PRIVACY v FREEDOM OF SPEECH: A COMPARATIVE STUDY ON THE LAW OF PRIVACYAND FREEDOM OF EXPRESSION IN RELATION TO THE PRESS, IN THE UK AND THE USA

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Abstract:

The principal objective of this paper is to critically examine how freedom of expression is balanced with rights to privacy against media intrusion. This study compares the right of privacy and the right to freedom of expression in the federal republic of the United States of America (USA) and the sovereign state of the United Kingdom (UK). The contention of this study is that there is a need for a more strictly enforced protection of privacy by media regulatory bodies in both countries and that there should be a standard of legal protection against invasions of privacy by the media. This paper discusses the role of the media in the UK today and the extent to which freedom of expression is granted and balanced against the protection of an individual's privacy. It examines the role of public officials and individuals who are in the public eye, because of their work as entertainers or media personalities, and the extent to which they are entitled to privacy whilst in the public eye.

Keywords: freedom of expression, privacy, media regulation

Introduction

A pivotal theory emerged when examining the role of those in the public eye and their privacy against the press and the freedom of expression; the theory that those in the public eye had minimal privacy rights once they were known to the public so that the press could intrude on their private lives on the basis that it is 'the public's right to know'. This paper is based on the balance between freedom of expression, in relation to the press, and the protection of privacy in relation to the UK. This paper will draw comparisons from the USA, namely the State of California, with reference to both domestic and international legislation, which govern the protection of privacy and allows for the freedom of expression. The media is often accused of being intrusive and invasive in their news reporting by their targets, and so the question of 'Is it the public's right to know?' is often asked and followed by the equally

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compelling question of 'How free can the press be?'[2] This paper endeavours to answer these questions along through critical analysis on whether the media should be allowed to report on the private lives of those in the public eye. It will examine how and whether the Article 10 of the European Convention on Human Rights in UK and the First Amendment in the USA provide for protection of one's privacy; and importantly further question, whether the UK can assiduously affirm the line on an individual's right to privacy and the media's right of free speech.[3] The privacy of publicly known individuals, public office holders and corporations, arguably, is near non-existent in the UK and in the USA, thereby this paper critically evaluates why the privacy of those aforementioned are regarded less than an individual deemed to be 'ordinary'.

1 Freedom of Expression in the United Kingdom

Lord Denning famously said:

> The freedom of the press is extolled as one of the great bulwarks of liberty. But it is often misunderstood...It does not mean that the press is free to ruin a reputation or break a confidence, or to pollute the course of justice or to do anything that is unlawful... [4]

Freedom of speech and expression was recognised as a human right in the United Kingdom through the ratification of European Convention on Human Rights (ECHR) in 1951 and since the year 2000, when the Human Rights Act 1998 came into force, it has been an enforceable right in domestic courts. The concept, however, precedes the modern human rights framework and was already documented in the Bill of Rights 1689. The 1689 Bill of Rights ensured freedom of speech for the Members of Parliament whilst in Parliament without the fear of repercussion of facing court action when outside Parliament and stated 'That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament'.**[5]** Whilst Parliamentary Privilege then applied only to Parliamentarians, freedom of expression is now recognised as a fundamental human right by virtue of the Article 10 of the ECHR. Article 10 like most rights under ECHR is a qualified right, as explained by Lord Bridge in *R v Secretary of State for the Home Department, ex parte Brind* where he states;

> Most of the rights spelled out in terms in the Convention, including the right to freedom of expression, are less than absolute and must in some cases yield to the claims of competing public interests. Thus, Article 10 (2) of the Convention spells out and categorizes the competing public interests by

[2] Bezanson R P., *How Free can the Press be* (University of Illinois, 2003).
[3] For the purposes of this paper, freedom of expression will be referred to as free speech, and the media referred to as the press, at times interchangeably.
[4] *British Steel Corporation v Granada Television Ltd* [1981] AC 1096.
[5] UK Legislation, Bill of Rights <http://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction> 12 July 2013.

> reference to which the right to freedom of expression may have to be curtailed[6].

The legitimate aims identified in Article 10(2) permits restrictions on freedom of expression include protection of the rights of others and preventing the disclosure of information received in confidence but it further states any restrictions must be necessary in a democratic society. In *AG v Guardian Newspapers (No 2)* Lord Donaldson states that 'the starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law or by statute'.[7] This standpoint provides basis for free speech within the UK and same viewpoint was already reflected in Thomas Hobbes' viewpoint that freedom lies in the silence of the law and 'when the law does not speak the individual is sovereign over himself'.[8] It is difficult to argue that freedom of expression was intended to afford every citizen an absolute right to speech, as in write or express whatever they desire in public, or in private, without sense of accountability. The notion of accountability forms basis for lawful restrictions on freedom of speech such as outlawing the incitement of racial hatred in the Public Order Act 1986 Parts 3 and 3A, slander of title in section 3 Defamation Act 1952, and encouragement of terrorism in section 1 Terrorism Act 2006. Free speech in the UK is driven on the notions of truth, self-autonomy and democracy; important notions that, without which, may not validate the justification of free speech.

