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**Right to privacy v. Freedom of expression: Mosley case**

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# RIGHT TO PRIVACY V. FREEDOM OF EXPRESSION: MOSLEY CASE

## 1. Introduction

“... An ‘intense focus’ is necessary upon the comparative importance of the specific rights being claimed in the individual case...”<sup>1</sup>. This statement was made during the *Mosley v. News Group Newspaper Limited* judgment by David Eady, also known as Mr. Justice Eady, an High Court judge in England and Wales notable for having presided over many high-profile libel and privacy cases.

In that occasion, once again great attention has been given to the issue of balancing “the competing interests of privacy and of freedom of expression”<sup>2</sup>. This topic has always been really controversial. After the recognition of the right to privacy, “the normative panorama of the journalistic activity”<sup>3</sup> has been completely renewed. Journalists have started paying more attention to the respect of personal dignity of the people involved in their news and it’s also possible to find a more diffuse sensitivity about privacy, a term that in certain society has even became hackneyed. Citizens are now more aware of their rights and this is clearly visible by the higher number of legal cases that fill our tribunals as well as our newspapers today.

But how is it possible to balance these two rights? When does the freedom of expression end and gives way to privacy? What does public interest mean and how can be distinguished from public curiosity? Is the ‘prior notification’ claimed by Mosley needed to protect the right to privacy or would that kill the right of freedom?

In my paper I will try to answer to these questions defining the right to privacy and showing how this right is protected by the Italian and the English law and by the *European Convention for the Protection of Human Rights and Fundamental Freedoms* driving the attention to the particular case of celebrities. I will especially focus on the Mosley case showing how this case is emblematic of the ‘fight’ between the right to privacy and the freedom of expression and how it could have shocked the precarious balance between these two rights.

## 2. Right to privacy

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<sup>1</sup> "Mosley v. United Kingdom Judgment (Application No. 48009/09) Strasbourg 10 May 2011." *Scribd*. European Court of Human Rights. Web. 01 June 2012. <<http://www.scribd.com/doc/55082172/Mosley-v-United-Kingdom>>.

<sup>2</sup> "Privacy and Injunctions: The Law According to King Canute?" *IP Draughts*. Web. 01 June 2012. <<http://ipdraughts.wordpress.com/2011/05/25/privacy-and-injunctions-the-law-according-to-king-canute/>>.

<sup>3</sup> Paissan, Mauro. *Privacy E Giornalismo: Diritto Di Cronaca E Diritto Dei Cittadini*. Roma: Istituto Poligrafico E Zecca Dello Stato, Libreria Dello Stato, 2003. Print.

The term privacy, from the Latin: *privatus* "separated from the rest, deprived of something..."<sup>4</sup> becomes really ambiguous when it comes to the juridical meaning.<sup>5</sup> Most cultures, use the term privacy to describe "the quality or condition of being secluded from the presence or view of others"<sup>6</sup> but it is still not an universal concept because individuals gives a different meaning to what is considered private and in some cultures the idea of privacy has remained unknown until recent times.

This English term, sometimes regarded as untranslatable by linguists, has different origins. Some experts say it comes from the book "*Liberty, Equality and Fraternity*" written by J.P Stephen in 1873. Others say it has appeared in Europe in 1885 when Rudolf von Jhering proved that non economical interests were linked to protecting personal rights looking at the fact that, after the discovery of photography, always more people started complaining because they did not want the photographer to take and commercialize their picture without their permission. There are also historians affirming that privacy was born in the United States of America in 1890 with the book "*Right to privacy*" written by Louis Brandeis, a professor at Harvard University and the lawyer Samuel Warren. This book, which is consider the essence of the right to privacy, had two different aims: it wanted to solve a practical issue trying to stop the numerous intrusions in the private life of Werren's wife by the Boston's "*Evening gazette*" but it also wanted to give juridical importance to the aspirations of the new society.<sup>7</sup>

