Balancing Freedom of Expression and the Right to Private Life in the ECtHR - Some Critical Remarks

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Contents

1 The aim of the study.............................................................................................................................................. 2
2 General Principles and Margin of Appreciation When Balancing the Right to Privacy and Freedom of Expression................................................................................................................................. 4
   2.1 Freedom of Expression...................................................................................................................................... 4
   2.2 Margin of Appreciation...................................................................................................................................... 4
3 Balancing criteria concerning freedom of expression and right to private life .............................................. 7
   3.1 Some general remarks........................................................................................................................................ 7
   3.2 Contribution to a debate of general interest....................................................................................................... 9
   3.3 How well known the person concerned is and what is the subject of the report......................................... 12
   3.4 Prior conduct of the person concerned........................................................................................................... 13
   3.5 The content, form and consequences of the publication.................................................................................... 15
   3.6 Circumstances in which the photos were taken, and how the information is obtained.............................. 16
   3.7 Proportionality of the sanctions imposed....................................................................................................... 17
4 Conclusions.......................................................................................................................................................... 18
The aim of the study

The aim of this article is to examine the praxis of the European Court of Human Rights (ECtHR or ‘the Court’) when it is weighing up the relative claims of the freedom of expression and the right to private life. The evaluation is made by scrutinizing two recent Grand Chamber judgments (von Hannover No 2 v. Germany and Axel Springer v. Germany, 7.2.2012) and comparing them to the Court’s case law, both before and after. In its reasoning of these cases the Court itself stated (§ 108 and § 88) that it was only repeating the criteria laid down in earlier case law.

According to the European Convention on Human Rights (ECHR), the freedom of expression, as guaranteed in Article 10 ECHR, includes the freedom to hold opinions and to receive and impart information and ideas without interference by a public authority and regardless of frontiers. As established in the case law of the ECtHR, “freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment”.¹

The concept of private life, as guaranteed by the ECHR, Article 8, is a broad term, which covers the physical, psychological and moral integrity of a person. The notion of ‘private life’ isn’t limited to the notion of an ‘inner circle’ in which individuals may live their own personal life, thereby excluding entirely the outside world not encompassed within that circle. Respect for private life also comprises to a certain degree the right to establish and develop relationships with other human beings. In addition, the concept of private life also covers activities of a professional or business nature, since most people have a significant opportunity to develop relationships with the outside world in the course of their working lives.² Also those persons that are known to the general public through media representations of whatever kind, are able to count on a legitimate expectation of protection and respect for their private life.³

The right to private life also covers the protection of reputation⁴ and honour,⁵ if the attack on personal honour and reputation attains a certain level of gravity and is in a manner causing prejudice to personal enjoyment of the right to respect for private life.⁶ Article 8 doesn’t give protection against loss of reputation.

⁶ Sidabras and Džiautas v. Lithuania (27.7.2004) § 49; i § 64 and Axel Springer v. Germany (7.2.2012) § 83.
which is the foreseeable consequence of one’s own actions such as, for example, the commission of a criminal offence.\(^7\)

Publication of a photo may intrude upon a person’s private life even when that person is a public figure.\(^8\) According to the Court, “a person’s image constitutes one of the chief attributes of his or her personality, as it reveals the person’s unique characteristics and distinguishes the person from his or her peers. The right to the protection of one’s image is thus one of the essential components of personal development”.\(^9\) In the Court’s opinion this “mainly” presupposes that the individual has a right to control the use of that image, including the right to refuse publication thereof.\(^10\) The right to private life also covers the right to other kinds of personal information, which individuals can legitimately expect should not be published without their prior consent.\(^11\) And it is this aspect of the right to private life that concerns us here. The right to honour or a good reputation will not be discussed further but the focus will be on the evaluation of the right to publish or disseminate truthful information (via text or photograph) about someone else’s private life without his or her consent.

Until the early 2000’s that aspect of private life that covers the right to personal information which shouldn’t be published or otherwise widely disseminated without consent of the person in question, was considered an acceptable limitation of the freedom of expression, but not an independent human right as such. However, in the current court practice the right to private life is considered as an equivalent right to freedom of speech.\(^12\) This has complicated the task of weighing up and balancing the competing claims of the protection of private life and freedom of expression, both in the national courts as well as in the ECtHR. A recent more restrictive trend has raised concerns, which is seen in the legal literature as well as in dissenting opinions of some judgments.\(^13\)

This text focuses on the key criteria that are listed in the *von Hannover No 2* and *Axel Springer* cases and which are important when balancing the freedom of expression and the protection of private life, namely:

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\(^7\) Sidabras and Džiautas v. Lithuania § 49 and Axel Springer v. Germany § 83.


\(^9\) von Hannover No 2 § 96.

\(^10\) von Hannover No 2 § 96 and Reklos and Davourlis v. Greece (15.1.2009) § 40.


\(^12\) Flauss writes that “[t]he overprotection conferred to the right of freedom of expression vis-à-vis the protection of the reputation of others is, in any case, well on the way to being lessened (indeed modified), as seen in some very recent jurisprudence of the Strasbourg Court.” Jean-François Flauss: The European Court of Human Rights and the Freedom of Expression. Indiana Law Journal Vol 84 (3), 809-849, 846.

