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Creators	Doherty, Michael

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POLITICIANS AS A SPECIES OF "PUBLIC FIGURE" AND THE RIGHT TO PRIVACY

**Michael G. Doherty, Principal Lecturer
University of Central Lancashire, United Kingdom**

Abstract

This article addresses the extent to which the public role or profile of an individual can affect their reasonable expectation of privacy under Article 8 European Convention of Human Rights. It argues that the case law shows that status as a 'public figure' does have some limited impact on the expectation of privacy. It goes on to assess whether politicians are treated as a separate category of 'public figure'. The conclusion is that some differential treatment is revealed and that the general impact of public profile on privacy is broadened for politicians. The rationales for this differential treatment though also apply to other figures who wield power and influence on matters of public concern.

1. Introduction

Those Scots considering a future in politics are warned by their Careers Service that; 'As a public figure you will have less privacy than before. People have expectations about the way that a politician should behave. You have to think carefully about your personal lifestyle, and be prepared for strong interest from the media' (Careers Service Scotland, 2007).

This article explores whether politicians are singled out as a particular type of public figure under Article 8 of the European Convention of Human Rights (ECHR) in ways that affect their reasonable expectation of privacy. To address this issue it aims to identify the general scope of the right to privacy under Article 8 ECHR and the values protected by it. It assesses the general impact that the status of an applicant as a 'public figure' can have on their expectation of privacy, deriving both from their voluntary actions and inherently from their status. From this basis the article aims to explore whether politicians are treated as a different category of 'public figure', the scope of the categorization and the extent to which it leads to differential treatment of privacy claims. Its final objective is to evaluate

the rationales for this differentiation and assess whether they apply exclusively to politicians or have some application to other individuals who wield power and influence over the lives of citizens. Its focus is on the position under ECHR law, but it also considers, particularly English, domestic law that seeks to implement the ECHR obligations.

2. Public figures

The level of protection that public figures and especially politicians are entitled to has been extensively considered in defamation cases by the European Court of Human Rights ('the Court'), for example *Lingens v Austria* (1986) 8 EHRR 407, and the English courts, for example *Reynolds v Times Newspapers* [1999] 4 All ER 609. The issue has also been subject to detailed consideration in the US (e.g. *New York Times Co. v Sullivan* (1964) 376 US 254). The concepts of qualified privilege and public figure defence developed in these cases though relate to reputation rather than privacy (Phillipson and Fenwick, 2000: p.685). There has been a narrower range of cases that directly concern the balance between privacy and expression rights for politicians as public figures. These have generally found that such figures do have the right of protection for their private life but with some qualifications.

In these cases the applicant's privacy rights under Article 8 ECHR are engaged and the defendant's rights to freedom of expression under Article 10 ECHR are engaged. Article 8 ECHR provides that 'Everyone has the right to respect for his private and family life, his home and his correspondence'. It obviously has a broad scope and applies to issues including family life, sexual autonomy and environmental threats to the home (Ovey and White, 2006, pp.241-298). At its core though is the right to privacy, providing protections on the gathering and use of personal information. The question of what constitutes personal information can be a difficult one. The personal quality can arise from the nature of the information (sex life, medical details, personal financial information) or from the circumstances in which it is imparted (within a confidential business relationship, within an intimate friendship, within the applicant's home). The leading case before the Court, *von Hannover v Germany* (2005) 40 EHRR 1, gives personal information a very broad reading. There was little conceptual analysis leading to the conclusions in that case (Fenwick and Phillipson, 2006: p.667), but the outcome was that photographs of someone in the street carrying out activities of daily living, such as shopping, were capable of engaging Article 8. Despite indications that this finding arose from the longstanding and almost continual low-level media harassment of

the applicant, the Court subsequently confirmed that its approach was not limited to circumstances of harassment (*Sciacca v Italy* [2006] 43 EHRR 20).

A full explanation of all the criteria that can affect the finding on whether there has been an interference with personal information, such as what is a 'public place' and the impact of location, is beyond the scope of this article, but the key test that has emerged is the reasonable expectation of privacy test outlined in the section below. An important guide in deciding when this reasonable expectation may arise comes from the key values protected by Article 8 ECHR of informational autonomy and human dignity. Informational autonomy is the right of an individual to control the flow of personal information about themselves (Phillipson and Fenwick, 2000: p.662; see also Chadwick, 2006). 'What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity', (per Lord Hoffman, *Campbell*: para 50).

Article 8(2) ECHR though establishes that the privacy right is not absolute; 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of... the protection of the rights and freedoms of others'. These rights and freedoms will include the freedom of expression of the defendant. Article 10 ECHR provides that 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference ...'. Article 10 ECHR is similarly non-absolute and allows restrictions, on the same basis as Article 8 ECHR, 'for the protection of the reputation and rights of others'. In circumstances like this, there is no presumptive priority for any one Article and the particular exercise of the competing rights in the specific circumstances of the case have to be carefully weighed (Ovey and White, 2006: p.6). The familiar proportionality test of ECHR law normally involves a close scrutiny of the broader societal interest, such as public health, invoked to restrict the Convention right. The national law must be clear and necessary and only go as far as is required to secure the societal interest. In circumstances where there are two competing Convention rights, the question is one of a fair balance between them (Ovey and White, 2006: p.6). This requires identification and correct assessment of all relevant factors, including, where applicable, the status of the applicant as a public figure and in the case of a politician as a particular archetype of 'public figure'. This paper first examines the general significance of the categorization 'public figure' and then the particular position of politicians as a subset of the broader group.