The initial notion of truth is imperative as it provides the foundation of why free speech is important. The allowance of free speech, in its full capacity, can allow one to discover the truth as argued by John Stuart Mill.[9] Mill argues that free speech should be allowed, as much as possible, as this will help in the pursuit of truth and any restriction on free speech will only constrain the quest for truth. Mill also believed in the free-market of ideas, modern day equivalent of which is the internet. The argument of the correlation between the freedom of expression and its element in a democratic society is a cogent and true one. As stated by Theodore Roosevelt in 1918, 'Free speech exercised both individually and through a free press, is a necessity in any country where people are themselves free'.[10] This assertion is founded on the belief that in order for individuals to make free and informed choices, freedom of expression is needed for the individuals to obtain information and embark on the decision making process. This is evidenced when there is a parliamentary election in the UK

[6] [1991] 1 AC 696 at 748-749.
[7] [1990] 1 AC 109 at 178F.
[8] Tregenza I., *Michael Oakenshott on Hobbes: A study in the Renewal of Philosophical Ideas*, (Imprint Academic, UK, 2003) page 119.
[9] Gray J., *John Stuart Mill on Liberty and other Essays* (OUP, Oxford 1998).
[10] Liberty, 'Human Rights: Free Speech' http://www.liberty-human-rights.org.uk/human-rights/free-speech> 16 July 2013.

when the months and weeks leading up to the election are used to campaign and scrutinise electoral manifestos in radio appearances and televised debates. Freedom of expression is essential for democracy as citizens would not be able to receive information and make free and informed voting decisions. Another example of freedom of expression is exemplified in the UK's decision to go to war in Iraq. This decision was and still is often debated, however, without freedom of expression the decisions and rationale of declarations of war could not be able to be discussed freely. In this regard, it is not just the right to express but the exercise of that right which demonstrates the utilitarian part of a democratic society.

Lord Goff emphatically stated in *AG v Guardian Newspapers Ltd (No 2*) that 'freedom of expression has existed in this country perhaps as long, if not longer, than it has existed in any other country in the world'.[11] Hoffmann LJ states that where there is a clash between freedom of speech and other interests and no clear exception given by the law, freedom of speech is a 'trump card which always wins'.[12] These phrases imply once there was a strong preference in the courts in favour of freedom of expression but this is not necessarily the standpoint in the UK anymore. The Human Rights Act 1998 (HRA 1998) guarantees the enforceability of freedom of expression in domestic legal system and under the HRA 1998, restrictions to any of the rights, including freedom of expression, must be 'proportionate to the legitimate aim pursued'.[13] In addition, section 12 of the HRA 1998 on freedom of expression in case of injunction applications was introduced over concerns, at the Committee stage, of a predicted clash between the press freedom and the right of privacy to protect press freedom. Recently often evoked in the so called super-injunction cases such as those of Ryan Giggs and Andrew Marr's, the clarification section 12 provides has been of use. Section 12(1) seeks to protect press freedom while section 12(4) provides that freedom of expression should be given special regard within the Court in connection to material of a journalistic, literary or artistic nature. Press freedom has been described as 'essential to the nature of a free state'[14] by William Blackstone and the of the press role as a purveyor of information and public watchdog solidifies the importance of free speech and free press in a democratic society[15].

2 Freedom of Expression in the USA

Franklin. D. Roosevelt asserted:

[11] [1990] 1 AC 109, at 285.
[12] *R v Central Independent Television plc* [1994] 3 WLR 20,at 30.
[13] *Handyside v UK* (1976) 1 EHRR 737 at [49].
[14] Blackstone W., *Commentaries on the Laws of England*, Book IV, p.151.
[15] Smith A., 'The Press, the Courts and the Constitution' (1999) 52 *CLP* 126 p.129.

> We look forward to a world founded upon four essential human freedoms.... Freedom of speech and expression...freedom of every person to worship God in his own way...freedom from want...freedom from fear'.[16]

The seventeenth century John Peter Zenger case is regarded as a landmark case for press freedom in the USA. John P. Zenger was a publisher who published a journal titled *New York Weekly Journal* which harshly criticised the actions of Governor William S. Cosby. The Journal accused the, then, governor of New York of a variety of crimes and Zenger was subsequently arrested and jailed. Alexander Hamilton as Zenger's defence lawyer exclaimed that 'truth should be an absolute defence' after a procession of persuasive arguments[17]. Arguably, the case of *NY Times v Sullivan*[18] led into a fundamental change in law regarding the First Amendment. The First Amendment now requires that public officials suing for defamatory statements made in relation to their official conduct must prove actual malice, thus securing a victory for the press and their freedom of expression.

The First Amendment of the Bill of Rights guarantees the right of freedom of expression as a constitutional right but there are some exceptions, as in the UK, that make it a limited right. The Amendment reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances[19].

Following the case of *Gitlow v New York*[20] where the Supreme Court used the incorporation doctrine to also bind State's to the prohibition, it became generally accepted that freedom of speech and freedom of the press are fundamental personal rights that should be protected by the States from invasion under the Due Process Clause of Section 1 of the 14th Amendment. The First Amendment is a very strong guarantee to freedom of speech, in that Congress cannot stop an individual expressing an opinion or displaying a certain affiliation, however, it does place limits on how this can be done. The Government can restrict such things as violent and disorderly protest, activities which are likely to cause harm and distress to others, or place restrictions on where you can do it. These restrictions are not stopped by freedom of speech as they do not stop you expressing an opinion, only doing so in a way which is likely to cause damage or distress.