\(^13\)Dirk Voorhoof – Hannes Cannie: Freedom of Expression and Information in a Democratic Society. The Added but Fragile Value of the European Convention on Human Rights. The International Communication Gazette vol. 72 No. 4-5, 407-423, 420-422; See the dissenting opinions in Grand Chamber cases Lindon and others v. France (22.10.2007) and Stoll v. Switzerland (10.12.2007). See also Flux No. 6 v. Moldou (29.7.2008), where the dissenting judge stated “this judgment of the Court has thrown the protection of freedom of expression as far back as it possibly could”, making it “a sad day for freedom of expression”.
1) whether it contributes to a debate of general interest;
2) how well known the person concerned is and what is the subject of the report;
3) the prior conduct of the person concerned
4) the content, form and consequences of the publication;
5) circumstances in which the photos were taken, and how the information is obtained; and
6) the proportionality of the sanctions imposed.

The author contests that whilst these criteria are relevant and reasonable, their application in the ECtHR’s court praxis has not always been entirely coherent.

2 General Principles and Margin of Appreciation When Balancing the Right to Privacy and Freedom of Expression

2.1 Freedom of Expression

As we all know, the ECtHR has constantly stated that freedom of expression is essential to a democratic society. It is also important for society’s progress and for each individual’s self-fulfilment. Besides positive and insignificant expressions it also applies to those that offend, shock or disturb.\(^\text{14}\)

The Court has emphasised the important and essential role played by the press in a democratic society. It is the press’s task to impart information and ideas and act like a “public watchdog”. Consequently, the public also has a right to receive different kinds of information, opinions and ideas.

As set forth in Article 10(2), the freedom of expression is subject to exceptions. The restrictions have to be prescribed by law, necessary in a democratic society and in the interests that are mentioned in Article 10(2). They have to be construed strictly, and the need for any restriction must be established convincingly. Protecting the reputation or rights of others is mentioned as one reason for restricting freedom of expression.

2.2 Margin of Appreciation

When examining the necessity of interference in a democratic society, the Court verifies whether the domestic authorities have struck a fair balance when protecting two values that are guaranteed by the Convention and which, in certain cases, may come into conflict with each other.\(^\text{15}\) When deciding this, the Court has a margin of appreciation. As the Court has put it, “[t]he Court’s task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article

\(^{14}\) For example Hertel v. Switzerland (25.8.1998) § 46; Stoll v. Switzerland § 101; Steel and Morris v. UK § 87; Mouvement raëlien suisse v. Switzerland § 48.

\(^{15}\) Hachette Filipacchi Associés v. France (14.6.2007) § 43; MGN Limited v. UK § 142.
10 the decisions they delivered pursuant to their power of appreciation.”16 Thus, although there is a European level of supervision, the Court’s task is not to take the place of the national courts. Its job is rather to assess, in the light of the case as a whole, whether the national decisions are compatible with the provisions of the Convention relied upon.17

However, it seems that in some cases the ECtHR has been acting like a fourth instance, considering what would be the best possible solution instead of setting the standard for international human rights and leaving the Member States a margin of appreciation within which they can decide the case themselves, as long as certain minimum standards are met.18 As a former judge on the ECtHR, Dr Matti Pellonpää writes, the very word margin suggests that there might not always be only one right solution but a ‘margin’ within the limits of which two or more solutions can be accepted, depending on whether the ‘margin’ is ‘broad’ or ‘narrow’, or something between.19 A violation also depends on the arguments advanced by the national court. If the case is well reasoned and both the competing interests have been carefully balanced, the scope for different results is greater.

As we know, the margin of appreciation has traditionally been very narrow, when the question is one of limiting political speech20 or discussion on matters of general interest.21 There is a wider margin of appreciation when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or religion.22 Member States also have a broad margin of appreciation when the freedom of expression is used in commercial matters or advertising24 or when the freedom of speech is used to satisfy people’s curiosity about other people’s intimate, private concerns. However, exceptions in both directions to those common principles of interpretation have been witnessed in the recent court praxis.

Sometimes the Court has explored national legislation in different countries to ascertain the current level of protection for the right in a particular case. This engagement with a European legal culture means that if there is no European consensus about the matter at hand, and the margin of appreciation is wider, leaving

16 Stoll v. Switzerland ([GC], no. 69698/01, § 101, ECHR 2007-V); Steel and Morris v. the United Kingdom (no. 68416/01, § 87, ECHR 2005-II); Mouvement raëlien suisse v. Switzerland [GC], no. 16354/06, § 48. See also Axel Springer AG v. Germany [GC], no. 39954/08, § 86, 7 February 2012.
18 Hughes writes, that “there are some competing rights cases in which it is questionable whether the Court has in fact afforded any margin of appreciation to the state”. Kirsty Hughes: Balancing Rights and the Margin of Appreciation: Article 10, Breach of Confidence and Success Fees, Journal of Media Law (2011) 3(1) 29-48, 40. See also p. 48.
20 Ceylan v. Turkey (GC, 8.7.1999) § 34; Lingens v. Austria (8.7.1986) § 42; Castells v. Spain (23.4.1992) § 43.
24 markt intern Verlag GmbH and Klaus Beermann v. Germany (plenary; 20.11.1989; dissent 9-9) § 33.
more discretion to the national level. For example, in Egeland and Hanseid v. Norway (16.4.2009) ECtHR found no violation of Article 10 because legal restrictions also applied in five other countries and no European consensus to this effect existed.

It seems that in some cases the Court has conducted a very precise examination that recalls the decision-making in national courts. At first glance, this is problematic because it is laborious in circumstances where there is an exponential rise in the caseload. That problem has been recognised and several measures have already been taken to reduce the burden on the courts.