A. Public Figures and the Right to Privacy

Public figures have a right to privacy. Any notion that a human right does not generally apply to a group of human beings would be a striking proposition. In addition, there is nothing in the core values protected by Article 8 (the development of the personality and informational autonomy), to suggest that they do apply to public figures.

The leading cases in both the European Court of Human Rights, (*von Hannover*), and English law, (*Campbell v MGN Ltd* [2004] 2 AC 457), stressed the fundamental importance of privacy for the development of personality of every human. According to *von Hannover* (para. 69) ‘anyone, even if they are known to the general public, must be able to enjoy a “legitimate expectation” of protection of and respect for their private life’ (see also *Craxi v Italy* (No.2) [2003] ECHR 24337/94, para. 65, ‘Public figures are entitled to the enjoyment of the guarantees set out in Article 8 of the Convention on the same basis as every other person’). In *Campbell* (per Lord Nicholls, para. 12) it was said that ‘A proper degree of privacy is essential for the well being and development of an individual’, and that ‘even a public figure would ordinarily be entitled to privacy’ (per Lord Hoffman, para. 36; see also *A v B plc* [2003] QB 195 (per Lord Woolf, para. 11(xi)), that ‘A public figure is entitled to a private life’).

The key test that has emerged from these cases is, does the applicant have a reasonable expectation of privacy? The test was adopted by the House of Lords in *Campbell* (per Lord Nicholls, para. 21) and has been applied by lower courts since (for example in *McKennitt v Ash* [2007] 3 WLR 194). Although it featured more in the concurring opinions than in the main judgement in *von Hannover*, it has been explicitly adopted in subsequent cases such as *Karhuvaara v Finland* (2005) 41 EHRR 51. The reasonable expectation test provides for a flexible approach and there is a range of dicta to suggest that the public profile of an applicant can have an effect on the level of privacy that they can expect.

The concurring opinions in *von Hannover* emphasized the pressures on the privacy of high profile people. Judge Cabral Barreto said (Concurring Opinion, para. 2), ‘In view of their fame, a public figure’s life outside the home and particularly in public places, is inevitably subject to certain constraints. Fame and public interest inevitably give rise to a difference in treatment of the private life of an ordinary person and that of a public figure’. Similarly, Judge Zupančič argued that (Concurring Opinion, para. 1), ‘He who willingly steps onto the public stage cannot claim to be a private person entitled to anonymity. Royalty, actors, academics, politicians etc. perform whatever they perform publicly. They may not seek publicity, yet, by definition, their image is to some extent public property’. Both

judges found that the limits of private life are difficult to define, and can only be dealt with using the reasonable expectation test and approaching the question on a case-by-case basis.

The Council of Europe Parliamentary Assembly Resolution on 'The right to privacy' has been regularly cited by the Court and by domestic courts. It points out that the private information of public figures is lucrative and is often invaded but that they 'must recognise that the special position they occupy in society – in many cases by choice – automatically entails increased pressure on their privacy' (Council of Europe, 1998: para. 6).

This special interest is also recognised in domestic law. In *Tammer v Estonia* (2003) 37 EHRR 43 (para. 29) it was found by the domestic courts that Estonian law allowed public figures to be subject to special interest of the press, who had the right to describe the life of a public figure more thoroughly than an ordinary citizen. The English courts have similarly recognized that the relationship of public figure with the media 'is different from that of people who expose less of their private life to the public' (Campbell, per Lord Hoffman, para. 37).

Clearly then, the public profile of the applicant will have a practical effect on their level of privacy and, to some extent, a legal effect on their reasonable expectation of privacy, but what aspects of this expectation are affected and what is the rationale for this?

B. The Balance between Privacy and Speech Claims

The reasonable expectation test is specifically concerned with whether the information ought to be regarded as private and as to the weight of the privacy claim. The actions or inherent status of public figures though can also affect the strength of the opposing expression claim.

1. Voluntary Actions

Voluntarily revealing aspects of one's private life and the related issue of arguments from hypocrisy can affect the relative strength of the competing claims. They are not inherently limited to public figures but are very likely to arise only in relation to an individual who has an existing public profile.

It seems intuitive that if a public figure has voluntarily revealed aspects of their private life to the public they will have a lower expectation of privacy in relation to that private life than someone who has not made such revelations. The issue has not been considered by the Court though, and the domestic courts in England have been reluctant to allow this argument to be used in a broad-brush manner.