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[16] Voices of Democracy, FDR 'The Four Freedoms Speech,' Text <http://voicesofdemocracy.umd.edu/fdr-the-four-freedoms-speech-text/> 25 November 2013.
[17] US History. 'The Trial of John Peter Zenger' <http://www.ushistory.org/us/7c.asp>15 August 2013.
[18] [1964] 376 US 254.
[19] USA Archives. Bill of Rights <http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html> 16 August 2013.
[20] [1925] (268 US 652, 666).

On 10 August 2010, President Barack Obama signed the SPEECH Act (HR2765)[21] after months of intense pressure and lobbying from specialists and media publishers. The SPEECH Act, the full title being: 'Securing the Protection of our Enduring and Established Constitutional Heritage Act' now prevents the enforcement of foreign libel judgments in the US Courts where, in the opinion of a US Court, the jurisdiction first granted does not protect free speech. The Act was prompted by an English case of *Sheikh Bin Mahfouz v Ehrenfeld*[22] where it was claimed that defamatory claims were made against the claimant in the Ehrenfeld's book *Funding Evil: How terrorism is financed and how to stop it.*[23] The defendant failed to provide a defence for the claims and ultimately to appear in Court and so a judgment was entered by Mr Justice Eady in default. In the defendant's absence, the claimant was awarded the maximum level of damages available under the section 9 of the Defamation Act 1996 following the rationale that any damaging allegations, which may be published and are not supported by credible research or evidence, are false. The enactment of the SPEECH Act codified the law which has been practised by the US from before the inception of the case of *Mahfouz v Ehrenfeld*. In the case of *Telnikof v Matusevitch*[24] the Court of Appeals in Maryland refused to recognize the judgment given in a UK libel case between the parties on the basis that it conflicted with the First Amendment and is repugnant with the public policy of the State of Maryland. Earlier cases which have refused to recognize or enforce overseas judgments on public policy grounds include *Overseas Inns S.A.P.A. v. United States*[25]*, Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B*.,[26] and *Ackermann v. Levine*[27] to name a few. The SPEECH Act now confirms and solidifies the American belief to the journalistic right of free speech and maintains the US media in a position of power with words.

3 Privacy in the United Kingdom

'I have as much privacy as a goldfish in a bowl'[28]. -Princess Margaret

The Oxford English dictionary defines privacy as 'a state in which one is watched or disturbed by others'[29]. In the legal context privacy is first discussed in the early English case

[21] The Library of Congress <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.2765.ENR:> 19 August 2013.
[22] [2005] EWHC 1156 (QB).
[23] Ehrenfeld R., *Funding Evil: How Terrorism is financed and How to Stop It*, (Bonus Books, Chicago, 2003).
[24] 702 A.2d 230 (1997).
[25] 911 F.2d 1146 (5th Cir.1990).
[26] 825 F.2d 709, 715 (2d Cir. 1987).
[27] 788 F.2d 830 (2nd Cir.1986).
[28]Brit Royals, Princess Margaret <http://www.britroyals.com/windsor.asp?id=princess_margaret> 17 August 2013.

of *Prince Albert v Strange* where it was viewed as an intrusion by Knight Bruce VC who stated 'an intrusion- an unbecoming and unseemly intrusion ...offensive to that inbred sense of proprietary natural to every man- of intrusion, indeed fitfully describes a sordid spying into the privacy of domestic life'.[30]

The law of privacy is traditionally not a right recognised in English common law as evidenced in the case of *Khorasandijan v Bush*[31] though judges, such as Buxton LJ in the *Wainwright Case*, who had expressed the view for it to be taken as a right 'it is thus for Parliament to remove, if it sees fit, the barrier to recognition of a tort of breach of privacy that is at present erected by *Kaye v Robertson* and *Khorasandijan*'.[32]

Whilst the HRA 1998 created a right to privacy in human rights sphere, the House of Lords held in *Wainwright v Home Office*[33] that English law did not recognize a general tort of invasion of privacy. Two major cases in the UK, however, provided the major steps needed towards such recognition: *Campbell v MGN Ltd*[34] and *Douglas v Hello Ltd.*[35] In Campbell, the Court held that where the invasion is occasioned by wrongful disclosure of personal information there is a breach of privacy with Lord Nicholls stating 'the essence of the tort is better encapsulated as the misuse of private information'.[36] The results of these cases have led to some parts of the media calling for comprehensive and codified legislation on the law of privacy, legislation these parts of the media were initially firmly against. The lack or absence of such legislation has led to some experiencing a 'gross invasion of their privacy' as commented by Baroness Hale in *Wainwright.*[37]

The lack of UK legislation in this area means that the Courts can only apply the right to privacy under the Article 8 of the ECHR to the facts of the case and this has prompted practitioners and media commentators to call for statutory reform. The right to private life and the intertwined right to reputation contained in Article 8, like in Article 10, is a qualified right which means interference can be justified in certain circumstances set out under Article 8(2) and where there is justified interference, there will be no breach. The absence of a clear cut

[29] *Oxford English Dictionary* (OUP 2001).
[30] [1884] 2 De G & SM 652.
[31] [1993] QB 727 CA.
[32] Secretary of State for the Home Department v Wainwright [2002] QB 1334, [94].
[33] [2004] 2 AC 406.
[34] [2004] 2 AC 457.
[35] [2008] 1 AC 1 255.
[36] [Ibid, at [39].
[37] *Wainwright v UK* (2007) 44 EHRR 40,at [55]).

