

THE LEGAL APPROACHES OF DEFINING THE EQUIPOISE BETWEEN PRIVACY AND PUBLIC INTEREST

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The article encompasses a narrow topic in media law, namely the problem of utilization of personal data by media personnell, informational agencies as well as broadcasting enterprises. Since conventional personal data maintenance procedures expounded in appropriate data protection acts are almost explicitly exempt for journalistic, artistic or literary purposes, the issue of preserving a proper equipoise between the right to one's privacy and the freedom of speech remains a crucial topic for analysis and theory assemblage.

I. Introductory clause

1. Statement of the issue

Journalists, informational agencies and broadcasting enterprises frequently operate with various personal data footage, which is inserted into the media content. Within their performance, the media agents are to keep within the equipoise between freedom of expression and personal privacy. A large quantity of suits regarding privacy violations by media agents, considered by domestic and international courts over the last decades, indicates that there are no ultimate “tare weights” to handle this balance. At the same time, one’s privacy can not be explicitly immune since the matter of public interest may override it in some cases. Therefore, the article is vectored at the analysis of any conjectural “tare weights” in the scope of privacy and public interest test parity.

2. Topicality justification

The article’s theme arises a multitude of disputes regarding the adequate usage of personal data by media agents as well as the margins of intrusion into one’s private life in various situations. This and similar issues have been a relevant topic in the praxis of the European Court of Human Rights (thereafter – ECtHR) since early-to-mid-1970s. Within the praxis, the Court elaborated a number of estimative constituents regarding the margins and public interest test on grounds of which the decisions are adopted. As time goes, newcoming issues could also be augmented to overall framework.

3. The analysis or current condition of the issue in legal sphere

The topic of data privacy vs. the public interest (precisely, the *public interest*, but not freedom of speech in general) seldomly attracts attention of researchers, therefore it’s quite an understudied niche in media law. Moreover, the normative content of both sides of the given parity is also *arguable*. The

article is grounded on the treatises and opinions of primordial privacy and data protection scholars in the 1960s-70s (William Prosser, Milton Konvitz, Alan Westin, Jacques Velu, Thomas Emerson, Ruth Gavison, Willis Ware etc.), oldschool and contemporary case law in the praxis of the abovestated European Court of Human Rights as well as the European Commission of Human Rights (a defunct Council of Europe tribunal that operated in 1954-1998 which conducted a protogene examination of applications). Other sources involve reports and brochures of Great Britain's Information Commissioner's Office (henceforward the ICO), Council of Europe case law guidebooks and catalogues as well as UK legislation and professional codes of ethics.

II. The main body

1. Defining privacy in brief

The *privacy v public interest* parity is a substantially scarcer equation than *privacy v freedom of expression*, which is under discussion in media law for the last decades. The reason of this is pretty obvious – the matter of public interest has never been regarded as a fundamental human right unlike freedom of expression (declared in Art. 10 (§ 1) of the European Convention of Human Rights, henceforward ECHR), but rather the *will of society* to be concerned about relevant and resonant events that occur around. This *will of society*, as a matter of human's nature can not be observed as a substance which is abjoint from freedom of expression, whose legal content, laid down in Art. 10 (§ 1) of ECHR and challenged by numerous case law footage, gives this notion a complex growth. ICO states that “<...> there's an inherent public interest in freedom of expression itself, regardless of the specific content of the story <...>”¹. The gist and margins of both terms “*privacy*” and “*public interest*” are naturally arguable and there is no unified view on their concept or normative content. However, the 1960-70s authors, contemporary British legislation and editorial codes, the recent ICO treatises as well as the Council of Europe case law guidebooks (embracing the praxis of the ECtHR) as well as the Court's judgements themselves contributed a lot to clarify the respective concepts. Before examining the equipoise between the notions, we need to define them properly at least in the scope of mass media performance. After that, the equipoise between the two sides is to be built up.

So, the first term to deal with is obviously, “*privacy*”. Since a thorough study of all approaches of the term origin could encompass a whole book, let us examine the most common approaches briefly. Willis Ware, the main author of “Records, Computers and the Rights of Citizens” (1973), in the brief version of the report² summarized, that “<...> There has been many definitions of privacy <...> all of which contain the common element that personal data are bound to be disclosed and the data subject should have some hand in deciding the nature and extent of such disclosure”³. Dean Prosser, an early privacy concept moulder, in his prominent treatise “Privacy” (1960), noted: “<...> First, the disclosure of private facts must be a public disclosure, not a private one. There must be, in other words, publicity <...>”. The scholar goes on with the following: “Second, the facts disclosed to the public must be private facts, and not public ones <...>”⁴. In the interpretation of William Prosser, “public” facts stood for any information which the person “<...> himself leaves open to the public eye <...>”⁵.

¹ Data protection and journalism: a guide for the media. ICO, Sep. 2014, Ver. 1.0, p. 34. Link: <<https://ico.org.uk/media/1552/data-protection-and-journalism-media-guidance.pdf>>.

² The “HEW Report” is actually a rather volumetric book which contains over 330 pages; the short version has got only 11 and sums up the main points, including the 1973 Fair Code of Informational Practice which was extended by RAND Co. in 1975.

³ WARE, W. *Records, Computers and the Rights of Citizens*. Rand Co., 1973, p. 4.

⁴ PROSSER, W. L. *Privacy*. *California Law Review*, 1960, Vol. 48, iss. 3, p. 393–394.