Secondly, if the Court decides the case from the beginning to the end, it may be that another composition would come to a different conclusion in a similar case. That, in turn, may have the consequence that the case law becomes contradictory and loses its foreseeability. The third problem with exercising too close scrutiny is that if the ECtHR were to examine even minor details this could trivialize and undermine the standing of the Court and the human rights system more generally.

The very precise and elaborated examination of facts and the different ways to apply the balancing criteria – leading to divergent judgements from different Chambers – means that it is very difficult for the national courts to obey the European Convention on Human Rights. Moreover, if the ECtHR’s court practice is deemed to be too inconsistent it can jeopardize legal certainty and reduce the intelligibility and prestige of its praxis. This may in turn undermine confidence in its judgments and lead to a loss of prestige or deference with regard to its condemnatory judgments.

There are certain disadvantages relating to the wide margin of appreciation, too. A wide margin of appreciation may constitute an incentive to minimize human rights i.e. content themselves with the minimum level without trying to attain a higher level of human rights protection. The margin of appreciation also allows quite a range of differing outcomes.

What makes the present-day situation more complicated is that some recent Grand Chamber judgments indicate that the Court seems to distance itself from its former practice involving very precise examination. The case law is moving in the opposite direction, leaving the Member States a wider margin of appreciation

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27 One can say that the ECtHR is a prisoner of its own success: at the end of the year 2011 there were 151,624 pending applications before the Court. Due to the numerous measures, the total number of pending applications was 113,350 as at 30.6.2013.
29 Pellonpää 2012, 535.
than before. For example, in *Mouvement raëlien suisse v. Switzerland* the Court stated that “[h]aving regard to the foregoing considerations concerning the breadth of the margin of appreciation in the present case, the Court finds that only serious reasons could lead it to substitute its own assessment for that of the national authorities.” In *Austin and Others v. UK* the Court reasoned that the Court system is “intended to be subsidiary to the national systems safeguarding human rights”. In “normal circumstances” it required cogent elements to lead the Court to depart from the findings of fact reached by the domestic courts.

Because applying the margin of appreciation doctrine varies in different cases Kratochvil has compared applying the margin of appreciation to a high jump competition where the jumper doesn’t know the height of the bar. Hughes, in turn, has stated that in some cases the margin of appreciation has played a limited role, which raises the question, is the margin of appreciation only a misleading judicial rhetoric that disguises the Court’s determination.

3 Balancing criteria concerning freedom of expression and right to private life

3.1 Some general remarks

In this chapter I evaluate the balancing criteria that are clearly expressed in Grand Chamber cases *von Hannover No 2* and *Axel Springer AG*, both of which were delivered the same day (7.2.2012). The Court is of the opinion that it just applied the criteria that had been laid down in its earlier case law, so it did not think it had created new principles of interpretation. One would think that by delivering Grand Chamber cases the ECtHR had wished to underline those principles that are listed in both cases.

Before a more precise examination of the balancing criteria it is worth mentioning that, in the Court’s view, freedom of expression and right to privacy deserve in principle equal respect, and accordingly, the margin of appreciation should in principle be the same whether the case has been lodged with the Court under Article 10 of the Convention by the publisher who has published the offending article or under Article 8 of the Convention by the person who was the subject of that article. According to section 11 of the *Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy*, the right to privacy and right to freedom of expression are neither absolute nor in any hierarchical order, since they are of equal value.

31 See *Mouvement raëlien suisse v. Switzerland* (dissent 9-8) and *Austin and others v. UK* (GC; 15.3.2012) and Roi’s (2013) critical article about the Court praxis. See also *MGN Limited v. UK*.
32 See also § 72 and Roi’s criticism 2013, 45-48.
33 *Austin and Others v. UK* § 61.
34 Compare for example *von Hannover v. Germany* (24.6.2004) and *MGN Limited v. UK*.
35 Kratochvil 2011, 330.
36 Hughes 2011, 40.
In *von Hannover No 2* and *Axel Springer AG* the Court pointed out that “[w]here the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court’s case-law, the Court would require strong reasons to substitute its view for that of the domestic courts.” However, examination of case law reveals that in many cases the Court has made a very precise and independent examination of the case and instead criticised national courts for reaching the ‘wrong’ outcome instead of examining whether a proper balancing has taken place. In *von Hannover No 2* (§§ 124-125 and 117) the Court stated that the national courts had carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life according to the guidelines set down in ECtHR’s case law. The national courts’ interpretation could not be considered unreasonable and there were no violations of Article 10. One could think that the criterion of unreasonable means that the preconditions for adopting the opposite solution to that of the national Court would be quite demanding. However, in *Axel Springer AG* the Court found a violation even though it ruled that “[w]here the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court’s case-law, the Court would require strong reasons to substitute its view for that of the domestic courts.”

Next I shall analyze the balancing criteria as stated in *von Hannover No 2* and *Axel Springer AG*. In *von Hannover* a German magazine had published a photo of Princess Caroline (von Hannover). The photo was taken in St. Moritz and it showed her out for a walk with her husband during their skiing holiday. The photo was accompanied by an article with the heading: *Prince Rainier – not alone at home.* According to the article, the ill health of the prince Rainier was a subject of concern to the country and Rainier’s children, who took care of him in turns. Von Hannover claimed a violation of Article 8 because the German courts had refused to grant an injunction against any further publication of the photo. The Court was of the opinion (§ 117) that it could not criticize the Federal Court of Justice on the grounds that it had assessed the informational value of the photo in question in the light of the accompanying article. Because the article was about a matter of general interest, the Court did not find a violation of Article 8.