Voluntary revelation arguments are derived largely from *Woodward v Hutchins* [1977] 1 WLR 760, that those who seek favourable publicity in relation to their private lives cannot complain about the revelation of unfavourable publicity. This notion of implied consent was pleaded in *McKennitt* through the ‘zone argument’, i.e. that putting some parts of one’s private life into the public domain allows others to disclose other information from within that same zone of information. It was argued that the claimant’s limited public comments (to support accident prevention charities) on the accidental death of her fiancé put that zone of her life into the public domain. This was rejected as ‘cruelly insensitive’ and it did not justify opening ‘whole areas of her private life to intense scrutiny’ (*McKennitt*: para.54). *Woodward* was further distinguished on the basis that *McKennitt* had not sought favourable publicity of her private life (*McKennitt*: para.36).

The implied consent argument has had a similarly cool reception in other recent cases. In *Douglas v Hello! (No.2)* [2003] EWCA Civ 139 the only relevant information was the specific information in the dispute, i.e. the wedding photographs, not the previous voluntary revelations of *Douglas* and *Zeta-Jones*. In *Campbell* the only relevant disclosures were in relation to her drug use not other areas of private life where she had previously courted favourable publicity. The concept was applied in *Theakston v MGN Ltd* [2002] EWHC 137 but only because the claimant’s conduct in the case concerned the issue, sexual conduct, on which there had been previous disclosures.

Additionally, implied consent on the basis of voluntary revelations is not consistent with the personal autonomy rationale for Article 8 (Phillipson and Fenwick, 2000: p.679-80). Under informational autonomy individuals have an interest in being able to control the flow of personal information. It is their decision to disclose or withhold details of their private lives. On this basis, Phillipson (2003: p.742) rejects even a limited notion of implied consent; any previous disclosures amount to an exercise of the right of privacy not an abandonment. He admits though that despite its logical force this position may cause unease. In relation to figures who actively try to control their perception by the public, McInnes (2004: p.7) argues that ‘there may be a buried assumption that image management ... is in fact an assault on the that truth, whole truth and nothing but the truth on which the courts routinely insist’, that suppression of the truth can very easily cross the line into false suggestion, and the courts should be very wary of promoting this outcome.

Phillipson (2003, p.742) proposes that any concession to these doubts about selective presentation should be narrowly drawn, applying only where a) previous information amounts to manipulation intended to mislead the public on a matter of some importance, or b) details of private life are voluntarily, repeatedly and

thoroughly placed into the public domain (particularly for profit) so that the private life can be regarded as commodified. It is unclear in the absence a law report, but this may well have been the basis for allowing publication of private information in *Beckham v Gibson* (Unreported, 29 April, 2005, QBD, Langley J.).

There is a close relationship here with arguments from hypocrisy, that is, that the behaviour of the claimant is so inconsistent with their public persona that there is a public interest, buttressing the expression claim, in exposing the hypocrisy and setting the record straight.

In *von Hannover*, it was argued that it was legitimate to show public figures outside of their function partly because of the legitimate interest in judging whether their personal behaviour tallies with their behaviour on official engagements. The intervening publishers claimed that restricting the right to take photographs to official functions favours 'selective presentation that would deprive the public of certain necessary judgmental possibilities in respect of figures from socio-political life' (*von Hannover*: para. 25). This argument was not directly addressed as there was no specific allegation of hypocrisy in relation to Princess Caroline's conduct. Some kind of watching brief, leading to publication, of the activities of public figures in case they act hypocritically is clearly unacceptable.

In *Campbell* it was found that the claimant was correct in not seeking to block publication of the fact of her drug use and treatment for addiction. She had lied about the issue previously and the newspaper was justified in exposing that hypocrisy. There have, though, been some judicial statements indicating a narrow reading of this justification. At first instance in *McKennitt*, Eady J was concerned that it would stop public figures sharing their ideals or aspirations with their audience and that 'a very high degree of misbehaviour must be demonstrated'. This was rejected on appeal, though the Court of Appeal interpreted *Campbell* as indicating that it was important that she had not merely lied about taking drugs, but that she had 'gone out of her way' to emphasize that this distinguished her from other fashion models (*McKennitt*: paras 67-70). This is an unnecessary gloss and the position is best summarized by Lord Hope that 'where a public figure chooses to make untrue pronouncements about his or her private life, the press will normally be entitled to put the record straight' (*Campbell*: para. 82). The interest in correcting previous false statements, almost always from public figures, continues to provide a powerful support to some expression claims.

2. Inherent Status

If a public figure becomes a role model through their pronouncements on a public issue or their principled stance on a social question, then any disjunction between their 'role model persona' and the reality of their private life on that issue,

can be dealt with through the principles outlined above. It has been argued though that public figures become role models as an inherent consequence of their public profile. Lord Woolf in *A v B plc* (para. 11(xii)) found that even though he had not sought that distinction, the claimant was a role model on the basis of his sporting success. This meant that he should expect closer scrutiny by the media and be expected to conduct himself according to high standards. A similar argument, that 'since celebrities embody certain moral values and lifestyles' they can provide examples that people chose to adopt or reject, was accepted by the German Federal Constitutional Court (von Hannover: para. 25).