⁵ *Ibid*, p. 394.

R. Gavison (1980) observed this point in the scope of defining privacy as a control of admittance to one's personal affairs. In such case, one's disclosure of any information has to be regarded not as a privacy *loss* but an *exercise* of the right of control⁶. The history of privacy definitions had much older footage deriving from US or UK common law. For instance, in one of the most resonant privacy violation cases in US common law, *Melvin vs. Reid* (1931), the Court of Appeal of California (4th district) referred to California's constitution to clarify its legal content (we will discuss it below)⁷. One of the "automated data protection" discipline fathers, namely Alan Westin elaborated a custom and well-accepted definition of privacy in his book "Privacy and Freedom" (1967), which is laid down as underwritten: "<...> The claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others"⁸. The 1967 Nordic Conference of Jurists on the Right to Privacy (Stockholm, May 1967)⁹ used a shorter definition, namely "the right to be and alone to live one's own life with the minimum degree of interference"¹⁰. Milton R. Konvitz (1908 – 2003), a professor of Cornell University used the ideas of the British philosopher John Locke and coined a custom concept in his article "Privacy and the Law: A Philosophical Prelude" (1966)¹¹. Konvitz outlined that a person can assert his right to privacy even any of his actions or features are made in *public places*. He described privacy as a "claim that there is a sphere of space that has not been dedicated to public use or control"¹². Konvitz added that privacy is "<...> a kind of sphere that a man may carry with him, into his bedroom or into the street"¹³. There is a multitude of other approaches by oldschool authors (R. Dworkin, P. Bender, R. Parker, P. Juvigne, R. Gavison, R. Jones, T. Emerson and others)¹⁴, which is too volumetric for the purposes of the article. The aforementioned statements hint that the facet of privacy is evaluative and depends on the person itself. This claim could be easily backed by the report of Jacques Velu, a French lawyer, at the Third International Colloquy about the European Convention of Human Rights (October 3–5, 1970). Having analyzed the concepts of a German scholar, Heinrich Hubmann¹⁵, he stressed that the scope of privacy "depends on current manners and on custom and varies from place to place, even in Europe"¹⁶. Velu also stated that "the wall around a person's private life is not identically situated with everyone", that means the privacy sphere is not identical among different people and can seriously vary with respect to different

⁶ GAVISON, R. Privacy and the Limits of the Law. *The Yale Law Journal*, 1980, Vol. 89, No. 3 (Jan. 1980), p. 426–427.

⁷ *Melvin vs. Reid*, Docket No. 346, Cal. App. 285, Feb. 28. 1931.

⁸ EMERSON, T. Right of Privacy and Freedom of the Press. *Yale Law School Legal Scholarship Repository*, 1979, Faculty Scholarship Series, Paper 2776, p. 338.

⁹ ROBERTSON, H. *Privacy and Human Rights*. Papers by experts on an issue by growing importance under the auspices of the European Convention of Human Rights. Manchester City Press, 1973, p. 32–34.

¹⁰ UNESCO (Cooperative). The Protection of Privacy. *International Social Science Journal*, 1972, Vol. XXIV (24), No. 3, p. 419–420.

¹¹ KONVITZ, M. Privacy and the Law: A Philosophical Prelude. (Duke University School of Law) *Law and Contemporary Problems*, 1966, Vol. 31, No. 2, p. 275–276.

¹² *Ibid*, p. 279.

¹³ *Ibid*, p. 280.

¹⁴ GAVISON, R. Privacy and the Limits of the Law <...>, p. 424–435; EMERSON, T. Right of Privacy and Freedom of the Press <...>, p. 337–339.

¹⁵ In his report, Jacques Velu referred to Hubmann's 1953 book, "Das Persönlichkeitrecht" (en. "The Personality Law", unlaut omitted). Hubmann designated three subspheres of privacy – the individual, the secret and private one. The first is designated to secure one's name, honour and dignity. The second embraces all the sorts of the closest relations and their nature of the person which could be known to a very narrow group of people. Jacques Velu wittily emphasized that these two subspheres do not protect a person in society, but protect him against society (p. 32 of Velu's report). The last subsphere comprises the features of a person which could be learned provided on is with contact with him – his appearance, the details of his life and his character.

¹⁶ *Ibid*, points 32 and 33 of Jacques Velu's report.

impact factors¹⁷. A basic framework regarding the normative content of privacy is displayed in a 2001 Council of Europe guidebook “The right to respect private and family life” by Ursula Kilkelly. It is based on the practice of ECtHR and the now-defunct Commission¹⁸:

A¹⁹. Respect of the private life must anyhow involve one’s right to found relationships with other people stated in para. 29 of the *Niemietz vs. Germany*²⁰ case (1992) where the Court ruled that “Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings”²¹;

B. Relationships and family life. The relationships are commonly observed in a legal scale²², but since life is obviously unforeseen, a multitude of semi-conventional relationships can occur in one’s life. Therefore, since mid-1970s the Court and the Commission elaborated a construction to patch up the notion:

- legally born children, who become *ipso iure* (that is, on the strength of law²³) a constituent of relationship (also featured in *Berrehab v. the Netherlands* (1988) case);
- foster children (est. in *X v/Switzerland*, App. No. 8257/78, Decision of 10 July 1978), initially the Commission encountered this issue back in 1976 but did not elaborate the principle²⁴;
- unmarried people with cohabitation (est. in *Johnston vs. Ireland* case, App. No. 9697/82, Judgement of 18 December 1986)²⁵;
- grandparents, uncles, nephews and other relatives (to many cases to mention);
- homosexual people and their partners (est. in *Kerkhoven & Hinke vs the Netherlands*, App. 15666/89, Decision of 19 May 1992)²⁶;
- sexual life, disregard to the person’s orientation (est. by *Dudgeon vs. United Kingdom* (1981) case and others);

What is notable: the relationships between *owners* and their dogs or other *pets* are not regarded as a constituent of private life (est. in *X v. Iceland*, App. No. 6825/74, Decision of 18 May 1976)²⁷;

C. Domicile (commonly, an owned home)²⁸;

¹⁷ *Ibid.* point 33; ROBERTSON, H. Privacy and Human Rights <...>, p. 33.