The history of the evolution of privacy can be summarized by the words of Michael Gorman: "privacy emerged as a social issue in the eighteenth century. Before then, people, even rich and powerful people, lived open lives because of the nature of the society and the buildings in which they lived. Most people lived, ate, slept, played and so on communally...there was no distinction between domestic life and the work life... the concept of privacy and the solitary life of the mind came when communities and extended families gave way to nuclear families with houses with solid walls that contains separate rooms and were situated on private land...it was not until the twentieth century that the opportunity for privacy was available to the less well-off in Europe and in North America. The important changes in the way in which

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<sup>4</sup> "Privacy." *Wikipedia*. Wikimedia Foundation, 22 June 2012. Web. 25 June 2012.  
<<http://en.wikipedia.org/wiki/Privacy>>.

<sup>5</sup> Bevere, Antonio, and Augusto Cerri. *Il Diritto Di Informazione E I Diritti Della Persona*. Milano:Giuffrè, 1995. Print p.49

<sup>6</sup> <http://www.thefreedictionary.com/privacy>

<sup>7</sup>Partipilo, Michele. *Le Notizie E La Persona: Dalla Diffamazione Alla Tutela Della Privacy*. Bari: Cacucci Editore, 2005. Print. P. 136-138

people lived and work, and especially with the physical and psychological distinction between work and 'private life', the desire for privacy was born and continues to exist today"<sup>8</sup>.

Talking about the juridical meaning of the term, at the beginning privacy had only a negative significance: it included a list of things that couldn't interfere with someone's intimacy. With the progress of the jurisprudence, though, they started elaborating other interpretations of it, linking privacy to private life, habits, actions etc that do not necessarily have to be connected to someone's work position or functions.<sup>9</sup>

Putting the right to privacy between the fundamental human rights has been really controversial. It has been said that "privacy is the heart of freedom in the modern state"<sup>10</sup>. Privacy means freedom of expression for the human being<sup>11</sup>; it allows reaching the moral aims, which represent the expression of the human dignity<sup>12</sup>. The jurisprudence differentiate three different types of freedom: there is a 'freedom without interferences', which allows individuals to decide freely their behavior, 'promotional freedom' which occurs anytime you have to do something that hampers your freedom, and a 'freedom to participate' if it aims to favorite the intervention in the formation of politics and in the process of producing norms, to establish goals and values of the State.<sup>13</sup> 'Freedom without interferences' is the base of the right to privacy as well as of the most important individual and civil rights as the right to life and the rights related to thoughts, conscience, expression etc...<sup>14</sup> Privacy is based on this freedom because is "the expression of everyone's autonomy inside a community."<sup>15</sup>

The right to privacy had its first recognition in Article 12 of the *Universal Declaration of Human Rights* in 1948. Consequently it was recognized in the *European Convention on Human rights* in 1950 and in the legislation for the protection of personal data's of the German land, Essen in 1970. The first national normative was introduced by Sweden in 1973 followed by USA in 1974, the German Federal Republic in 1977 and France in 1978. The right to privacy is also protected by the *Charter of Fundamental Rights of the European*

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<sup>8</sup> Gorman, Michael. *Our Enduring Values: Librarianship in the 21st Century*. Chicago: American Library Association, 2000. Print. p 146

<sup>9</sup> Pagallo, Ugo. *La Tutela Della Privacy Negli Stati Uniti D'America E in Europa*. Giuffrè, 2008. Print.p. 52

<sup>10</sup> Corapi, Elisabetta. *Il Diritto Alla Privacy: Convenzione Europea Dei Diritti Dell'Uomo Ed Esperienza Inglese*. Salerno: CartoGrafiche, 2001. Print. P 34

<sup>11</sup> J. S Mill, *On Liberty, in Utilitarianism, Liberty, and representative Government*, New York, 1951, p 81

<sup>12</sup> D. Flahert, *Privacy and Data protection : an international Bibliography*, Lodon, 1948