Ultimately though, this 'involuntary role model' concept has been much criticized and judicially rejected. It rests on unsupported suppositions of how the behaviour of public figures influences the general public and is utterly inconsistent with the concept of informational autonomy (Phillipson, 2003: p.741; Aplin, 2007, p.46). In the Court of Appeal in *Campbell* (para. 151) it was said that if someone was a role model 'without seeking that distinction' then it was not necessarily in the public interest to show that they had 'feet of clay' (see also McKennitt: para. 65). Both Rudolf (2006) and Sanderson (2004) argue that the role model argument was implicitly rejected by the Court in von Hannover.

Is there any scope for arguing that the inherent status of being a public figure affects the expectation of privacy? In von Hannover, Princess Caroline was categorized under German law as a figure of contemporary society *par excellence* ("eine absolute person der Zeitgeschichte"). The protection of her image rights was therefore less than for an ordinary person. Outside of her home, she could only rely on protection of her privacy if she had retired to a 'secluded place' where it was objectively clear that she wanted to be left alone (von Hannover: paras. 23-24). The domestic courts had held that the public had a legitimate interest in knowing and seeing how she behaved in public because she was a public figure. This was unambiguously rejected by the Court, but largely on the basis that she should not have been categorized as public figure under German law and that the expression claim was exceedingly weak. It is arguable that, even after von Hannover, there remain some circumstances where a finding that the applicant is a public figure inherently affects their expectation of privacy.

The first relates to innocuous facts. In McKennitt (para. 139), it was held that not all the information that had passed between the parties in the course of a relationship of confidence was worthy of protection by the court, for example, information on a shopping trip to Italy was found to be trivial, and crucially, non-intrusive. In *Murray v Express Newspapers* [2007] All ER (D) 39 (Aug), (para. 66), the English High Court found that there remained even after von Hannover 'an area of routine activity which when conducted in a public place carries no guarantee of

privacy'. The notion that a simple walk down the street could be characterized as private was particularly troublesome in relation to celebrities, as it meant that they could confine photographs of themselves to concerts, film premieres and the like. Similarly, what may be intrusive to a private individual may be public knowledge for a public figure. In *Karhuvaara* (para. 44) it was pointed out that the newspaper only reported the fact of the MP's marriage which was already public knowledge. In other words, the borderline between private information and innocuous facts can be affected by public figure status.

This ability for public profile to turn what would otherwise be an objectionable use of private information into an acceptable exercise of freedom of the press is seen most clearly in cases concerning image rights. Control over use of one's image is often linked to privacy and is clearly capable of protection under Article 8. A number of cases before the Court have shown that if there is a story in the public interest then use of an individual's image to accompany the story will be permissible, particularly if it is context-less and does not reveal further details of private life. In *Krone Verlag v Austria* (2003) 36 EHRR 57, for example, there was an allegation of unjust enrichment involving an individual who was a member of the national and European parliaments. The newspaper story had an accompanying photograph and the MP tried to injunct the use of the photograph only. The domestic court held that his interest in privacy and the use of his own image outweighed the newspaper interest because it had no informational value and his face was not generally known. The Court held that there was little scope for restrictions on political speech or questions of public interest and found in favour of the newspaper's expression claim. It was not so much his public profile as his status as a public figure deriving from his role that affected use of his image.

The scope for the inherent characteristics of being a public figure to impact on the expectation of privacy remain unclear. The courts have been willing to proceed on a case-by-case basis and have avoided general propositions of law on the connection between public profile and privacy. It has not been explicitly stated but this is consistent with the adoption of the reasonable expectation of privacy test. Such a test necessarily involves looking at the full range of factors in each case. It has been pointed out though that the absence of any findings of broad principle would leave the interpretive discretion unstructured and result in excessive uncertainty (see *CC v AB* [2006] All ER (D) 39 (Dec)). It is argued below that some tentative and broad statements of principle can be made as to how politicians ought to be regarded as public figures and as to how this may affect their expectation of privacy.

3. Politicians

A. A Separate Category?

The profession of politician is the one that comes most readily to mind for writers and judges who want to illustrate that there may be a reduced expectation of privacy or a public interest in disclosing information about private life. In Campbell, (para. 60) Lord Hoffman outlines what he regards as the relatively anodyne additional details about the claimant's medical treatment and distinguishes this from cases where there is public interest in disclosure, e.g. of a sexual relationship 'say between, a politician and someone she has appointed to public office'. Phillipson and Fenwick (2000: p.685), for example, argue that a genuine conflict between Articles 8 and 10 ECHR only arises in a narrow range of cases, such as 'where publication relates to the personal life of a particular figure, but there is a serious argument that it serves a valuable purpose in revealing a matter relevant to that person's fitness for office'. The cases, though, do not disclose a clear approach of treating politicians as a completely distinct category. They do, however, indicate that politicians are such an archetype of 'public figure' that they can be subject to some differences of approach. Sanderson (2004: p.637) argues that politicians must be taken as a sort of 'special paradigmatic case'.