¹⁸ KILKELLY, U. The right to respect private and family life. Council of Europe, 2001, *Human Rights Handbooks*, No. 1, p. 11–16.

¹⁹ This classification is originally broader, especially if alternate sources are browsed. This passage is compressed to a moderate length. The letters used in the scale are custom and are not used in “manufacturer” guidelines – they are put here only for convenience.

²⁰ Judgement of Dec. 16, 1992; Application No. 13710/88.

²¹ European Court of Human Rights. Case of *Niemietz v. Germany*, Judgement of 16 Dec. 1992, App. No. 13710/88. Link: <<http://www.bailii.org/eu/cases/ECHR/1992/80.html>>.

²² KILKELLY, U. The right to respect private <...>, p. 18.

²³ I hardly ever use Latin word combinations, but it’s suitable to use it at this point. I would like to outline, that some legal researchers often stew their works with latinisms but seldomly explain their meaning which could distort or ruin the matter of the passage. One has to keep in mind that an article on a legal topic could be read not only by lawyers or legal researchers. Therefore, the text has to be anyway comprehensible.

²⁴ European Commission of Human Rights. *X v/Switzerland*, Decision of 10 July 1978, App. No. 8257/78 (For access see p. 252–253 of the report attached). Link: <<http://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=001-74359&filename=X.%20c.%20SUISSE.pdf>>.

²⁵ European Court of Human Rights. Case of *Johnston and others v. Ireland*, Judgement of 18 Dec. 1986, App. No 9697/82. Link: <<http://www.bailii.org/eu/cases/ECHR/1986/17.html>>.

²⁶ European Commission of Human Rights. *Kerkhoven, Hinke & Hinke v The Netherlands*, Decision of 19 May 1992, App. No. 15666/89. Link: <hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=001-1748%26filename%3D001-1748.pdf>.

²⁷ European Commission of Human Rights. *X vs. Iceland*. Decision of May 18, 1976, App. No 6825/74. Link: <<http://www.bailii.org/eu/cases/ECHR/1976/7.html>>.

²⁸ There were some exceptions in the praxis of the Court in the 1980s and 90s (*Gillow v. United Kingdom* (1986) and the abovementioned *Niemietz vs Germany* (1992)) but they’re too shallow to be mentioned for the purposes of this article.

D. Correspondence, which encompasses the right to conduct uncensored and uninterrupted communications²⁹. Before the mid 1970s, only the mail was embraced by the scope of Art. 8 (§1), but owing to *Klass and others v. Germany* case (1978), *phones* were augmented. Telex was cultivated as the next “trailer car” in *Campbell Christie v. the United Kingdom* (App. No. 21482/93, Commission Decision of 27 June 1994)³⁰. This construction is not explicit and involves more detailed specimen, which are too small-scale to be notable for the purposes of given article. Still the abovegiven framework is quite terse to be used in the *data privacy v public interest* parity: the media agents are obliged to keep within the construction of privacy under general circumstances, but exemptions doubtlessly exist, too.

2. The concept of public interest

The subject of *public interest* is mainly³¹ associated with FOI (freedom of information acts³²) issues as well as privacy interferences, too³³. The former is genuinely eligible for the purposes of the article, as public information disclosure can contain personal data. The British legislation as well as ICO reports have a robust framework on this issue. In their 2014 and 2016 reports, ICO specialists confirmed, that there is no ultimate public interest test³⁴ or a unified determination³⁵. The Office adheres to the position that having independent media which provides the society relevant news is in the public interest; therefore, any outfit in the media agenda could possess it:

*“The secret of freedom lies in educating people whereas
the secret of tyranny is keeping them ignorant.”*

– Maximilien Robespierre (1758–1794)³⁶

The abovementioned quote by Maximilien Robespierre, an outstanding French lawyer and politician, corroborates the following thesis: a democratic society must be an informed one. The strength of the public interest is to be estimated by a multitude of impact factors and thus has to be examined each time individually. In terms of *FOI*, the concept of public interest is conventionally attached to customary “public good” such as transparency, accountability, qualitative public decision making and

²⁹ KILKELLY, U. The right to respect private <...>, p. 22.

³⁰ *Ibid.*

³¹ In British law public interest is also concerned with labor law. The Public Interest Disclosure Act (1998) c. 29 was enacted to amend the Employment Rights Act (1996) c. 18, namely, inserting Section 43. The protected disclosures under Section 43 (B) (1) of the Employment Rights Act (1996) c. 18 feature operational malfunctions, criminal offence, hazard towards one’s health or towards environment, justice miscarriage or deliberate actions which could conjecturally lead to the given consequences. Section 43 (G) of this Act features some more eligible cases: the worker reasonably believes that his information is substantially true and he does not conduct these actions for his personal gain See. Employers Rights Act (1996) c. 18, Section 43. Legislation.gov.uk, 1996. Link: <<http://www.legislation.gov.uk/ukpga/1996/18/contents>>.