division of public and private space is exemplified in the case of *Peck v UK*[38] where a troubled youth tried to commit suicide on the side street of a public road. The youth was caught on CCTV camera and the operator sent for help. Though the use of CCTV was heavily debated, the local Council released stills of the captured footage to highlight usefulness of CCTV. Acknowledging this, the ECtHR found the stills to be in violation of Peck's Article 8(1) rights as though he ran the risk of being seen by a passer-by, he did not run the risk of being seen by the world at large. The issue of 'reasonable expectation to privacy' arose in *Murray v Big Pictures UK Ltd*[39] which concerned Harry Potter author J.K Rowling, who entered a breach of privacy claim when photographs were taken and published of the author and her infant child in Edinburgh using covert camera lenses.

Breach of privacy actions in Italy and France are comparatively less common than those in the UK because of their more protective privacy laws which prohibits photographs being taken of any individual whether in a shopping centre or on a beach. The private lives of politicians in France, for example, have always been vigorously protected. The level of respect given to well known individuals in France is exampled in the etiquette extended by the media that once an individual has given an interview on aspects of their family or private lives, the media will not report on the contents of that interview without prior consent from that individual. Although the individual in question will have a diminished right to privacy, they are still entitled to a level of privacy as any other private individual would.

The case of von Hannover v Germany[40] litigation involving Princess Caroline of Monaco is a prime example where the defendants relied heavily on the press freedoms generated by Article 10. Although the decision of *Van Hannover* was reached nearly a decade ago, privacy lawyers in the UK are still waiting for domestic courts to fully endorse the protection laid down for public figures and individuals. In the UK, the Press Complaints Committee (PCC) code contains a provision that 'editors will be expected to justify intrusions into any individuals' private life without consent'.[41] What is *in the public interest* and *what the public are interested* in are two very different scopes that tend to be mixed up in the name of free speech. The press regulatory body PCC, have however been described as 'toothless'[42] and 'not equipped to deal with systematic and illegal invasions of privacy'.[43] The regulation of the

[38] [2003] 3 EHRR 41.
[39] [2008] EWCA Civ 446.
[40] [2004] ECHR 294.
[41] PCC Editors' Code of Practice s3 (ii), < http://www.pcc.org.uk/cop/practice.html> 23 August 2012.
[42] Report of the Culture, Media and Sport Select Committee on Press Standards, Privacy and Libel, (Feb 2010) [531].
[43] Parliament Publication, '1st Report- Privacy & Injunctions' <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/27302.htm>16 August 2013.

press is admittedly difficult in the UK and this task falls unto the PCC which is made up of at least 7 members who were newspaper editors or are in association with current newspaper editors.

The recently concluded Leveson Inquiry, chaired by Lord Justice Leveson, looked into the practices and ethics of the British press following the phone hacking scandal of the *News of the World*. Following a series of public hearings where celebrities and public officials were called as witnesses, the Leveson Report Part 1 was published in November 2012. The 1,987 page report recommended that a new self-regulating body, independent of serving editors, businesses and the Government was to be established to replace the failing PCC. This new body would have the power to investigate serious breaches and impose high sanctions on offending newspapers. They would also be backed by legislation which would assess its effectiveness in the role. The Report's recommendations were not wholeheartedly supported by Prime Minister David Cameron, who though recognizing the need for press regulation, was uncomfortable with the idea of state intervention in the press.[44] Rejecting the calls for statutory legislation, a Royal Charter is the alternative which, as of November 2013, has been sent to the Privy Council for their formal approval.

The Royal Charter on the regulation of the press at first appears to be similar to the 'toothless' PCC but upon closer inspection, there are notable key differences. The Charter proposes a regulator which has increased powers and a separate watchdog to ensure that the regulator remains impartial. Like the PCC, the regulator will be set up by the press and the board will be made up of non-journalists, who will be chosen by an independent appointment panel and, crucially, the board will not contain any serving editors, which is in contrast to the PCC. The new regulator also has a tough stance on those who break press regulations with a fine of one percent of annual turnover which will be capped at £1million. Under the new regulator complaints against the press can also be dealt with by an arbitration system for a small fee, which has left the press disgruntled with many journalists claiming that this opens the door to countless complaints from anybody who does not like what the press has printed. This addition coupled with the general consensus within the press that they are being muzzled, has prompted some newspapers to voice their intentions to not join the system of regulation. Section 34(2) of the Crime and Courts Act 2013 has, however, provided a financial incentive to join. Section 2 states that damages may not be awarded to the defendant, a newspaper, if they were not part of an approved regulator at the time the

[44] 'David Cameron statement in response to the Leveson Inquiry report', *The Guardian* 29 November 2012 http://www.theguardian.com/media/2012/nov/29/leveson-inquiry-david-cameron-statement 05 December 2012.

material was published and more controversially, may have to pay the complainant's legal fees even if the newspaper wins the case. Newspapers that are part of the Royal Charter are protected from the cost of legal fees and exemplary damages as complaints go through an arbitration system and if the complainant chooses to go to Court in the first instance, rather than try arbitration, the presiding Judge will take this into account and the complainant may have to pay the newspaper's legal fees.[45]

If the UK press is to abide by the rules laid down by said regulator, in regard to respecting individual private lives and determining what exactly is in the public's interest, then the regulator needs to have the power to effectively sanction any newspaper or media sector that fouls the rules, a power the Royal Charter now grants. The misuse of private information action identified by the House of Lords in *Campbell v MGN Ltd* is directly aligned to the protection of private information which is governed by the Data Protection Act 1998 which provides for the regulation of the processing of information relating to individuals including the obtaining, holding, use or disclosure of such information.