There is some authority pointing to a conception of 'politician' as category *sui generis*. In von Hannover, the criterion of performing some State function was important in the approach of the Court to assessing Princess Caroline's status. It pointed out that whilst she was president of various humanitarian and cultural foundations and represented the Royal Family of Monaco at some charitable and social functions, she did not 'perform any function within or on behalf of the State of Monaco or any of its institutions' (para. 8). Once the Court had defined 'public figure' solely by reference to public function (i.e. exercise of official State powers) the Princess was put in the same category as a wholly private person, one 'entirely unknown to the public' (Sanderson, 2004: p.637). This led the Court to conclude that the public had no legitimate interest in knowing where Princess Caroline is and how she behaves generally in her private life. The High Court in Murray (para. 42), considering von Hannover, said that someone like Princess Caroline was a 'well-known but not a public figure in the sense of being a politician or the like'. So the leading case on the issue does seem to indicate that there is a category of public figures (entirely comprised of public office holders) and everyone else is in the category of 'private individual'.

It is important though to take into account the legal context of the litigation. German law provided protection on the use of images of individuals (Copyright

(Arts Domain) Act, cited in *von Hannover*: paras 40-1). There was an exception that photographs depicting scenes of contemporary society could be published without obtaining the consent of all those included in the photographs. This exception included depictions of figures of contemporary society *par excellence*. The facts of the case concerned, therefore, not the impact of categorization as a public figure on a general right to privacy, but on the narrower question of protection of image rights. It was in this context that the Court found that Princess Caroline ought not to have come within the categorization. It did though go further than this finding to doubt the general validity of a concept of figure of contemporary society *par excellence*. It concluded that the category 'could conceivably be appropriate for politicians exercising official functions' (*von Hannover*: para. 72). Since the category is largely about the use of image rights it cannot realistically be limited to politicians in this way. It would otherwise exclude taking pictures of e.g. a film star attending a premiere (or Princess Caroline attending a charity ball). It does though reveal a mindset in the judgment that any concession to status as a public figure should be strictly limited, and that the obvious exemplars for a limited conception of public figure are politicians.

The weight of authority though more explicitly places politicians as a particular subset within a broader category of public figures. The Council of Europe Resolution (1998: para. 7), seems to set up this two tier approach stating that the category of public figures comprises those 'holding public office and/or using resources [and] more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain'. A similar approach is taken in the domestic law of some States. Provisions of Finnish domestic law, for example, were outlined in *Karhuvarra*; 'The spreading of information, an insinuation or an image of the private life of a person in politics, business, public office or a public position, or in a comparable position, shall not constitute an invasion of personal reputation, ...' (S.8, Chp 24 (531/2000) Penal Code of Finland). The German Federal Constitutional Court in *von Hannover* (para. 24) found that 'This public interest [in politicians] has always been deemed to be legitimate from the point of view of transparency and democratic control', but also that in principle this interest exists in respect of other public figures. It is therefore legitimate to show people in situations that are not limited to their function, subject to balancing with other rights. This view was echoed by the intervening publishers that 'the public's legitimate interest in being informed was not limited to politicians, but extended to public figures who had become known for other reasons' (*von Hannover*: para. 46).

Judge Cabral Barreto, in his concurring opinion in *von Hannover*, refers to the Council of Europe Resolution in arguing that a public figure does not neces-

sarily perform State functions. He cites paragraph 9; ‘Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens’ and finds that ‘If that is true of politicians it is also true of all other public figures in whom the public takes an interest’ (Concurring Opinion, para. 2; see also *A v B plc*, para 11(xii)). On this basis he concludes that ‘information about [Princess Caroline’s] life contributes to a debate of general interest. The general interest does not have to be limited to political debate’ (Concurring Opinion, para. 2). We should remind ourselves here that identification of these characteristics as relevant factors does not determine the outcome of the case; they need to be weighed together with any other strengths and weaknesses in the privacy claim and the strengths and weaknesses of the expression claim.

There is obviously a potential for significant overlap between image rights and privacy issues, as outlined in relation to von Hannover and *Krone Verlag* above. In *Krone Verlag* use of the image of a politician was at stake. The national court ruling that the applicant was not sufficiently well-known to justify use of his image to illustrate a story with a clear public interest was rejected by the Court. It held that the issue of how well-known or not a person is has little importance; ‘What counts is whether this person has entered the public arena. This is the case of a politician on account of his public functions, a person participating in a public debate, an association which is active in a field of public concern, on which it enters into public discussions, or a person who is suspected of having committed offences of a political nature which attract the attention of the public’ (*Krone Verlag*: para. 37). This is not a list arrived at through deduction from first principles, but a compilation of the circumstances of actual cases heard by the Court. This emphasizes the pragmatic case-by-case approach of the Court, and the term ‘enter the public arena’ is interesting as it obviously places politicians at its centre, but is by no means limited to them.

There is a similar overlap in relation to laws restricting personal criticism, for example, *Krone Verlag* (para. 35), ‘The limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual, as the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large’. In *Karhuvaara* (para. 11) the defendant newspaper claimed that the applicant MP, as ‘a public political figure, must tolerate more from the media than an “average citizen”’. This was partly accepted by the Finnish court, with the proviso that it only applied to matters connected to her public functions and in so far as there was a public interest justifying disclosure. The Court agreed that as a politician she had to endure more from the press than the average citizen. It overturned the national court ruling though because, even though the story had no direct bearing on politi-

cal issues or direct links with her role as a politician it came within the remit of her having to endure more than the average citizen (Karhuvaara: para. 44). This can be interpreted as one of the 'special circumstances' mentioned in von Hannover where politicians may have a lowered expectation of privacy.