In *Axel Springer AG* the applicant company relied on Article 10 and complained about the injunction imposed on it against reporting on the arrest and conviction of a well-known actor for a drug-related offence. The actor had played the part of Police Superintendent Y in a famous television series broadcast over many years. ECtHR found a violation of Article 10. A former judge of the ECtHR, Dr Pellonpää, writes that the *Axel Springer AG* case raises the question as to how seriously the Court itself takes the principles it recalled and summarised in the *von Hannover* case. Even though one can understand why the freedom of expression

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39 Pellonpää (2013, 534) mentions the case Saaristo v. Finland as an example of this.
40 Pellonpää 2012, 537.
should weigh more heavily than the right to private life, one might equally well reflect that it is not obvious why the German decisions did not meet the criteria summarised in von Hannover No. 2.41

3.2 Contribution to a debate of general interest

The first essential criterion of evaluation is whether the text or photo contributes to a debate of general interest.42 What constitutes a subject of general interest will depend on the circumstances of the case. The Court has recognized the existence of such an interest not only when the publication concerned political issues or crimes43 but also when it concerned sporting issues44 or performing artists.45 For example in Axel Springer it was a matter of general interest that an actor, who had played the role of police superintendent, was convicted of using drugs. Also seal hunting,46 how the police investigated a crime,47 an accusation of violence used by the police,48 information about a national Court,49 how the state managed the assets,50 patient safety,51 patients’ dissatisfaction with the treatment provided by a plastic surgeon,52 political appointment to office53 and environmental protection54 have all been considered as matters of general interest.

The rumoured marital difficulties of a president of the Republic55 or the financial difficulties of a famous singer,56 in turn, were not deemed to be matters of general interest. How the princess of Monaco spent her free time was not a matter of general interest either.57

In von Hannover No 2 the Court formally upheld the same principle as in the first von Hannover case, namely that publishing photos revealing a person’s private life without their consent, has to contribute to a

43 White v. Sweden § 29; Egeland and Hanseid v. Norway; Leempoel & S.A. ED. Ciné Revue v. Belgium § 72
47 Pedersen and Baadsgaard v. Denmark (GC;19.6.2003) § 78.
49 Rizos and Daskas v. Greece (27.5.2004) § 42.
52 Bergens Tidende v. Norway (2.5.2000) § 49.
55 Standard Verlags GmbH v. Austria No. 2 (4.7.2009) § 52. See also Bou Gibert v. Spain (15.3.2003, decision) and compare to the Saaristo v. Finland.
56 Hachette Filipacchi Associés (ICI PARIS) § 43.
debate which is of general interest. As Prince Rainier’s illness was an event with which contemporary society had to come to terms, the Court considered that the photograph showing von Hannover walking in St. Moritz when her father was in poor health “considered in the light of the accompanying articles, did contribute, at least to some degree, to a debate of general interest”. In my opinion the threshold for considering the photograph as a matter of general interest was set very low as the image itself revealed nothing that would be considered a matter of general interest.

I agree with the Court that there was no violation of private life, but in my opinion this is simply because publishing a legally taken harmless picture of a public figure walking in a public place with her husband cannot cause that kind of harm that would or should be legally prohibited by the ECHR. In von Hannover No 2 the Court also ignores the argument it has used before - namely that the attack has to attain a certain level of gravity and be in a manner causing prejudice to personal enjoyment of the right to respect for private life. Can one really say that one harmless photograph that is taken without harassment or persecution (as in the first von Hannover case) like the one in question does that?

Furthermore, one could argue that von Hannover as a member of the royal family is enjoying public resources and therefore the readership as taxpayers have a certain public interest to see the royal lifestyle and how taxpayers’ money is spent. She is also regarded as an idol or role model and as such her behaviour in public places could be said to make some contribution to matters of public interest.

In MGN Limited v. UK a media company complained because it had been found guilty of breach of confidence and condemned to pay the claimants’ legal costs including success fees. ECtHR found no violation on the first ground but condemned the fact that the legal expenses amounting to £ 500,000 constituted a violation of the freedom of expression.

In this case a national daily newspaper had published articles about the world famous supermodel Naomi Campbell’s drug addiction and treatment. The parties - including Campbell - accepted before the Court and national court that given her prior public denials of drug use, the core facts of her drug addiction and the fact that she was undergoing treatment were legitimately a matter of public interest and therefore the paper was entitled to write about it. However, publishing photographs as additional information had been considered as a violation of her private life.

ECtHR considered that the sole purpose of publication of the photographs and articles was to satisfy the curiosity of a particular readership regarding the details of a public figure's private life. That could not be deemed to contribute to any debate of general interest to society despite the person being known to the public. Hence freedom of expression called for a narrower interpretation. Moreover, photographs appearing in the tabloid press were often taken in a climate of continual harassment. States had a broad margin of appreciation in such cases where two contrary interests had to be balanced, and the national authorities were

58 Sidabras and Dėiautas v. Lithuania § 49; A v. Norway § 64; Axel Springer AG v. Germany § 83.
better placed than the ECtHR to assess whether or not there was a “pressing social need” that would justify an interference.

In the ECtHR’s opinion national courts had scrutinized the case carefully, taking into account the Court’s case law. In these circumstances and having regard to the margin of appreciation, “the Court would require strong reasons to substitute its view for that of the final decision of the House of Lords or, indeed, to prefer the decision of the minority to that of the majority of that court, as the applicant urged the Court to do”. After this the Court stated further that there were convincing reasons for the decision of the majority of the House of Lords. Publication of the additional material had been harmful to Ms Campbell's continued treatment for narcotics addiction and risked causing a significant setback in her recovery. The photos had been taken covertly with a telephoto lens outside her place of treatment for drug addiction, revealing the location of her narcotics addiction meetings, which was deemed to be distressing. Nor was the publication of the additional material necessary to ensure the credibility of the story. The public had no compelling need of this additional material. On the whole the Court found no reason to substitute its view for that of the final decision of the House of Lords or to prefer the decision of the minority to that of the majority. The applicant's conviction did not violate Article 10 of the Convention.