The Joint Committee on the Draft Defamation Bill, chaired by Lord Mawhinney, considered the complexity of internet defamation in relation to privacy and the law. This Joint Committee highlighted the crucial need to reform the defamation law, unchanged since 1996, to include the internet. The Committee voted in favour of replacing the existing multiple publication rule with a single publication rule, which in essence means that each online view of a defamatory material would no longer give rise to a fresh cause of action, one view is sufficient to bring forward a claim.[46] Lord Nicholls established a set of criteria that journalists and their actions would be judged by and compliance with which would grant a degree of protection from legal claims. The Reynolds case[47] provided the Reynolds Factors, a pragmatic and workable set of pointers for journalists seeking to run a story that may result in controversy or court action. The Reynolds Factors includes assessment of the seriousness of the allegation; the nature, status and source of the information as well as tone of the article. Urgency of the matter as well as the steps taken to verify the information and contact plaintiff before publication is also of essence.

Arguably, the low damages awarded for breach of privacy is another obstacle in way of effective remedy in defamation cases. The amount of damages awarded in the UK pale in

[45] 'Press regulation: Judge for yourself - the Royal Charter in full' *The Independent* 29 October 2013 http://www.independent.co.uk/news/media/press/press-regulation-judge-for-yourself--the-royal-charter-in-full-8910572.html 05 December 2013.
[46] Joint Committee on the Draft Defamation Bill, 1st Report (2011), [81]).
[47] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

comparison to those the USA where the damages awarded can go up to an astonishing $7,000,000. It has been argued that this does not paralyse newspapers when balanced against what the papers stand to gain once the controversial stories are published.[48] This is highlighted by the domestic case of *Max Mosley v News Group Newspapers Limited*[49] where former President of the Fédération Internationale de l'Automobile, Max Mosley, successfully challenged a British newspaper, *News of the World*, for breach of privacy. The award in this instance was limited to £60,000, an arguably inconsequential sum compared to the amount the newspaper made on the publication of the sensationalized story. A subtle change in this stand can be seen recently with the large awards given to the victims of the recent phone-hacking scandal with £2,000,000 given to the family of murdered school-girl Milly Dowler and an undisclosed six-figure sum given to Actress Sienna Miller to mention a few. The payment, it has to be noted, were not court ordered awards, instead given by the defendants to the claimants and may be a form of damage control.

The fact is that newspapers will continue to flout the principles of privacy unless they are properly disciplined and held liable when in breach. In the Max Mosley case, the defendants were convinced that they were entitled to the defence of Qualified Privilege. Qualified Privilege permits a person in a position of 'authority' or 'trust' to make statements or relay or report statements that would otherwise be considered 'slander and libel' if made by anyone not in that position. In order for the defence of qualified privilege to be available, the report must be one of a public meeting/press conference that is fair, accurate, published without the intention of malice, subject to the right of reply in the form of a letter that gives explanation or contradiction and may not be contemporary, depending on the publication. The *News of the World* had much to gain and little to lose in comparison by publishing the story Max Mosley argues should have never been allowed to publish. It can be argued that once the damage of publication has been done it is difficult to see how financial compensation can right the wrong of a privacy breach.

The biggest story of 2011 was the gross breach of privacy committed by the now infamous *News of the World.* It was discovered that the newspaper's editors, Andy Coulson and Rebekah Brooks, had authorized their journalists to illegally obtain voicemails by hacking into the mobile phones in hope of salacious stories. In a shocking announcement Paul McMullan, a *News of the World* journalist, announced 'privacy is for paedos' in his testimony to the Leveson Inquiry where he further noted that:

> In 21 years of invading people's privacy I've never actually come across anyone who's been doing any good. Privacy is the space bad people need to

[48] Article 19, 'Civil Defamation' <http://www.article19.org/data/files/medialibrary/1427/civil-defamation.pdf> 17 August 2013.
[49] [2008] EWHC 1777 (QB).

> do bad things in. Privacy is for paedos. If there is a privacy law your secrets are going to be much more valuable than they were before.[50]

McMullan also equated public interest to the amount of copies the newspaper could sell, effectively equating circulation as legitimizing what the public were interested in; thereby defending the sensationalized headlines and inaccurate stories as 'the public's interest'. This defence by McMullan is arguably representative of the belief ingrained with many tabloid journalists. The simplified belief that if a newspaper story can sell hundreds of thousands copies uncovering a lie or buried truth, then clearly there is a public interest.