B. Who is a Politician?

Given that there do seem to be some legal consequences flowing from placing an individual within the category of 'politician', there has been very little consideration of who is 'a politician'. The term clearly applies to those in party politics who hold elective office. Across Europe though, there is a very wide variety of governmental, political and administrative structures and even within each State there will often be no clear division between public office and quasi-governmental positions. In *Radio Twist v Slovakia* (2006) 22 BHRC 396, (para. 14) for example it was noted as relevant, that even though the posts that the complainants held had administrative titles they were actually political and not civil service appointments. In these circumstances it must be questioned whether a general approach is possible.

Categorization could be limited to those in elective office on the basis of the rationales for differential treatment outlined below at section 3.C. The formal mechanisms of political accountability apply most directly to elected party politicians (though those in quasi-governmental positions are also made accountable in a number of ways) and the 'readers as voters' concept, also attaches most strongly to elected office (though public opinion can affect the tenability of holding even non-elected office). A narrow focus on elected office, though, would miss a wide range of people who exercise state power, or more broadly who exercise power and influence on matters of public concern.

The US approach, according to Prosser, 1960 (in Phillipson and Fenwick, 2000: p.688) 'strives for a rough proportionality between the importance of the office the person holds and the range of ordinarily protected information that may be revealed'. This has the advantage of flexibility and of focusing on power and influence. Rudolf (2004: p.537) argues that the decisive criterion is not a person's status as politician or non-politician but 'whether a person's public activities create a legitimate public interest in the information in question'. The status of the individual is important to the extent that the greater the power wielded over the public, the greater the public need to know about that individual. Phillipson and Fenwick (2000: p.688) propose that this includes not just elected posts but those employed by the state 'to make decisions directly affecting the basic interests of the citizenry', for example of governor of the national bank or chief of police. We

should also recognise that some individuals though formally only private citizens may have ‘great practical power over the lives of people or great influence in the formation of public opinion ... which may exceed that of most politicians’ (per Lord Cooke, Reynolds, at 640). The obvious example would be a global media magnate such as Rupert Murdoch, but the argument could also apply, in a form that recognised any disparity of power, to the leader of a large trade union, or the CEO of a supermarket with a large share of the consumer market.

There has been no attempt in ECHR or domestic English case law to define the category of ‘politician’ for privacy purposes. The rationales for differential treatment do point to a focus on elective office. This though could expose those wielding very limited powers, such as local authority councillors to a lower expectation of privacy whilst missing those who exercise significant power and influence (whether from State or private sources of power) over the lives of citizens.

C. Differential Treatment?

Sanderson (2004, p.637) argues that as only politicians fulfil both the competing claims of the meaning ‘public’, in that a) they exercise public function, and b) they are well-known to the general public, there is ‘a very nearly universal agreement that the media is generally entitled to examine the private as well as the public lives of politicians’. The cases, though, do not disclose this general entitlement. The impact of categorization as a politician on an individual’s expectation of privacy is more subtle than this, nevertheless, some differential treatment can be identified.

The approach of the Court in von Hannover (para. 63) was that a ‘fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions’. This is clearly true but there is huge gap between the two examples, and whilst this formulation distinguishes two very different sets of circumstances, it does not provide a demarcation line between information which is clearly publishable (on a politician’s exercise of their public functions) and information which is not. Rather it differentiates two positions on different ends of a continuum, without giving guidance on the wide range of circumstances that lie between these poles. Rudolf (2004: p. 537) agrees that the judgement fails to address a) non-politicians who have social or economic influence, and well-known people who seek publicity in the interests of political or social causes, e.g. a clergyman arguing for criminalising abortion who in the past had persuaded a girlfriend to have an

abortion, and b) persons who choose to make their private lives public by virtue of political or personal objectives, e.g. a politician using his family in an election campaign or a celebrity using their fame to support good causes.

The Court does go on, in *von Hannover* (para. 64), to make some comment on the private information of public figures; 'the public has a right to be informed, which is an essential right in a democratic society that, in certain special circumstances can even extend to aspects of the private life of public figures, particularly where politicians are concerned'. This links the right to be informed to the demands of a democratic society, indicates that politicians are a particular kind of public figure and confirms that public figure status does not automatically open up all aspects of private life. It says nothing, though, as to what are the 'special circumstances' justifying publication.

The key case illustrating the operation of these 'special circumstances' for a politician's expectation of privacy is *Editions Plon v France* (2006) 42 EHRR 36 (see also *Karhuvaara*, as discussed above). The case concerned the publication of information concerning Francois Mitterrand's state of health during the time he had been French president. The French government opposed publication but did recognise the importance of public debate on the right of the electorate to receive information about the physical and intellectual capacities of its leaders. The applicants argued that the book raised issues of general concern, in that a) that the President had assumed a duty of medical transparency and had committed a 'State lie', and b) it addressed a more general debate about the health of serving leaders (*Editions Plon*: para. 40). The Court held that the book was in the context of a wide-ranging debate on the public right to be informed about serious illness in the Head of State (*Editions Plon*: para. 44). Whilst there was clearly a fairly even balance between the public interest in freedom of expression and the privacy claim, as time passed the privacy interest which justified an interim injunction to protect the legitimate emotions of grief of the relatives had waned (*Editions Plon*: para. 53).