<sup>13</sup> Corapi, Elisabetta. *Il Diritto Alla Privacy: Convenzione Europea Dei Diritti Dell'Uomo Ed Esperienza Inglese*. Salerno: CartoGrafiche, 2001. Print. P 34

<sup>14</sup> G. Peces-Barba, *Teoria dei Diritti Fondamentali* cit. p 207

<sup>15</sup> M Dogliotti, *Le persone fisiche*, in *Trattato di Diritto Privato*, P. Rescigno; Vol 1, Torino,p. 143

*Union* with Article 7 which protects “the respect of the private life and the familiar life” and Article 8, “the protection of personal data’s”<sup>16</sup>.

- **2.1 The Italian right to privacy**

In the Italian legislation the right to privacy is generally recognized. However this right, which is considered as a unitary value and aspect of personality, does not come from a unique norm of civil law but from the decisions of judges.

After the Second World War the Italian judge had to face millions of cases of personal injuries due to the changes in society with the diffusion of new media’s as radio and television. The recognition of the right to privacy, thought, has not been immediate. The process of acceptance has been marked by three important facts: in the 1950’s in the *Caruso* case (Civil Cassation - 22 December 1956 n. 4487), which dealt with the publication of material about the singer’s past life, the Tribunal and the Court of Appeal of Roma have recognized the existence of the right to privacy even if not explicitly recognized by the Italian Constitution, forbidding the interference in someone’s private life. However, this statement has been followed by the Court of Cassation’s one which contradicted this trend saying that “it is not illegal to say things about other people if you do not use illicit means and there is not the obligation of secret”<sup>17</sup>. In the 1960s the Court of Cassation started to open up with the case *Petacci* (Civil Cassation - 20 April 1963 n. 990) saying that information’s about someone’s private life should not be written without its consensus if the information’s do not satisfy a public interest. The decision of the Court is based on Article 2 of the Italian Constitution and the Court admitted the violation of the right of personality. Fundamental is the 1975 leading case *Soraya Esfandiary* which recognized the existence of a right to privacy in the Italian court system saying that this right protects individuals “...both in personal and familiar situations and outside their place of residence if the information’s do not have a public interest” (sent. No. 2129/1975)<sup>18</sup>. This sentence represents a turning point in the Italian privacy law because it innovated the Court’s believe that “the simple desire to keep something

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<sup>16</sup> Nicoletta Parisi E Dino Rinoldi. *Lineamenti Di Diritto Europeo Dell' Informazione E Della Comunicazione*. Napoli: Editoriale Scientifica, 2006. Print. p.151

<sup>17</sup> Corapi, Elisabetta. *Il Diritto Alla Privacy: Convenzione Europea Dei Diritti Dell'Uomo Ed Esperienza Inglese*. Salerno: CartoGrafiche, 2001. Print. P 43

<sup>18</sup> Zaccaria, Roberto. *Diritto Dell'informazione E Della Comunicazione*. 7th ed. Padova: CEDAM, 2007. Print. p127

private does not constitute an interest remarkable to the tort protection”<sup>19</sup>. Introducing the concept of public interest, the Court claims Article 41 of Constitution saying that pictures cannot be published for lucrative reasons if there is not a public interest related to it. Five years before, in 1970 the right to privacy have had its first legislative recognition in the *Workers’ statute*, as a reaction to the filing which discriminate workers by their political or religious believes, and with the introduction of videotaping in working places.<sup>20</sup> After the sentence of 1975 another decisive moment for the Italian jurisprudence has been the introduction of *directive CE 1995* approved late in 1997. Since 1980, the Italian government had always tried to approve bills to introduce the right to privacy in the legislation but all of them were rejected generating a big gap between the Italian and the European legal system.<sup>21</sup> Trying to reduce this gap the Italian government decided hurriedly to implement the directive with the *law 675/96* but it also approved the delegated *law 676/96* which allows government to modify the first law. This delegation has been used a lot to modify and integrate the law, creating a confused system of norms. The need of a reorganization of the laws on this subject has been fulfilled with the introduction of the *Journalist’s Code* that is in force since the 1<sup>st</sup> January 2004. This code finds the balance between the needs of the contemporary society: right of the individual to protect its personal interests and collective freedom to know what it is going on in the world.<sup>22</sup>It introduced great innovations: it defines the meaning of ‘personal data’s’ and it puts forward important principles. The Code also plans the adoption of the *Code of conduct* for journalists which will be adopted according to Article 25 of the *law 675/1996*, the 29 July 1998. But the most important innovation is that it codifies the limits of freedom of press found by the jurisprudence: for example it stands that the consensus is not needed for sensible data’s when the journalist finds information’s that have public interest. The journalist still has to respect the limits of freedom of press and especially the essentiality of the information.<sup>23</sup>