³² FOI is an act which establishes the rights of citizens to obtain information from public bodies which is maintained by them. It is implemented via lodging requests on information to public bodies. The applicant usually obtains a written response (in some states a digital form is also acceptable). The contemporary FOI concept emerged in the early 50s in Finland and spread around all Europe in early-to-mid 1970s. In mid-2010s, over 100 states in the world adopted such laws. Not all information can be disclosed, though, but any exemptions are to be prescribed by law. E.g. the British Freedom of Information Act (2000) c. 36 encompasses over 20 types of exemptions.

³³ Data protection and journalism: a guide for the media. ICO, 4 Sep. 2014, Ver. 1.0, p. 32–36. Link: <<https://ico.org.uk/media/1552/data-protection-and-journalism-media-guidance.pdf>>.

³⁴ *Ibid.*, p. 32.

³⁵ The public interest test. Freedom of Information Act. ICO, 19 Jul. 2016 Ver. 2.1, p 5. Link: <https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf>.

³⁶ Quotes by Maximilien Robespierre. Brainyquote. Link: <https://www.brainyquote.com/quotes/authors/m/maximilien_robespierre.html>.

a handful of others^{37,38}. In terms of *privacy trespassing*, a certain number of specific constituents (at least, recommended by ICO) are to be estimated:

- an overall interest of society in freedom of expression;
- a specific interest regarding the displayed topic of the publication;
- the degree of such intrusion (the ICO stated that the interference equipoise is to be adjusted by the following principle – “the more the intrusion is – the more the public interest should be”)³⁹;
- conjectural harm which will be evoked by such trespassing⁴⁰ (this factor is also considered by ECtHR).

At the same time, ICO stresses that a matter of public interest is “not the same what interests the public”⁴¹. Therefore, the Office previses media agents not to allow serious disproportionality, reminding that the construction “the more intrusion is – the more public interest should be” is extremely relevant. The Great Britain’s Data Protection Act (1998) also sets out one more norm regarding data uncovering: under Section 32 (1) (b) of the Act, the personal data can be revealed in case the data controller reasonably believes that “<...> having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest”⁴². The conception of this norm could be rather arguable and tricky, but the Office interprets it plainly: the media agents are disposed to conclude their own decisions but at the same time, they have to be capable of proving their actions and to display their decision-making process⁴³. All-in-all, the media agents can not be abjunct from ICO in Great Britain, hence, to be uncontrolled. As I have already mentioned in my preceding article⁴⁴, the media organizations are not exempt from notifying in ICO, as processing without registration is prohibited in compliance with Section 17 (1) of the Data Protection Act⁴⁵. Therefore, the data controllers are also under supervision of a public body.

3. Colliding privacy and public interest: the framework represented by the BBC Editorial Guidelines and the Ofcom Broadcasting Code

Tentative (but not explicit) palettes of public interest test in Great Britain are depicted in various professional *codes of ethics*. In my preceding article, I analyzed the model presented in Section 7.1 of the 2010 BBC Editorial Guidelines, which embraces a multitude of privacy-related issues⁴⁶. As given in Section 7.1 of the BBC Editorial Guidelines, private behavior, information, correspondence and conversation are not to be brought to the public unless the general interest will override it. Seven criteria of such overweight are given, which include, but are not bound with detecting crime, depicting

³⁷ See point 9 in the ICO report named “The public interest test. Freedom of information act” (July 19, 2016).

³⁸ The public interest test. Freedom of Information Act. ICO, 19 Jul. 2016 Ver. 2.1, p. 5. Link: <https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf>.

³⁹ Data protection and journalism: a guide for the media. ICO, 4 Sep. 2014, Ver. 1.0, p. 33. Link: <<https://ico.org.uk/media/1552/data-protection-and-journalism-media-guidance.pdf>>.

⁴⁰ *Ibid.*

⁴¹ The public interest test. Freedom of Information Act. ICO, 19 Jul. 2016 Ver. 2.1, p. 6. Link: <https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf>.

⁴² Data Privacy Act (1998) c. 29 (Section 32). Legislation.gov.uk., 1998. Link: <<http://www.legislation.gov.uk/uk-pga/1998/29/section/32>>.

⁴³ Data protection and journalism: a guide for the media. ICO, 4 Sep. 2014, Ver. 1.0, p. 33. Link: <<https://ico.org.uk/media/1552/data-protection-and-journalism-media-guidance.pdf>>.

⁴⁴ LYTVYENKO, A. *The analysis of contemporary legal standards and principles in mass media performance: a domestic and international law overview*. *ScienceRise*, 2016, Vol. 12, No. 1 (29), p. 55.

⁴⁵ Data Privacy Act (1998) c. 29 (Section 32). Legislation.gov.uk., 1998. Link: <<http://www.legislation.gov.uk/uk-pga/1998/29/section/32>>.

⁴⁶ LYTVYENKO, A. *The analysis of contemporary <...>*, p. 55–56.

anti-social behavior, corruption or injustice, reveals someone's pronounced incompetence, deals with public health and safety, averts from deception or provides some information to conceive public matters better⁴⁷. Section 7 of the Guidelines also involves expanded issues on consent of filming in semi/non-public places or socially-vulnerable people, making secret recordings and doorstepping, contributor's personal data protection and other related issues (Sec. 7.4)⁴⁸. Some of them are covered in my preceding article⁴⁹.