The UK media view the notion of conducting pre-publication court hearings as having a negative effect on free speech concerning matters of public importance. Codification of privacy laws in UK is not available as there is not a composed privacy law aside from Article 8. The reliance of the developing law of breach of confidentiality has been successfully applied and provides a degree of privacy and interpretation of Article 8 which has safeguarded false information as evidenced in *McKennit v Ash.*[51] Search engine giant, Google, have also faced criticism on their platform Google Earth in which all properties can be viewed in detail online with the aid of street view. European Member States are strong opposition on account of their stance that storage of street view images clash with the privacy laws set in Europe. In a bid to alleviate the tension Google offered a compromise by blurring the images of individuals and vehicle licence plates which were unintentionally caught during filming. Switzerland was not happy with this compromise and sued Google for breach of privacy.[52] Any financial sanction given for an invasion of privacy appear to be minute in comparison to the financial gain a newspaper or media giant stand to gain. With the absence of a definitive law of privacy, this issue will continue to be a matter the Courts will have to deal with.

4 Privacy in the United States of America

According to Tiger Woods: 'The virtue of privacy is one that must be protected in matters that are intimate and within one's own family'[53].

[50] Sabbagh D., 'Paul McMullan lays bare newspaper dark arts at Leveson inquiry' *The Guardian*, 29November 2011 < http://www.theguardian.com/media/2011/nov/29/paul-mcmullan-leveson-inquiry-phone-hacking**>** 22 November 2013.
[51] [2006] EWCA Civ 1714.
[52] *FDPIV v Google Inc and Google Switzerland GMbH,* (decision A-7040/2009).
[53] Tiger Woods statement in full, *The Guardian* London 3 December 2009 http://www.theguardian.com/sport/2009/dec/03/tiger-woods-statement-in-full 01 December 2013.

The US right to privacy is defined as 'the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others',[54] similar to the definition of privacy Alan Westin gave in *Privacy and Freedom.*[55] Writers such as Ruth Gavison have included 'the protection of private information'[56] as part of their definitions. Thereby, information that is regarded as intimate such as health, sexual activities and fantasies, financial position, home life and personal life can be regarded as a breach of privacy if disseminated without the person's prior permission. Access and dissemination of information stored in private diaries, emails contents of a letter and telephone voicemails can also be regarded as a breach as they are private. Gavinson further argues that privacy is lost when one person finds out information about the other person. It can be argued that one person knowing a piece of information cannot be compared to many people, possibly millions, knowing the same information. A degree of privacy is still intact when one person knows, it is lost forever when many do. In addition, allowing claims for breach of privacy just because the claimant did not want information shared could open the floodgates to a wide variety of claims creating backlog in courts. While the privacy against intrusion into physical/personal space is, arguably, an under-developed area in English Law, it is a well-established tort in US Law. Section 652B of the Restatement of the Law, Second Torts, states:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to the reasonable person.[57]

The intrusion does not have to be physical, for instance using binoculars to spy on someone would be construed as intrusion. Most people would regard being spied on in their bedrooms or personal conversations being recorded as a breach of privacy regardless of whether the information gathered is subsequently being used or not. The Supreme Court of California held in *Schulman v Group W Productions Inc*[58] that the intrusion is the tort which best captures the common understanding of invasion of privacy.

Celebrities in the USA are constantly stalked and harassed, defamed and suffer from invasion of privacy, all things which are clear violations of the constitutional rights of the citizens of the nation. As a fundamental human right, every individual is entitled to the sphere of privacy which shelters their familial dignity and their personal life. This level of

[54] Warren S & Brandeis L., 'The Right to Privacy' (1890) 4 *Harvard Law Review* p.193.
[55] Westin A.F., *Privacy and Freedom* (The Bodley Head Ltd, Oxford 1967).
[56] Gavison R., 'Privacy and the limits of the law, (1979) 89 *Yale Law Journal* pp. 421-428.
[57] Section 652B of the Restatement of the Law, Second Torts.
[58] 18 Cal 4th 200, 955 Pg 67 2d 469.

protection is often countered by the concept of the public's right to know. Media reaction to the ruling in the *von Hanover* case is best shown in the *New York Times* editorial 'Privacy, Even in Plain Sight'[59] where journalist Doreen Carvajal heavily criticized the European Court's decision and implored the USA to not follow the precedent laid down. It is a widely accepted notion within the US and by the media that public figures have little to no rights that the press are bound to respect. This correlates with people's insatiable appetite for news updates into the private spheres of a public figure's life regardless of whether they court fame:

> In the US the press is much more clearly protected by the constitutional right to freedom of expression... but in Europe, the Court of Human Rights concluded that there are limits to how the press can meet the public's fascination with the daily lives of the rich and famous.[60]

Caroline Van Hanover exercised no public function in need of public scrutiny and by the Courts ruling in her favour, a line was drawn between what information the public needed to know and how much of that information they needed to know. Jeff Rosen remarked that Americans see privacy as a protection of liberty, while Europeans see it as a protection of dignity. He further questions 'whether one concept triumphs the other or are both destined to perish?'[61]

Every individual when acting outside of a public of official duty is a private citizen and by virtue of that status is entitled to an equal measure of respect that one not in a public or official duty is given. Robin D. Barnes further argues that the laws in New York and California, where most celebrities work or reside, offer virtually no protection for the rich and famous in public space and to an extent, this is true. News reports of the paparazzi hounding a celebrity as they go into a shop to purchase something or invading their personal space as they attempt to get into a car after leaving a venue is rife. The images of the number of paparazzi following the late Princess Diana's car trying to get a photograph the night she was killed, shocked the public. To try and tackle this problem in California, under former Governor Arnold Schwarzenegger's leadership, a new body of law was introduced to strengthen and afford celebrities a further level of protection from the over-enthusiastic media. The anti-paparazzi statute section 1708.8 of the California Civil Code has been strengthened to increase the potential penalties for paparazzi that endanger their celebrity prey in the pursuit of a lucrative photograph or video. There is also a further provision in the