As a public figure Campbell is much better known than the actor playing the role of superintendent (he was called X in the judgement) in the Axel Springer AG case. The national court had considered that the offence committed by the actor was of medium, or even minor, seriousness. X had used drugs - just like Campbell. X was not accused of selling or trafficking drugs. For me it is difficult to see why a newspaper was not allowed to publish photographs that proved that Campbell had used drugs even though she had previously denied having done so. Moreover, Campbell was an idol and role model for many young girls. Some models use drugs to avoid feeling hungry and in that way keep thin, so in this respect too one could say that narcotic abuse among models who are also role models is a matter of public interest.

Of course publishing photographs is different from publishing information in text format, but the photographs were taken legally and as such were not embarrassing. Ms Campbell’s face was well known in the UK even before publication of the photographs, so the images did not make it any easier to recognize her than previously. In addition, the Court has in many cases emphasized that it is not the Court’s or national courts’ task to tell what technique of reporting the press should use when fulfilling its role as a ‘public watchdog’. All in all, it is difficult to understand why the Court did not find a violation of freedom of expression also at the first ground for application in the MGN Limited case – especially in view of the Axel Springer AG case delivered later in Grand Chamber. I also wonder why the Court commented in such detail on the harm caused to Campbell, because after it had referred to the margin of appreciation it could have refrained from taking a stand as to the validity and reasoning of the national court.

3.3 How well known the person concerned is and what is the subject of the report

The second essential criterion for evaluation is the public role or function and the nature of the activities that are the subject of the report and/or photograph. Private individuals have the greatest protection. In von Hannover No 2, the Court stated (§ 110) that “a distinction has to be made between private individuals and persons acting in a public context, as political figures or public figures. Accordingly, 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 […]."

There is a fundamental distinction between on the one hand reporting facts relating to politicians in the exercise of their official functions and on the other hand reporting details of the private life of an individual who does not exercise such functions. Here, as noted by Ohly, it is interesting that, whereas in von Hannover the Court only drew a distinction between politicians and private persons, leaving no room for media celebrities in between, in Hannover No. 2 the ECHR distinguishes between private persons and persons acting in a public context.60

In Axel Springer AG the Court stated that even though the general public usually makes a distinction between an actor and the character he or she is playing, there may nonetheless be a close link between the actor and his or her character. In this case X’s role was that of a police superintendent, whose mission was law enforcement and crime prevention. That fact increased the public’s interest in being informed of X’s arrest for a criminal offence. In my opinion one could also say that it is for X a foreseeable consequence of his crime that it raises public interest and attention.

Civil servants acting in an official capacity are subject to wider limits of acceptable criticism than is the case of private individuals. However, in the Court’s opinion “it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the same extent as politicians and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions”.61 The Court is also of the opinion that civil servants must be able to perform their tasks enjoying public confidence in conditions free of undue perturbation. That is why it is necessary to a certain extent to protect them from offensive and abusive verbal attacks when on duty.62 Persons acting in a public capacity, either as political or public figures, have to face greater public scrutiny. Since the latter have inevitably and knowingly laid themselves open to close scrutiny of their words and deeds, they are obliged to display a greater degree of tolerance.63

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60 Ohly 2012.
61 Saaristo v. Finland § 60. As far as civil servants are concerned, there are differences depending on the task, see e.g. Nikula v. Finland § 50.
62 Nikula v. Finland § 48.
63 Lingens v. Austria § 42; Castells v. Spain (23.4.1992) § 46; Petrenco v. Moldova § 55.
In certain special circumstances the public’s right to be informed can even extend to aspects of the private life of public figures, particularly where politicians are concerned. However, when the published texts or photographs reveal only details of the person’s private life and have the sole aim of satisfying public curiosity, the freedom of expression calls for a narrower interpretation. For example, even though information about a person’s health usually belongs to their private life and its heartlands, information concerning the health of the head of state is also a matter of public interest if it can affect the way the executive performs his duties.

In sum, ECtHR’s distinction from government, politicians, civil servants (and different categories thereunto, depending on the task), public figures and private persons is quite clear and reasonable. However, the sole significance of a person’s status is weak in privacy cases because the Court also presupposes that the published matter is of some general interest.

3.4 Prior conduct of the person concerned

The Court also considers the conduct of the person concerned prior to publication or the fact that the published information has already been published in an earlier publication weigh heavily when deciding the legality of publication. However, the Court has stated that “the mere fact of having cooperated with the press on previous occasions cannot serve as an argument for depriving the party concerned of all protection against publication of the photo at issue”. In Hachette Filipacchi Associés (ICI PARIS) v. France (§§ 53-54) the Court stated that the revelations of the singer, once made public, weakened the degree of protection to which he was entitled. Concerning information that was freely disclosed and made public by the singer, he no longer retained a "legitimate expectation" that this part of his private life would effectively be protected.

In my opinion the Court’s arguments are reasonable, but applying them seems inconsistent. Egeland and Hanseid v. Norway is a good example. In that case two editors-in-chief (applicants) alleged that their conviction and sentence to a fine by the Norwegian courts for unlawful publication of photographs of a person (B) while leaving a court building, gave rise to a violation of Article 10 of the Convention.