A number of issues are also presented in the Ofcom Broadcasting Code⁵⁰. Ofcom (Office of Communications, established in 2003)⁵¹ is a UK public regulatory and competition body for broadcasting and postal enterprises in the United Kingdom and the successor of Broadcasting Standards Commission (BSC). Under Section 107 (1) of the Broadcasting Act 1996 c. 55, the BSC was to elaborate and establish guidelines for fair practices regarding privacy, as well as to monitor their enactment (Sec. 109) and adjudicate on complaints (Sec. 110)⁵². The BSC operated for 6 years (1997–2003), was defunct by December 2003 and henceforth replaced by Ofcom⁵³. Section 8 of the Code omnipresently operates with the word “*warranted*” which “has a particular meaning” as of Section 8.1 of the Code⁵⁴. This term rectilinearly stands for public interest and the broadcasting enterprises are to be capable of demonstrating that this interest *does* outweigh one's right to privacy. The specimen of such “*warrants*” are shorter, than in BBC Editorial Guidelines and are quite tentative. That is, they embrace but are not confined with crime revelation, public health and safety security, deception delineation or exposure of someone's uncovered incompetence which could affect the public⁵⁵.

4. Privacy expectation and the publicity issue in the parity. Approaches by Ofcom and BBC Guidelines, Council of Europe and vintage US common law

Both Ofcom and BBC Guidelines accentuate on *privacy expectation* (Sections 8.1 and 7.1 respectively), which is determined by the specification of the person's disposition, behavior and activity⁵⁶. The Ofcom guidelines outline that a person can expect privacy preservation even in *public* places depending on various factors, which exhaustively coincides with the notions elaborated by Milton Konvitz fifty years beforehand in his article “Privacy and the Law: a Philosophical Prelude” (1966)⁵⁷. Both codes incline that commonly people are to expect a lesser degree in privacy while being filmed or

⁴⁷ BBC Editorial Guidelines (Section 7). British Broadcasting Corporation, 2010. Link: <<http://www.bbc.co.uk/editorialguidelines/guidelines/privacy>>.

⁴⁸ *Ibid.*

⁴⁹ LYTVYENKO, A. *The analysis of contemporary* <...>, p. 55.

⁵⁰ Ofcom Broadcasting Code. Office of Communications (UK), 2016, p. 42–44. Link: <https://www.ofcom.org.uk/_data/assets/pdf_file/0024/49308/Ofcom-broadcast-code-May-2016.pdf>.

⁵¹ According to the official history line, Ofcom was primordialy founded in summer 2002 by enactment of the Office of Communications Act 2002. Ofcom began its virtual operation on December 28, 2003. See. Financial Accounts. 28 April 2003 – 28 December 2003. Broadcasting Standards Commission (BSC), 2003. Link: <https://www.ofcom.org.uk/_data/assets/pdf_file/0017/3077/bsc.pdf>.

⁵² British Broadcasting Act (1998) c. 55. Legislation.gov.uk., 1996. Link: <<http://www.legislation.gov.uk/ukpga/1996/55>>.

⁵³ Financial Accounts. 28 April 2003 – 28 December 2003. Broadcasting Standards Commission (BSC), 2003, p. 3–4. Link: <https://www.ofcom.org.uk/_data/assets/pdf_file/0017/3077/bsc.pdf>.

⁵⁴ Ofcom Broadcasting Code. Office of Communications (UK), 2016, p. 43. Link <https://www.ofcom.org.uk/_data/assets/pdf_file/0024/49308/Ofcom-broadcast-code-May-2016.pdf>.

⁵⁵ *Ibid.*, p. 43–44.

⁵⁶ BBC Editorial Guidelines (Section 7). British Broadcasting Corporation, 2010. Link: <<http://www.bbc.co.uk/editorialguidelines/guidelines/privacy>>; Ofcom Broadcasting Code. Office of Communications (UK), 2016, p. 43. Link: <https://www.ofcom.org.uk/_data/assets/pdf_file/0024/49308/Ofcom-broadcast-code-May-2016.pdf>.

⁵⁷ KONVITZ, M. *Privacy and the Law* <...>, p. 279.

recorded in public places (notwithstanding with the preceding these). The factor, described by Milton Konvitz has to be considered, both guidelines contain a complex of rules of filming people in non-public or semi-public places, vulnerable people or broadcasting depressive images⁵⁸.

A few inferences are to be aligned about the privacy expectation of people, who are famous (for instance, politicians, sportsmen or artists). Probably nobody would argue on their legitimate right to privacy, but their status could evoke the interest of the public. A number of issues are highlighted in Council of Europe Resolution No. 1165 (1998)⁵⁹, which deals with the right to privacy of public figures⁶⁰. As public figures play a certain role in public life⁶¹, the details of their entire life could be considered as attractive for readers. I would like to cite the following provision to display the notion at its best:

“Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens and it may therefore be legitimate for readers, who are also voters, to be informed of those facts”

– *CoE Resolution No. 1165 (1998)*, p. 9

As it follows from the abovestated, the public interest towards a politician is concordantly larger, than to an ordinary person. Therefore, politicians are to expect a somewhat lower degree of privacy which obviously does not derogate their right to privacy in general (which was emphasized in the Resolution No. 1165 (1998), too). The concept of politicians’ privacy is not that new and was discussed by Jacques Velu in 1970⁶², referring to a French researcher, Lindon:

“Under the existing political conventions <...> the public life of a member of an elected body or a candidate in a “political” election covers so much that his private life amounts to very little compared with that of persons not competing in election”

– *Jacques Velu, at the Third International Colloquy about the European Convention of Human Rights (October 3–5, 1970)*

The notion that public figures are to expect a lesser degree of privacy owing to a higher public interest grade, was reiteratedly considered by the European Court of Human Rights in various cases (we will depict one of them beneath). One of the most resonant cases in US common law featuring a dreadful privacy violation involving personal data exploitation, *Melvin vs. Reid* (1931)⁶³, mentioned in the treatises of John A. Callahan (“Torts – Right to Privacy – Unauthorized Radio Dramatization of Shooting”, 1940)⁶⁴ and William Prosser (“Privacy”, 1960)⁶⁵ displayed a palette of privacy infringement consideration regarding non-public personalities by the Court of Appeal of California⁶⁶.

The fabula of this vintage entry goes as follows. Gabrielle Melvin (Darley by maiden name), a California resident, was a prostitute in her youth (presumably in the 1910s) and in 1918, when she was

⁵⁸ BBC Editorial Guidelines (Section 7). British Broadcasting Corporation, 2010. Link: <<http://www.bbc.co.uk/editorialguidelines/guidelines/privacy>>; Ofcom Broadcasting Code. Office of Communications (UK), 2016, p. 43-48. Link: <https://www.ofcom.org.uk/_data/assets/pdf_file/0024/49308/Ofcom-broadcast-code-May-2016.pdf>.

⁵⁹ Council of Europe Resolution 1165 (1998), adopted on June 26, 1998 at the Assembly’s 24th sitting.

⁶⁰ Resolution 1195 (1998) “Right to Privacy”. Council of Europe, 1998. Link: <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16641&lang%20=en>>.

⁶¹ See p. 7 of CoE Resolution No. 1195 (1998).

⁶² ROBERTSON, H. Privacy and Human Rights <...>, p. 34.

⁶³ Californian Court of Appeals (USA). *Melvin vs. Reid*. 112 Cal. App. 285 (Cal. Ct. App. 1931). Link: <<https://casetext.com/case/melvin-v-reid>>.

⁶⁴ CALLAHAN, J. A. Torts – Right of Privacy – Unauthorized Radio Dramatization of Shooting. *Marquette Law Review*, 1940, Vol. 24, Iss. 3 (April 1940), p. 171–172.

⁶⁵ PROSSER W. L. Privacy <...>, p. 392–393.

⁶⁶ Californian Court of Appeals (USA). *Melvin vs. Reid*. 112 Cal. App. 285 (Cal. Ct. App. 1931). Link: <<https://casetext.com/case/melvin-v-reid>>.

acquitted (tried for an alleged murder), she discontinued her previous lifestyle, got married in 1919 and led a respectable life thereafter. In 1925, the defendants produced and presented a film “The Red Kimono” (referred as “a moving picture film” in the decision) without any knowledge of G. Melvin. The central character’s name was Gabrielle Darley⁶⁷, and the film’s plot was grounded on true events of G. Melvin’s past life, which were extracted from the records of her trial, when G. Melvin was accused of having committed a murder – these records were public and eligible for reuse⁶⁸. Exposing such facts caused a lot of woman’s acquaintants to abandon her but for a substantial moral detriment (estimated by 50 thousand USD according to the verbatim)⁶⁹.

Considering the case, the Court referred to Section 1 of Article 1 of the 1879 California Constitution⁷⁰, which leads as underwritten: “All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and pursuing and obtaining safety and happiness”⁷¹ (it was cited in this judgement, too). The Court also emphasized that the “right to pursue and obtain happiness” is omnipresent, that is, it is guaranteed to everyone and outlined that this right involves “<...> right to live free from the unwarranted attack of others upon one’s liberty, property, and reputation”⁷². The Court upheld the rehabilitation of G. Melvin, citing “<...> This change having occurred in her life, she should have been permitted to continue its course without having her reputation and social standing destroyed by the publication of the story of her former depravity <...>” and found the publication of the film was “<...> not justified by any standard of morals or ethics known to us and was a direct invasion of her inalienable right guaranteed to her by our Constitution, to pursue and obtain happiness”. Finally, the Court ruled there was an invasion of privacy⁷³.

While considering this case, the Court hallmarked a set of 8 principles of privacy. It will be too long to discuss all of them, but in the 5th point, the Court considered that famous people can not expect a large grade of privacy, citing: “<...> It does not exist where a person has become so prominent that by his very prominence he has dedicated his life to the public and thereby waived his right to privacy. There can be no privacy in that which is already public”⁷⁴. As G. Melvin hadn’t been a prominent person, especially in her recovered status, her situation wouldn’t have fallen within such principle. This case was observed by J. A. Callahan to discuss privacy invasions by means of capturing devices in his article “Torts – Right of Privacy – Unauthorized Radio Dramatization of Shooting” (1940)⁷⁵ as well as William Prosser in his outstanding treatise “Privacy” (1960) to assemble his classification of privacy invasions, as well as other scholars⁷⁶. What is more, the *Melvin vs. Reid* case could be regarded as a progenitor of the “*Right to be forgotten*” concept. By far, it is one of the earliest “*Right to be forgotten*” footages ever existed. It obviously can not be tied with automated data maintenance but certainly implies illegal personal data exploitation. I can not claim it’s an explicit “*right to be forgotten*”

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ Constitution of 1849 the State of California with Amendments (Superseded by Constitution of 1879), Section 1. Findlaw – Codes – California, 2017. Link: <<http://codes.findlaw.com/ca/constitution-of-1849-the-state-of-california-with-amendments-superseded-by-constitution-of-1879/ocon-sect-1.html>>.