[59] Carvajal D., 'For the famous: Privacy? Even in Plain Sight', *The NY Times*, 10 October 2004.
[60] Coad J., 'Europe: Public Image', *The Lawyer* 2 August 2004 < http://www.thelawyer.com/public-image/111358.article> 20 July 2013.
[61] Rosen J., 'Showcase Panel I: Judicial Decision Making: The case of Life, Liberty & Property in Modern Technological Age' < http://www.fed-soc.org/doclib/20070912_ShowcasePanel12001LawCon.pdf> 20 July 2013.

section which also penalizes those who pay for or commission the ill-gotten photograph or video, not only the photographers themselves and further civil law amendments that created new remedies for invasion of celebrity privacy. As one of his last acts before he departed office, Schwarzenegger signed in the provision that would imprison those paparazzi who endanger lives on the road. The new law provides that a person who is engaged in reckless driving with the intent to capture a photo of another person is guilty of an offence punishable by up to 12 months in jail. In the absence of established case law on the matter, there remains the vagueness as to what constitutes an act 'offensive to the reasonable person' and what would amount to a situation where a celebrity had a 'reasonable expectation of privacy'. In a famous statement on the subject of privacy, Supreme Court Justice Brandeis in *Olmstead v. US* stated:

> The makers of our Constitution understood the need to secure conditions favourable to the pursuit of happiness, and the protections guaranteed by this are much broader in scope, and include the right to life and an inviolate personality -- the right to be left alone -- the most comprehensive of rights and the right most valued by civilized men. The principle underlying the Fourth and Fifth Amendments is protection against invasions of the sanctities of a man's home and privacies of life. This is recognition of the significance of man's spiritual nature, his feelings, and his intellect.[62]

In an attempt to provide some clarity on the matter, the American Bar Association communications law conference in May 2011 at Palm Springs expressed the view that a reasonable person would assess that actress Jennifer Aniston would have a reasonable expectation to privacy whilst sunbathing topless in the garden of her private Malibu residence, regardless of where the photographer was standing at the time when the photo was taken.[63] This should be contrasted to another case where actress Lindsay Lohan was told she could not expect privacy whilst shopping for jewellery in a Los Angeles store. The American Bar Association have seemed to distinguish the private space and public space debate by providing a clear example of when a celebrity is in a private space and when a celebrity is in a space deemed to be public. Section 1708.8 excludes photographs taken outside the State of California and highlights California as the sole State within the United States of America that has gone to such lengths to protect the privacy of its celebrities. In contrast to California, New York has no tort for privacy at all despite there being a high number of celebrities who work and reside in the State. The Californian Paparazzi Statute: Californian Civil Code 1708.8 reads in part:

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[62] *Olmstead v. United States*, 277 U.S. 438 (1928).

[63] R Boese & K Sager, *Redefining Privacy? Anti-Paparazzi Legislation and Freedom of the Press,* 29th September 2012> http://apps.americanbar.org/forums/communication/comlawyer/summer99/sum99boese.html> 3rd December 2013.

> 1708.8. (a) A person is liable for physical invasion of privacy when the defendant knowingly enters onto the land of another person without permission or otherwise committed a trespass in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image.
>
> (b) A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image...of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy.

Photographers working on behalf of the press, often violate this Civil Code when attempting to take photographs of celebrities as evidenced in the case of Jennifer Aniston. The press is continuously pushing the boundaries of privacy to the limit in California as shown in *Streisand v Adelman et al*[64] where a photographer took aerial photographs of Ms Streisand in her Malibu residence. In December 2009, Justice Eady granted professional golfer, Tiger Woods, an injunction restraining the UK publication of a naked photograph of Tiger Woods which had already been published in the US.[65] This added fuel to the rapidly increasing debate in America as to the privileges afforded to celebrities in English Courts regarding their privacy. Author Charles J. Sykes warns that privacy in the US has come to an end, asking readers:

> to think about the most painful episodes in your life: the time you got fired from a job you loved, got divorced, when your child failed at school or was caught foul of the law... now imagine if any of those events had been played out on the public stage or had been the subject of gossip columns, magazine headlines or the hot topic for talk shows.[66]

The ruling in Von Hannover reiterated and emphasized to the world that the original role of the press is to inform the public on those matters that affect social, political and economic change. Unbiased reporting as opposed to constant hounding is the mandate to which freedom was granted to the press, nothing more nothing less.

5 Proposed Reforms and Remedies

In the 1890 piece in the *Harvard Law Review* on the rise of 'yellow journalism' Samuel Warren and Louis Brandeis, then students who later became Supreme Court Justices, stated:

> Recent inventions...call attention to the next step which must be taken for the protection of the person, and for securing...the right 'to be let alone'. Instantaneous photographs and newspaper enterprise have invaded the

[64] California Superior Court, Case SC077257.
[65] Eldrick Tont (Tiger) Woods v X & Y & Persons Unknown [2009] Unreported.
[66] Sykes C.J., *The End of Privacy: The Attack On Personal Rights At Home, At Work, On-Line And In Court* (St Martin's Press, New York 1999).