This criminal proceeding was probably the most spectacular and media-focused criminal case in Norwegian history. As the Court states, “[t]he trial involved a son (A) and his wife (B), the wife’s half-sister (C) and a friend of the latter (D), who were charged with the murder of the son’s parents and sister, committed in a particularly brutal manner”. Due to the huge media interest in the case special arrangements were made.

64 von Hannover § 63, Standard Verlags GmbH § 47 and von Hannover No. 2 § 110.
66 von Hannover No 2 § 111; Hachette Filipacchi Associés (ICI PARIS) v. France §§ 52-53; Sapan v. Turkey § 34).
67 von Hannover No 2 § 111 and Axel Springer AG § 92; See also Egeland and Hanseid v. Norway § 62, Société Prisma Presse v. France (1.7.2003, decision) and Eerikäinen and others v. Finland § 66.
68 See also Société Prisma Presse (decision, 1.7.2003) concerning the same singer.
enabling the press to follow the trial at a press centre that was set up in a sports hall. A, B and C were convicted of triple murders with the maximum penalty of 21 years’ imprisonment. It was a matter of general interest that B had been arrested and taken into police custody after being free for the last 18 months.

The government maintained in the ECtHR that this case was “horrifying and the subject of enormous public interest”. In the government’s opinion there was anyhow a limited public interest concerning the photographs in question. They had been taken half an hour after conviction in the Court’s car park. The national law prohibited photographing and publishing photographs of a convicted person in the courtroom or on his or her way out of the court premises. B’s lawyer had attempted to prevent the photographing. The photographs as such were not particularly conspicuous in relation to what had been published about B earlier.

The Court referred to the essential function of the press in a democratic society. It also stated that B was shown in tears and great distress in an emotionally shaken condition and otherwise in a vulnerable psychological state. Hence, the need to protect B’s privacy was of equal importance as that of safeguarding due process. The Court also referred to the margin of appreciation and to the limitations of reporting court proceedings that existed in some other Member States. Therefore the conviction of journalists to fines of 10,000 Norwegian crowns did not constitute a violation of Article 10.

What I consider weak reasoning is the statement that the Court did not agree with the applicants’ argument that the absence of consent by B was irrelevant in view of her previous cooperation with the press. In the Court’s opinion, “[h]er situation could not be assimilated to that of a person who voluntarily exposes himself or herself by virtue of his or her role as a politician”.69 I wonder why the Court did not say that by committing three murders B had stepped into the public arena and as such would have to face the publicity that relates to public court proceeding and in particular a criminal proceeding that is a matter of general interest.

In addition to the publicity that relates directly to the triple murders B had committed with her accomplices, one could also say that publishing those photographs did not attain a requisite level of gravity and publishing them was not capable of causing prejudice to her personal enjoyment of the right to respect for private life because she had given many interviews during the past months and her face was already generally familiar.70

Furthermore, the Court has stated that article 8 doesn’t give protection against loss of reputation, which is the foreseeable consequence of one’s own actions such as, for example, the commission of a criminal offence.

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69 Here (§ 62) the Court refers to the cases Lingens v. Austria, (8.7.1986) § 42; News Verlags GmbH & Co KG, § 56; Krone Verlag GmbH & Co. KG v. Austria §§ 35-39; or as a public figure Fressoz and Roire v. France (GC, 21.1.1999) § 50; Blad A.S. and Haukom v. Norway (1.3.2007) § 87; or as a participant in a public debate on a matter of public interest Nilsen and Johnsen v. Norway (GC, 25.11.1999) § 52; Oberschlick v. Austria No. 2 (1.7.1997) §§ 31-35

70 See Axel Springer AG § 83 and A. v. Norway § 64.
The Court has applied this principle in *Axel Springer AG* and *Sidabras and Džiautas v. Lithuania*. I think this principle should have been applied to that case, too.

Also in general, the notion of the foreseeable consequences of one’s own actions should be taken into account in privacy cases at some extent. Despite the notion of a person’s earlier behaviour it seems not to have had any great bearing on the outcomes.

Compared to the *Egeland and Hanseid case*, the outcome in *Italehti and Karhuvaara v. Finland* (6 April, 2010) raises questions about the uniform line in the ECtHR’s case law. In that case a Finnish media company was ordered to pay damages of 5,000 euros for having published B’s – picture (B was convicted to 20 day-fines for a minor assault). The brawl happened at the home of the Finnish National Conciliator (A) with his family. A was married and had an extramarital relationship with B.

B was not a public figure or a politician but an ordinary person who was the subject of criminal proceedings. However, the Court noted that B was involved in a public disturbance outside the family home of A. Both A and B were later convicted for that brawl. The Court noted “B, notwithstanding her status as a private person, can reasonably be taken to have entered the public domain. For the Court, the conviction of the applicant company was backlit by these considerations and they cannot be discounted when assessing the proportionality of the interference with its Article 10 rights”. Then one might ask, did the triple-murderer not enter the public domain when she committed the murders and subsequently appeared in court proceeding?

Furthermore, the Court observed that the article did not disclose B’s identity in this context the first time and that the article was published immediately after the convictions of A and B. Thus, the article was closely linked in time to these events. To my mind, these are relevant observations, but in the *Egeland and Hanseid* case, where the crimes in question were much more severe, these notifications seem to have no impact on the Court’s ruling.