The facts of the case related to the Head of State, but using the 'rough proportionality' approach outlined above this could clearly apply with lesser force to, for example, the Interior Minister. It could, in theory and dependent on the circumstances, stretch to affecting the expectation of medical privacy for other powerful figures such as the governor of the national bank or the CEO of a major national corporation (e.g. *Aerospatiale*).

We can see *Editions Plon* as an example of legitimate public interest in private information flowing from inherent status as a political 'paradigmatic' public figure. This is where there is scope for differential treatment of politicians. The general ways in which public profile can have an impact on the expectation of

privacy (outlined above in Section 2.B) are quite limited, but for politicians they have a broadened relevance.

Arguments from hypocrisy have a particular resonance when the person acting hypocritically is directing or influencing public policy. Phillipson and Fenwick (2000, p.676) use the example of a privately gay politician making conservative 'family-values' policy statements. Rudolf's similar illustration of the clergyman campaigning against abortion (see above) shows that the argument from hypocrisy does have a special power when it relates to public role and influence, but also that this resonance is not limited to politicians, but extends to all those who have that role and influence.

Correcting outright lies will continue to provide a strong public interest in expression claims generally and for all public figures regardless of their political role. More difficult questions arise in relation to allegations of hypocrisy based not on express statements but on non-verbal image projection and management. Here we can argue that a married man having an affair and appearing with his family in public should not, other things being equal, justify publication where the individual is a public figure from the world of sports or entertainment. Where the person exercises some influence over public policy in any way that affects married and family life, though, their expectation of privacy, including hypocritical non-verbal representations of their life, ought to reduce in proportion to their influence. This can be linked to Rudolf's (2006: p.537) approach to the issue of voluntary revelations. She argues that the legitimate public interest cannot be derived solely from public curiosity about a person. It can though flow directly from that person's voluntary participation in public debate.

Even the derided notion of 'involuntary role model' seems to have some currency in relation to politicians. The Court of Appeal in *McKennitt* found that if the notion of expecting higher standards from certain people applied at all, it could only apply to certain professions. They gave the examples of headmasters or clergymen, and suggested that these could be joined by politicians (and 'according to taste', senior civil servants, surgeons and journalists).

The discussion above illustrated how inherent status as a politician, rather than as a general public figure, can affect the expectation of privacy in relation to image rights (Krone Verlag) and the latitude of the press to publish personal information (Karhuvaara). In some respects Editions Plon can be explained this way. The President had engaged his doctor in presenting a false image to the French people, but the justification for publication lay not only in correcting the false impression but also in the legitimate public interest in Mitterrand's health flowing directly from his inherent status as the most powerful politician in the country.

So whilst it is a matter of degree rather than wholly separate treatment, the cases do disclose that identification as a politician has a legal impact on the privacy expectation to a different extent than for other public figures. The other conclusion that emerges from the analysis above is that it is the power and influence of politicians that often provides the justification for finding that their status impacts on their reasonable expectation of privacy. Power and influence are obviously not unique to politicians and we turn now to whether there are rationales for differential treatment founded more specifically on their political role.

4. Justification for a Differential Approach

The power and influence that politicians exercise is unique in range and nature. State power includes, *inter alia*, a monopoly on the legitimate use of force, powers of taxation, law-making and the compulsory adjudication of disputes. This seems in itself to provide a rationale for differentiation, but since this line of argument identifies power and influence over citizens as a key factor, it really it goes towards the question of measuring the relative strength of the privacy and expression claims. That is, power and influence derived from other, non-State, sources can also affect the expectation of privacy. Whether this will be to a greater or lesser extent than a 'politician' will depend on the level of power and influence wielded and the relationship of the private information to that sphere of influence. There do though seem to be some rationales that apply particularly to those in, largely elected, public office

A. Readers qua Voters

Politicians are not presented to the electorate as merely efficient assessors of policy options but, increasingly, as men and women of integrity and vision, whose personal characteristics are a good basis for exercising one's franchise in their favour. The Council of Europe Resolution (1998, para 9) states that, '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 these facts' (see also *A v B plc*, para 11(xii)). This links the lower expectation of privacy for politicians to their representative function (and therefore excludes figure wielding power in non-elective office).

It was claimed by the newspaper in *Karhuvaara* that knowledge of the MP's family life could affect the decisions of voters in relation to her. The domestic court acknowledged this but found that it 'did not alone render the matter to be of such public interest' as to justify publication (*Karhuvaara*: para. 13). The Court disagreed with this finding and stated that the fact that the information may affect

voting decisions meant that ‘at least to some degree, a matter of public interest was involved’ (Karhuvaara: para. 45). There is, quite rightly, limited weight attached to this ‘readers qua voters’ concept and the Court is careful not to suggest that it provides carte blanche to scrutinise all aspects of a politician’s life. It does though indicate a reluctance to tell citizens the criteria they are entitled to take into account in exercising their franchise.