> sacred precincts of private and domestic life...'what is whispered in the closet shall be proclaimed from the house-tops.
>
> For years there has been a feeling that the law must afford some remedy for...the invasion of privacy by the newspapers.[67]

It is startling to note that 123 years later, not much has changed. Information that is 'whispered within the closet' is the precise information that the press are determined to proclaim from the house tops, even if this information is not for the public to know or in the public's interest. As long as the public know who the person being discussed is, it seems as though no information about them is off limits. It is the contention of this study that the law of privacy and freedom of expression in the UK and in the USA is unequally balanced for those in the public eye and an accurate and equal balance is imperative in order to allow a society where an individuals' privacy is intact and free speech is upheld. Why is it that a US Court can grant an injunction which restricts the publication of an article in the UK but when a UK Court makes equivalent ruling, it cannot bind parties in the US?

Sites such as Twitter, Facebook and Instagram are not mentioned or addressed in statutes and there is therefore a presumed immunity from defamation laws. Media legislation in the UK is not broad enough to catch up with the advancements of technology and rise of social media. New Zealand has tackled the issue: in 2006, the Law Commission began a five year review on privacy laws. In 2011, the review ended with a series of recommendations and proposals to improve and upgrade the Privacy Act 1993.[68] The proposed reforms have been made with the objective of maintaining flexibility to reflect the rapidly growing field.

The UK Government should, arguably, adopt and emulate the New Zealand review and model when discussing the creation of new privacy laws. When assessing the concept of an individual's reasonable expectation to privacy and their definition of private information, the courts have adopted a subjective test. The first point of call in the UK in establishing liability is to show that the claimant had a reasonable expectation of privacy in respect of the information in question. The tort of Privacy in New Zealand also has this as the first requirement imposing 'the existence of facts in respect of which there is a reasonable expectation of privacy'.[69] The case of *Von Hannover v Germany*[70] prompted the European Court of Human Rights to dramatically alter the way and the extent in which the media can

[67]Warren S. & Brandeis L., 'The Right to Privacy' 4 *Harvard L.R.* 193 (15 December 1890).
[68] *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4*(NZLC R123, 2011) <http://www.lawcom.govt.nz/project/review-privacy> 5th December 2013.
[69] *Hoksing v Runting* [2005] NZLR 1 [117].
[70] [2004] (Application no. 59320/00).

obtrusively disrupt the private lives of the rich and famous. Twentieth century columnist Walter Lippmann emphatically proclaimed that 'A free press is not a privilege, but an organic necessity in a great society'.[71]

In this modern day era, if pro-active steps are not taken to implement concrete privacy provisions and strict press regulations, the Courts will be faced with privacy issues, claims against freedom of expression and verbal persecution by the media. California, the State that is home to Hollywood, Beverly Hills and Malibu; the playground of the rich and famous, by virtue of its high-profile residents has the most comprehensive privacy and anti-harassment laws in the whole of the United States. In contrast, in the United Kingdom the Leveson Report found the behaviour of the press to have 'wreaked havoc with the lives of innocent people whose rights and liberties have been disdained'.[72] The Report also found that there was a general lack of respect for individual privacy and dignity at the paper, a lack of respect which could be regulated by the new press regulatory body introduced by the Royal Charter.

Conclusion

So where does the balance strike between Salman Rushdie's 'free press' and Princess Margaret's 'privacy in a goldfish bowl'? The techniques used to obtain information and photographs by the press have overstepped many boundaries, boundaries which have failed to be properly regulated and sanctioned giving the press a belief that they are indeed the '*free press'*. Free to publish scandalous and often damaging articles that have negative effect on the individual who is subject of the article and their close ones. American Founding Father and author of the *Declaration of Independence*, Thomas Jefferson has said that 'only security of all is in a free press'; these poignant words have provided the backbone to which the press in both the UK and the USA has operated. The UK Leveson Report has, however, stated new words, words which are arguably more characteristic of the press in society today, '…press behaviour that…can only be described as outrageous'.[73] Once the regulatory body identified in the Royal Charter is set up, the right to privacy will, arguably, have higher weighting when balanced with press freedom. An independent regulatory body which has the power to impose a heavy financial sanction on offending newspapers will be the first step to reigning in the freedom the press have enjoyed and abused.

[71] Freedom of the Press, *Rights of the People: Individual Freedoms and the Bill of Rights* >http://www.ait.org.tw/infousa/zhtw/DOCS/RightsPeople/press.html> 4th December 2013
[72] The Leveson Report <http://www.levesoninquiry.org.uk/about/the-report/> 21 August 2013.
[73] Ibid.

This paper has provided a comparative analysis of privacy laws in the United States and United Kingdom and concludes by arguing that a degree of privacy from the press should be upheld throughout these countries equally for all members of society. Those in the public eye are entitled to same fundamental human rights and should have their right to privacy respected especially when in private dwellings and in case of sensitive private information. This right to privacy is irrespective of whether they are a reality television star or a renowned scientist, privacy is a universally recognised right; a right which is not forfeited once the world at large can identify who the person is.