3.5 The content, form and consequences of the publication

In *von Hannover No 2* and *Axel Springer Ag* the Court also outlined that the way in which the photograph or report are published and the manner in which the person concerned is represented in the photograph or report may be taken into consideration. In the Court’s opinion the extent to which the information has been disseminated is also an important factor.

That these factors are significant is beyond dispute, but nowadays it is difficult to evaluate the consequences of the publication according to the nationality or locality of the publication, because news spreads through

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71 *Sidabras and Džiautas v. Lithuania* § 49.
72 See also four other condemnatory judgments that concern the same person and same episode and that were delivered the same day (6.4.2010): *Flinkkilä and others; Soila; Tuomela and others and Jokitaipale and others v. Finland*.
73 Also ECtHR’s case *A v. Norway* raises serious questions concerning the uniformity of ECtHR’s praxis.
the Internet everywhere. On one hand the media that has first published the information cannot have any control of how widely the information will spread. On the other hand it is foreseeable that the information once published in a local newspaper or its website will spread all over the world if the news is of interest.

3.6 Circumstances in which the photos were taken, and how the information is obtained

As stated in the introduction, the Court has considered that photographs enjoy a special protection because a person’s image reveals their unique characteristics. In von Hannover No 2 the Court mentioned that as it has already held, the context and circumstances in which the published photos were taken cannot be disregarded. Things to be considered are

- whether the person photographed has given his or her consent to the photographing;
- whether the photographing was done without knowledge of the person in the photograph or by subterfuge or other illicit means; and
- the nature or seriousness of the intrusion and the consequences of publication of the photo for the person concerned.

As the Court says, for a private individual unknown to the public, the publication of a photo may amount to a more substantial interference than a written article. The Court refers here to Eerikäinen and others v. Finland (§ 70) and A. v. Norway (§ 72) neither of which, in my opinion, are very good examples here.

First, in the Eerikäinen case the Court found a violation of freedom of expression even though the person concerned was an ordinary person hitherto unknown to the general public. The matter at hand was a criminal proceeding, in its early stages, and a magazine had revealed the defendant’s identity by publishing her name and photograph. The crime at issue was an economical crime. In that case one could argue that even though the matter at hand was of general interest, the identity or appearance of the defendant did not contribute to the matter of general interest.

In the Norwegian case in turn, the Court found a violation of private life when media companies were not ordered in court of law to pay compensation to a person who had been released from prison after he had served his sentence from murder. An unclear picture of him without his name had been published when the papers reported two homicides and told that the police wanted to question him. In the paper the Chief Constable was reported as saying that there were no suspects in the case and that all of those who had been summoned for questioning had formal status as witnesses. It was also written on the front page and inside

74 von Hannover No 2 § 96.
75 Gurgenidze § 56 and Reklos and Davourlis § 41.
76 Hachette Filipacchi Associés (ICI PARIS) § 47; Flinkkilä and others § 81.
77 Egeland and Hanseid v. Norway § 61; Timciuc § 150; A v. Norway.
78 In addition, compare A v. Norway to White v. Sweden where the newspapers had published serious allegations about Mr White that was a suspect in prime ministers murder case and who was never convicted of any crime.
that the applicant claimed he was innocent. However, the Court was of the opinion that focusing on the applicant as a previously convicted knife killer, and his presence near the crime scene gave an ordinary reader the impression that he could be suspected of having committed the murders in question, which was defamatory towards him.

The consequences of the publication were probably the most important factor in the Court’s ruling that the applicant’s right to private life had been violated. The Court found that journalists persecuted the applicant and that he had had difficulties to protect himself against them. Journalists had followed him in his footsteps on his way to his home and to his work place. The picture and information had been published after he had finished serving a prison sentence and security measures for other and unrelated crimes committed 13 years ago. Due to the publications he found himself unable to pursue his job and he had to leave his home and was driven into social exclusion.

One can understand that it is hard to be in the news headlines again after serving a prison sentence. However, the news reporting was not incorrect as such and the applicant’s statement, in which he claimed his innocence, was prominently published. Though the Court refers to the wide margin of appreciation also in this case, it seems again that, despite this statement, it has made an accurate evaluation and decided the case like a fourth estate.

In Eerikäinen v. Finland (§ 66) it was of importance that the information was obtained from public indictment written by the prosecutor and in Selistö v. Finland (16.11.2004, § 60) from public pre-trial investigation material. In Saaristo v. Finland (12.10.2010 § 65), Reinboth v. Finland (25.1.2011 § 85) and Axel Springer AG v. Germany (GC; 7.2. 2012, §§ 102-107) the Court stated that the published information was not obtained by subterfuge or other illicit means (in contrast to the von Hannover v. Germany, § 68).

Taking into consideration the meaning of the right to private life, the way in which the information is obtained is in my opinion a secondary criterion compared to the content of the information and the way in which it is published. The violation is usually based on the fact that private information has been disseminated without one’s prior consent, whilst the way in which the information is gathered is not so relevant. For example, eavesdropping and wiretapping and illicit viewing are different violations as such and independent of the publication of the information obtained. 79

3.7 Proportionality of the sanctions imposed

One very important criterion is the proportionality of the sanctions imposed. The sanctions can be, for example, compensation liability, punishment, confiscation or compensating legal costs. The outcomes of the Court have also been very difficult to predict in this respect because liability for compensation is an area where there is a very wide national margin of appreciation. In MGN Limited v. UK in § 200 the Court

79 See the decision Novak v. Czech Republic (13.11.2003).
emphasized the wide national margin of appreciation that is at hand when assessing the amount of compensation. However, in that case the Court found a violation of Article 10 when the total costs billed by the claimant amounted to GBP 850,000.00, of which GBP 365,077.13 represented success fees, and which was in the end settled to GBP 500,000.00 (base costs and success fees). In the Court’s opinion the requirement that the applicant pay success fees to the claimant was disproportionate having regard to the legitimate aims sought to be achieved and it therefore exceeded even the broad margin of appreciation accorded to the Government in such matters.\textsuperscript{80}

Some guidelines can be summarised. First, the Court pays very much attention to the reasoning followed in the national judgment: it must be seen that the national court has weighed up the relative claims of both freedom of expression and the right to private life. In political discussion the margin of appreciation is narrower than in an entertaining newspaper article.