This shows a careful appreciation of the role of law in influencing voting decisions in a democratic constitution, but there are some dangers. Phillipson and Fenwick agree that the public should be able to decide for themselves what to take into account when judging the criteria on which to cast their vote, which can open up large area of a politician’s private life to scrutiny. But it is inherent in the nature Articles 8 and 10 that politicians must have some right to privacy, and it is better to have a test of whether, in the view of a rational person, the information could be of real relevance to an assessment of fitness for office. In applying this test there is a need to be broadminded and tolerant of social differences (Phillipson and Fenwick, 2000, p.688-9).

In relation to the hypothetical example of a story on the homosexual affair of a politician who advocates conservative family values (see above), justification for publication lies in the fact that it a) contributes to political discussion, b) influences the standing of the political party in question, and c) reveals a public deception (Phillipson and Fenwick, 2000, p687-8). We should note that only the second of those applies solely to politicians, whilst the others apply to other powerful or influential public figures. Finnish law on privacy, outlined above, links the public interest in private information to ‘fitness for office’ assessments of not just politicians, but also business people and those holding other types of public office.

B. Mechanisms of Accountability

Politicians are subject to all sorts of mechanisms of accountability that makes it much more likely that they will be asked searching questions, or at least be asked such questions in circumstances that require an honest answer. In the UK, for example, government ministers are required to answer questions before Select Committees and before Parliament in Ministers Questions. The constitutional convention of Individual Ministerial Responsibility has been used to make ‘fitness for office’ judgements on ministers based on their private lives (for example, John Profumo 1963, David Mellor, 1992, Ron Davies 1998 (see House of Commons, 2004)). During election time hustings, politicians are asked questions on a wide range of issues (often going beyond any portfolio they hold within their political party) and are expected to answer them.

This notion of a legitimate public interest based on principles of transparency and democratic control was endorsed by the German Federal Constitutional Court in *von Hannover* (para. 24). In the related area of regulation of criticism the Court has said that ‘The limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual, as the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large’ (*Krone Verlag*: para. 35; see also *Incal v Turkey* (2000) 29 EHRR 449).

The Court’s consistent emphasis on the role of the press as a watchdog of a democratic society, and its reluctance to interfere in exercises of expression that can be properly linked to public debate and concern (see e.g. *Observer and Guardian v United Kingdom* [1991] ECHR 13585/88), also underlines the extent to which politicians must accept a more intense scrutiny of a wide range of aspects of their private life.

C. Reciprocity of Obligations

In *Karhuvaara*, the newspaper claimed it was disturbing that an MP should be trying to limit the freedom of expression of that media source. The rationale for being careful about politicians’ attempts to limit expression lies not only in the State’s power to effect restrictions on expression (as exemplified by s.15 Parliament Act of Finland in that case) but also in the special protection of expression rights that politicians enjoy. The Court in *Karhuvaara* (para. 50) mentions the longstanding practice for states generally to confer varying degrees of immunity to parliamentarians that allows free speech for the citizens’ representatives.

As the Court has consistently held, ‘While precious to all, freedom of expression is particularly important for political parties and their active members. They represent their electorate, draw attention to their preoccupations and defend their interests. Accordingly, interferences with the freedom of expression of a politician ... call for the closest scrutiny on the Court’s part’ (*Incal v Turkey*: para.46). In *Jerusalem v Austria* (2003) 37 EHRR 25, even though the speech was not made in Parliament the Court protected the politician’s expression claim because it was made in an analogous situation (a Municipal Council debate). Since politicians are the beneficiaries of particular protection of their expression rights they should be ready to be exposed to exercises of freedom of expression by others. Finding otherwise would result an imbalance in favour of the State that would be inappropriate in a liberal State.

Ultimately these arguments are secondary and supplemental to the key issue of the extent of the power and influence wielded by the complainant. It is the scope

of this power and a reasonable relationship between the contested information and the individual's power that provides the strongest rationale for disclosure and though, as we have seen, whilst politicians may be paradigmatic of this attribute of 'public figure' this is not confined to politicians.

5. Conclusion

Following the judgment in von Hannover, Sanderson (2004: p.637) argued that the Court never properly explains the reasons that justify distinguishing between politicians and private citizens. She called for consideration of a category of intermediate figures; those who had no formal state function but a sufficiently high public profile to be of interest to the general public.

The conclusion here is that formal categorization is not the answer. A reasonable expectation of privacy test that takes into account public function/power/profile as relevant criteria will perform better. This is because in the context of a balance between rights (Articles 8 and 10 ECHR) any test needs finer gradations than can be provided by monolithic categories. The danger of a case-by-case approach though is uncertainty and inconsistency, so there is a need for some principled account of the relationship between being a public figure and the expectation of privacy. A full account of this for all public figures is beyond the scope of this paper but for those exercising State power the arguments point most clearly to finding some reasonable relationship between the private information and the public role or activities of the individual concerned. As the core of this relationship is the power and influence which the individual wields then, whilst we can identify some special characteristics of State power, it is far from clear why this approach should not be applied to others who wield significant power and influence derived from non-State sources.

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