Public interest becomes the key to balance the right to privacy with the freedom of press. But what is the meaning of public interest? In the *sentence App. Roma 11 February 1991*,

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<sup>19</sup> Partipilo, Michele. *Le Notizie E La Persona: Dalla Diffamazione Alla Tutela Della Privacy*. Bari: Cacucci Editore, 2005. Print. p.139

<sup>20</sup> Ibid. P. 140

<sup>21</sup> Zaccaria, Roberto. *Diritto Dell'informazione E Della Comunicazione*. 7th ed. Padova: CEDAM, 2007. Print. p 129

<sup>22</sup> Partipilo, Michele. *Le Notizie E La Persona: Dalla Diffamazione Alla Tutela Della Privacy*. Bari: Cacucci Editore, 2005. Print. p. 26

<sup>23</sup> Ibid. p 131

*RAI/Tabocchini*, the jurisprudence differentiates between the ‘absolving’ information and the ‘unhealthy’ one. In this sentence the ‘unhealthy’ information is completely disqualified as ethically incorrect and culturally degrading and it is described to occur when the author confuses ‘public interest’ with ‘public curiosity’<sup>24</sup>. It has been stated, in fact, that the concept of public interest does not coincide with what interests the public.<sup>25</sup> The meaning of public interest has been defined in the 1960’s according to Article 2 of the Constitution as “regarding the duties of political economical and social solidarity concerning the position held by individuals” (Cass. Sect. I civ., 20th April 1963, *Petacci/ Palazzi*, in *Giur. It.* 1963, Gli 1, 961.) Subsequently underlining that the public interest does not necessarily have to be of the general community but it can also concern its specific parts. ( Cass. 9 Feb 1966). In 1982 it has been said that the freedom of expression is limited by the “collective public interest to the knowledge of a fact which is relevant to the significant interests for the associated life” excluding “facts strictly private related to an essential intimacy which remains inviolable...”<sup>26</sup> In 1988 the Tribunal of Messina stated that “public interest exists in relation to the events which interest the collective life...the knowledge of it is essential to the creation of a public opinion...”<sup>27</sup>. Through truth and objective information’s, individuals can create their own opinion on the subjects concerned in the story and this is overriding because “...only through a exhaustive and correct creation of a public opinion, citizens can exercise their rights constitutionally ratified for their democratic participation to the economic and social life in the Country”. (Cass. 3<sup>rd</sup> June 1983). That is for this reason that the public interest cannot be aside from the truthfulness of the information as well as for its actuality. Information’s about the political and ideological situation have a public interest only if diffused in that specific circumstance or they get insignificant with the time.<sup>28</sup> In the sentence of the Tribunal of Rome in 1987, it has even been stated that “the public interest of the immediate knowledge of facts of great social prominent importance, is leading compared to the principle that everyone has to be considered innocent until his guiltiness has not been proved”. Talking about pictures the Court of Cassation has affirmed that “a general interest on knowing the appearance of an individual is not enough... to predominate on the individual’s rights, the public interest must be serious, present and responding to the need of the community to grow culturally...a need

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<sup>24</sup> Bevere, Antonio, and Augusto Cerri. *Il Diritto Di Informazione E I Diritti Della Persona*. Milano: Giuffrè, 1995. Print. P. 85

<sup>25</sup> *Ibid.* p. 59

<sup>26</sup> V Trib. 20 Gennaio 1986, in *Diritto Inf. e Informat.* 1986, 906

<sup>27</sup> Razzante, Ruben. *Manuale Di Diritto Dell'informazione E Della Comunicazione: Con Riferimenti Alla Tutela Della Privacy, Alla Diffamazione E All'editoria On-line*. Padova: CEDAM, 2005. Print.