The Court also takes into account the nature of the information that is revealed and whether the journalists have acted in conformity with good journalistic ethics. Also the level of compensation in general in the country in question matters.\textsuperscript{81} If freedom of expression has been manifestly abused, the Court has accepted surprisingly high amounts of compensation.\textsuperscript{82} On the other hand, in \textit{Brasilier v. France} (11.4.2006) the Court considered that a “symbolic franc” as compensation for defamation was not sufficient in itself to justify the interference with the applicant's freedom of expression. So, the amount of compensation or nature of the punishment are not the only decisive factors, because a minor sanction too can have a deterrent effect on the freedom of expression. The nature of the reported matter and the way in which it is reported, together with the reasoning of the national court, have a considerable bearing.\textsuperscript{83}

### 4 Conclusions

\textsuperscript{80} For a detailed analysis of the case see Hughes 2011.

\textsuperscript{81} For example in many Finnish freedom of expression -cases the Court has compared the compensation of mental distress that has been convicted for media to pay, to the highest amount of compensation that has been convicted for the victim of serious personal injury.

\textsuperscript{82} For example, in \textit{Maroglou v. Greece} (23.10.2003, decision) nearly 60,000 euros for each victim, \textit{Bou Gibert v. Spain} (13.5.2003, decision) about 60,000 euros and \textit{Independent News and Media and Independent Newspapers Ireland Limited v. Ireland} (16.6.2005) about 380,000 euros. In \textit{Pakdemirli v. Turkey} (22.2.2005) ECtHR considered the 60,000 euros compensation the applicant had paid, too high, but ordered him to pay 35,000 euros in compensation. Thus, the Court actually acted like a national court and defined the just level of compensation. In \textit{MGN Limited v. UK} a success fee of

\textsuperscript{83} For example, compare \textit{Ruokanen v. Finland} (6.4.2010, decision) and \textit{YLEisradio and others v. Finland} (8.12.2011, decision) to \textit{Saaristo v. Finland}. Compare \textit{Ilta-lehti and Karhuvuara} (16.11.2004) to \textit{Independent News and Media and Independent Newspapers Ireland Limited v. Ireland} (16.6.2005). In \textit{A v. Norway} ECtHR ordered Norway to pay 19,000 euros as compensation while 5,000 euros compensation ordered by Finnish courts (Finland is also a Nordic country and very similar to Norway in many respects) has been too high in the ECtHR’s view. Compensation of 19,000 euros is very much compared to the compensation of 6,000 euros that the ECtHR ordered to be paid to a woman of childbearing age who, as a result of a medical error, had lost her uterus and ovaries (\textit{Csoma v. Romania}, 15.1.2013). For a person that had illegally lost her job as a judge, the Court in turn ordered compensation of 10,000 euros (\textit{Kudeshkina v. Russia} (14.9.2009; dissent 4-3)).
Following a strengthening of the protection of private life, the case law concerning freedom of expression and the right to private life has become more and more difficult to predict. One special feature is that information in photographic form has enjoyed a surprisingly large degree of protection.\textsuperscript{84} Flauss concludes his article by stating that there are distortions and discrepancies “that are detrimental to the intelligibility and authority of European jurisprudence”. In his opinion, the right to legal certainty is at risk, because different chambers use varying methods of assessment.\textsuperscript{85}

The principles that ECtHR has traditionally applied, such as the high level of protection of freedom of speech and the important role of the press as a public watchdog, are still valid, but their importance has, in some cases, diminished.\textsuperscript{86} In addition, applying the old general principles to individual cases has in some cases appeared inconsistent.

Moreover, the degree of discretion when applying the doctrine of margin of appreciation has been less than consistent. Even when the Court has referred to the margin of appreciation it has in some cases scrutinized the case in depth and found a violation of the ECHR. In addition, referring to the margin of appreciation seems sometimes to be merely a routine with no effect on the decision's reasoning or conclusion.

The lack of predictability in the case law means that for national courts it is unfortunately very difficult to implement the ECHR as interpreted in the ECtHR. This is highly regrettable, because if the court practice of the ECtHR seems to be too contradictory or confusing, it can undermine the authority of its judgments. In its recent Grand Chamber judgments the Court has decided that it will leave the Member States a wide margin of appreciation. Now it should maintain this method of interpretation and concentrate on developing the broad guidelines.

\textsuperscript{84} Gurgenidze v. Ukraine and Reklos and Davourlis v. Greece, MGN Limited v: UK and von Hannover cases.

\textsuperscript{85} Flauss 2009, 848. See also Voorhoof’s and Cannie’s (2010) critical view.

\textsuperscript{86} The state’s responsibility to secure the protection of privacy with legislation is relevant here. Nicol, Millar and Sharland (2009 p 37) note that the state’s active responsibility to guarantee protection against media publicity can be regarded as the most significant change in media law over the last ten years.