⁷² Californian Court of Appeals (USA). *Melvin vs. Reid*. 112 Cal. App. 285 (Cal. Ct. App. 1931). Link: <<https://casetext.com/case/melvin-v-reid>>.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ CALLAHAN, J. A. Torts – Right of Privacy <...>, p. 171–172.

⁷⁶ PROSSER, W. L. Privacy <...>, p. 392–394.

footage⁷⁷, however the Court found that the usage of Melvin’s name and other personal data obtained from open sources, infringed her right to rehabilitate herself, which, as the Court ruled, was engaged into the constitutional right to pursue and obtain safety and happiness as laid down in Section 1 of Article 1 of California’s Constitution⁷⁸. As the Court stated, the penal system is vectored at scavenging abandoned ones, but not finishing them off. Citing the Court’s decision on Melvin vs Reid case, “Where a person has by his own efforts rehabilitated himself, we, as right-thinking members of society, should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime”⁷⁹. Steven C. Bennett, an American scholar, upholds this these in his article “The Right to Be Forgotten: Reconciling EU and US Perspectives” (2012)⁸⁰. US common law encompasses other specimen that considered privacy breeches vis-a-vis broadcast, public interest matters as well as unauthorized personal data exploitation, but they are too volumetric to be depicted in the given article. The European Court of Human Rights also adhered to this position in the *Von Hannover v. Germany* (2012) case: as of para. 110 of the Judgement, “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”⁸¹.

5. The public interest test in the praxis of the European Court of Human Rights

The last framework to be observed is a structure by the ECtHR. Some general notions of a public interest test were introduced in the *James and others vs. the United Kingdom* (1986)⁸², though the case itself wasn’t tied with privacy violations (but with property alienation)⁸³. In compliance with para. 46 of the Judgement, the national authorities are *prior* to conduct the appreciation of public interest. The Court outlined that domestic authorities are better placed to assess this issue than an international court, as they possess rectilinear knowledge of the society and its demands⁸⁴. As the case was connected with property alienation, the Court found that the enactment of laws regarding any property alienation must anyway consider a range of social and political factors on which public opinion could be quite diverse within a democratic society. Therefore, the Court stressed it would respect the initial assessment done by the national legislature regarding what would be in the public interest, unless this judgement would be candidly unreasonable⁸⁵. As of para. 49 of the judgement, the Court gauged the public interest aim either as “*lawful*” or “*manifestly unreasonable*”⁸⁶. In para. 50, the Court augmented, that an equipoise of proportionality has to be sustained “between the means employed and

⁷⁷ It is a relatively contemporary concept which stands for one’s right to demand deleting any personal information so that nobody could ever use it again. Such a definition is not utter or explicit and this right obviously can not be confined to electronic databanks. Though some researchers connect “*the right to be forgotten*” to Internet technologies, there’s plenty of footage (case law or specific studies) from the 1970s and beyond which include it, at least, indirectly.

⁷⁸ Californian Court of Appeals (USA). *Melvin vs. Reid*. 112 Cal. App. 285 (Cal. Ct. App. 1931).

Link: <<https://casetext.com/case/melvin-v-reid>>; Constitution of 1849 the State of California with Amendments (Superseded by Constitution of 1879), Section 1. Findlaw – Codes – California, 2017. Link: <<http://codes.findlaw.com/ca/constitution-of-1849-the-state-of-california-with-amendments-superseded-by-constitution-of-1879/ocon-sect-1.html>>.

⁷⁹ Californian Court of Appeals (USA). *Melvin vs. Reid*. 112 Cal. App. 285 (Cal. Ct. App. 1931). Link: <<https://casetext.com/case/melvin-v-reid>>.

⁸⁰ BENNETT, S. C. “The Right To Be Forgotten”: Reconciling EU and US Perspectives. *Berkeley Law Journal*, 2012, Vol. 30, Iss. 1, p. 170.

⁸¹ European Court of Human Rights. Case of *Von Hannover v. Germany* (No. 2). Judgement of 7 Feb. 2012, Apps. No 40660/08 and 60641/08. Link: <<http://www.bailii.org/eu/cases/ECHR/2012/228.html>>.

⁸² App. No 8793/79; Judgement of 21 February, 1986.

⁸³ European Court of Human Rights. Case of *James and others vs United Kingdom*. Judgement of 21 Feb. 1986, App. No. 8793/79. Link: <<http://www.bailii.org/eu/cases/ECHR/1986/2.html>>.

⁸⁴ *Ibid*, para. 46.

⁸⁵ *Ibid*, para. 46.

