theakston v MGN* [2002] E.M.L.R. 22; *Mills v News Group Newspapers* [2001] E.M.L.R. 41
[24] fn 6, para 169, see also paras 28, 65, 116

lute control over the dissemination of information arising out of the 'intimate' sphere like illnesses[25] because they could not be published without her consent. The level of control decreases, however, if the information in question falls under the 'private' or the 'individual' sphere. A similar reasoning was given by Baroness Hale who found that there would be nothing essentially private about a picture showing Ms Campbell "when she pops out to the shop for a bottle of milk"[26].

Indeed, it seems questionable that a person who can be seen by observers can claim to have a reasonable expectation of privacy as to what would appear on a picture taken at that moment. According to the BVerfG pictures of an absolute person of contemporary history such as princess Caroline or the supermodel Naomi Campbell can generally be taken, distributed or shown without permission of the person involved.[27] For the House of Lords, however, it was irrelevant whether the individual is a public or a private person since the "famous and even the not so famous who go out in public must accept that they may be photographed without their consent, just as they may be observed by others without their consent."[28] This broad approach is again not surprising given the political background the Lords had to face while making the judgement. In 1998 it has been estimated that there were over 200,000 CCTV cameras nationwide, with spending on surveillance running at 150-300 million pounds per year.[29] The Lord could not rule any differently without opening the flood gates.

Therefore, the concept of 'reasonableness', *i.e.* to determine whether the publication of a private information would be offensive to a

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[25] Cf. BVerfGE 32, 373
[26] fn 6, para 154
[27] fn 7, 386
[28] fn 6, para 73
[29] Cf. House of Lords Science and Technology Select Committee, 5th Report, *Digital images as evidence* (London, 3 February 1998)

reasonable man, is inevitable under English law. The BVerfG also relies on an objective criterion to grant the individual a secluded space in public area by asking whether the individual has withdrawn in a manner recognisable to a reasonable spectator. Although, the application of the concept seems to be completely different, it fulfils the same objective. It illustrates that, although the complainant herself may count the photographs as belonging to the secluded private sphere or think that she has an expectation of privacy, it does not merely depend on her will.

An indicator that the "reasonableness" requirement was satisfied is constituted in the way in which the information was obtained. In the *Caroline* decision, the BVerfG made clear that "in the balancing exercise between the public interest in information and protection of the private sphere, importance is attached to the method of obtaining information"[30]. The justices found that the fact that the paparazzi had to use a long-distance lens to photograph Caroline with her male companion in a secluded part of a café signifies that she has withdrawn in a recognisable manner.[31] The Lords also paid special attention to the fact that the pictures of Ms Campbell were taken "deliberately, in secret and with a view to their publication in conjunction with the article"[32]. However, while for the English justices the secret and surprising context was decisive, the BVerfG rejected this very requirement brought forward by the *Bundesgerichtshof*[33] arguing that since "it often cannot be seen from a picture whether it has been taken secretly or by surprise, an impermissible invasion of the private sphere can be found even when these characteristics are not present"[34]. Hence, the German justices once again went a step further to protect privacy.

[30] fn. 7, 387
[31] Cf. fn 7, 388
[32] fn 6, para 123
[33] Cf. BGHZ 131, 332; translated in: Markesinis B.S. & Unberath H., *The German Law of Torts, A Comparative Treatise*, 4th ed. (Oxford, Hart Publishing, 2002) 448
[34] fn 7, 387

4. The proportionality test

Turning to the second step in balancing freedom of the press against the right to privacy, it seems that the 'dual perspective approach' of the Lords is congruent with the proportionality test applied by their German colleagues. In its leading decision on proportionality, the BVerfG held that a restriction of a fundamental right is only acceptable if it is adapted (*geeignet*) to the achievement of a legitimate purpose, necessary (*erforderlich*) to that end, and the burden it imposes is not excessive (*zumutbar*) in the light of the achieved benefit.[35] A measure which is *geeignet, erforderlich* and *zumutbar* is equally rational, fair, not arbitrary and impairs the right as minimally as is reasonably possible. Thus, the question for both Courts was "whether publication of the material pursues a legitimate aim and whether the benefits that will be achieved by its publication are proportionate to the harm that may be done by the interference with the right to privacy"[36].

First of all, the Courts differentiated between several types of speech. The justices accepted that although political speech deserves the utmost protection, mere entertainment may not be excluded.[37] Basically, they agreed that the information value of the events depicted played a significant role. The greater the interest of the public in being informed, the more the protected interests of the person had to step back. Since celebrities provide many people with a means of orientation in relation to their plans for their own lives, publication of photographs showing these idols in different life situations, whether going shopping or attending a meeting of Narcotics Anonymous, does pursue a legitimate aim in both jurisdictions.

In deciding whether the legitimate aim is proportionate to the harm caused, the approach developed by the House of Lords seems to be eas-

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[35] Cf. BVerfGE 78, 232, 245
[36] fn 6, para 113
[37] Cf. fn 6, para 77, 148; fn 7, 384

ier to apply than the abstract test of the BVerfG. This is not self-evident given the fact that English judges objected to the notion of proportionality on the ground "that it takes the court too far into the political merits"[38] for a long time. However, the common law tradition of case-by-case analysis countervailed this lack of experience. Applied to the *Campbell* case the 'dual perspective approach' demonstrates that a reasonable person in the shoes of Ms Campbell would consider the publication to be a severe interference with her right to privacy not only because it would be embarrassing for her but also because it could affect the process of recovery. On the contrary, the newspaper could have published the articles without pictures and would still have met the legitimate aim to reveal Ms Campbell's false statements about her addiction. Although the BVerfG would probably have reached the same results, one has to admit that the 'English way' is more elegant.

Consequently, regarding the means applied to balance freedom of the press against the right to privacy, both jurisdictions are not a long way away from each other anymore. The striking concordance in matters of proportionality particularly demonstrates that the common law system is more than capable to keep up with legal developments on the continent. However, the English concept of privacy still suffers under the elevated status of the press. Up to this point, Markesinis' call for a 'legal transplant' is still appropriate, but the donor can hardly be German. By stating that "the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in [public] places and … is well known to the public"[39] in *Von Hannover v Germany,* the justices of the European Court of Human Rights (ECtHR) showed both jurisdictions the red card. Since, in contrast to the German law, English courts have to take decisions of the ECtHR into ac-

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[38] Alder J., *Constitutional and Administrative Law*, 5th ed. (New York, Palgrave Macmillan, 2005) 384

[39] *Von Hannover v Germany* [2004] E.C.H.R. 294, para 77

count according to s.2 HRA, it will be the erstwhile ‘half-backed scheme’ and the ‘unknown court’ who will be ‘ruling the waves’ in the future of English debate concerning privacy.