⁸⁶ *Ibid*, para. 49.

the aim sought to be realised”⁸⁷. Basically, numerous case law footage depicts that the Court overallly uses the proportionality method and the ECHR provisions are not arranged in a hierarchical manner. Although the pattern of a public interest test was never precisely classified in the Council of Europe case law catalogues, like it was laid down in ICO reports⁸⁸, the catalogues involve cases which contain matters of public interest, e.g. the “Freedom of Expression, the media and journalists: Case-law of the European Court of Human Rights” by the Council of Europe’s Audiovisual Observatory (2013) contains a brief analysis of 212 cases, over 30 of which are tagged with the “public interest” label in the catalogue’s pivot table, though not all of them are connected with privacy violations⁸⁹. A framework regarding public interest test was utilized in contemporary judgements of the Court, in particular, *Axel Springer AG v. Germany*⁹⁰ (2012) and *Von Hannover v. Germany* (2012), para. 89-95 and para. 109-113 of the respective judgements⁹¹. The overall palette goes as follows:

1. *Publicity* (“How well known is the person concerned and what is the subject of the report?”): literally, this means the notoriety of the person regarding whom an interference was executed. This criterion was tested in both of the abovementioned cases; the publicity criteria was highlighted in other Court’s decisions separately earlier.
2. *The contribution of the issue into a public discussion* (labeled as “Contribution to a debate or general interest”). There is no explicit or tapered conception of what should actually constitute public interest (citing the Court: “The definition of what constitutes a subject of general interest will depend on the circumstances of the case”). In para. 90 of *Axel Springer AG v. Germany* (2012), the Court mentioned several elements, namely political issues, criminal, sport and artists⁹².
3. *Content, wording and consequences of publication*. This criterion is considered by estimating the wording of the publication and the manner how the person concerned was depicted (applied in both cases, para. 94 and 112 respectively). In para. 112 of the *Von Hannover* case, the Court outlined that this criterion was preliminarily applied in some earlier cases, too⁹³.
4. *The preliminary conduct of the person*. By this criterion, the Court subtends the person’s prior conduct towards the publication or its reaction to the onset of such a publication (discussed in *Von Hannover vs. Germany* (2012))⁹⁴. In para. 101 of *Axel Springer AG v. Germany* (2012) the Court considers the interaction of the person vis-à-vis the mass-media also concordant⁹⁵. If the person gave information regarding his private life in an interview, its privacy expectation degree would obviously crumble. This notion perfectly fits with William Prosser’s or Ruth Gavison’s concepts, who explained this approach decades beforehand.

⁸⁷ *Ibid*, para. 50.

⁸⁸ Data protection and journalism: a guide for the media. ICO, Ver. 1.0, 4 Sep. 2014, p. 33. Link: <<https://ico.org.uk/media/1552/data-protection-and-journalism-media-guidance.pdf>>.

⁸⁹ VOORHOOF, D.; VAN LOON, A.; VIER, C. and others (European Audiovisual Observatory): *Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights*. European Audiovisual Observatory, 2013, IRIS Themes Vol. III (3), p. 6–25.

⁹⁰ App. No. 39954/08, Judgement of 7 February 2012.

⁹¹ European Court of Human Rights. Case of *Von Hannover v. Germany* (No. 2). Judgement of 7 Feb. 2012, Apps. No 40660/08 and 60641/08. Link: <<http://www.bailii.org/eu/cases/ECHR/2012/228.html>>; European Court of Human Rights. Case of *Axel Springer AG v. Germany*. Judgement of 7 Feb. 2012, App. No. 39954/08. Link: <<http://www.bailii.org/eu/cases/ECHR/2012/227.html>>.

⁹² *Ibid*, para. 90.

⁹³ *Von Hannover v. Germany*, para. 112.

⁹⁴ *Ibid*, para. 111.

⁹⁵ *Axel Springer AG v. Germany*, para. 101.

5. The sanction imposed to the media agent for a publication which was recognized illegal by domestic courts (not applied in *Von Hannover* case, used only in Springer case)⁹⁶.
6. Circumstances under which the photograph of the person concerned was taken (obviously, this point is eligible to photo-related issues). This criterion was observed only in the *Von Hannover* case (para. 113 of the appropriate judgement). Within the examination, the Court stressed that regard must be had if the person gave consent to take the picture or not and whether any dodges were used to execute the photo.
7. The method of obtaining the information and its truthworthiness (emerged and discussed in para. 102–107 of *Springer* case, not applied in *Von Hannover* case)⁹⁷.

III. Corollary

The given article obtruded the problem of adjusting a proper balance between privacy with regard to personal data and public interest. From the altitude of the performed treatise, a handful of inferences are to be emphasized:

- this parity is an offshoot from the bigger one, “privacy vs freedom of expression” and has got autonomous features. At the same time, the notion of public interest can not be observed ab-joint from freedom of expression; the “*privacy vs public interest*” parity is paid considerably less regard than the former one;
- the terms have their conceptual and legal content, both of which are disputable in the views of scientists, specialized reports and court decisions. A brief analysis of the legal content of “privacy” in the praxis of ECtHR is conducted. The analysis of the term “public interest” is grounded on the UK Data Protection Act and two outfits of editorial guidelines, namely, the BBC and Ofcom;
- substantial regard is given towards the expectation of privacy by public (that is to say, more or less prominent) and non-public people. It was proved that public people are to expect a somewhat lesser degree of privacy than non-public in most cases owing to general interest that arises from their professional performance;
- a framework of public interest test by the ECtHR was observed and laid down.

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⁹⁶ *Ibid*, para. 109.

⁹⁷ I have to stress that this list is not utmost or explicit. The reader has to bear in mind that the Court can apply some subcriteria or other points to pronounce its judgement which can be divergent from case to case, therefore we overlooked only the conventional ones.

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