<sup>28</sup> Sezioni Unite della Cassazione 14 Novembre 1958



that only the diffusion of the image can satisfy”<sup>29</sup> If an information does not respond to this characteristics of actuality, truth and the continence it is possible to occur in a case of label. This crime is disciplined by article 595 of the *Penal Code* which also presents an aggravating circumstance for press- related crimes, due to the particular diffusion of the medium and of the undoubted power of psychological persuasion and of orientation that holds<sup>30</sup>.

The Court of Cassation has now recognized the right to privacy bringing it back to Article 2 of the Constitution, an article defined ‘open’, suitable to protect all the different kinds of damages that could happen, combined with the principle of equal social dignity, sanctioned by Article 3.<sup>31</sup> The idea that the right to privacy is not specific but is a new dimension of the rights to freedom is largely supported and this is why the right to privacy is also protected by Article 14 and 15 (right to inviolability of the domicile and secret of correspondence), Article 21 interpreted as the “right to not express their thoughts”<sup>32</sup> and also Article 13 which refers to “personal moral freedom, as well as to their immaterial goods...”<sup>33</sup>. Today, privacy is defined as “the right to exclusive knowledge of the events related to your private life”<sup>34</sup> and the “right- interest to control your personal data”<sup>35</sup> due to the tight link between privacy and technological development.

- **2.2 The English right to privacy**

Even if the English jurisprudence has always seen numerous cases of libel<sup>36</sup>, until the incorporation of the Convention of in the *Human Right Act*, approved by the Parliament the 9 November 1998 and came into effect in October 2000, the English law had never recognized a general tort of invasion of privacy<sup>37</sup>.

The right to privacy was never recognized as a stand-alone right, being considered as the “interest in controlling the disclosure of public information about oneself”<sup>38</sup>. Privacy was also identified as “...the right of seclusion as to one’s name, person, or representation of self...”,

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<sup>29</sup> A. Scalisi, *Il diritto alla riservatezza*; Giuffrè, Milano 2002, P 69

<sup>30</sup> Razzante, Ruben. *Manuale Di Diritto Dell'informazione E Della Comunicazione: Con Riferimenti Alla Tutela Della Privacy, Alla Diffamazione E All'editoria On-line*. Padova: CEDAM, 2005. Print. pag 296

<sup>31</sup> A. Barbera , *Art. 2 in Commentario alla Costituzione* 1975 p. 66

<sup>32</sup> Zaccaria, Roberto. *Diritto Dell'informazione E Della Comunicazione*. 7th ed. Padova: CEDAM, 2007. Print.

<sup>33</sup> Ibid.

<sup>34</sup> A. Cerri , voce Riservatezza Diritto Comprato e straniero in *Enc. Giur.*

<sup>35</sup> Zaccaria, Roberto. *Diritto Dell'informazione E Della Comunicazione*. 7th ed. Padova: CEDAM, 2007. Print

<sup>36</sup> Erdmann, Jens. *La Diffamazione Come Strumento Della Politica Inglese*. Bari: Arti Grafiche Laterza & Polo, 1940. Print. p 5

<sup>37</sup> , E. Frankel Paul, J .Miller, D. Paul, *The right to privacy*

<sup>38</sup> Helen Fenwick & Gavin Phillipson, *Confidence and Privacy: A Re-Examination*, 55 CAMBRIDGE L.J. 447, 447 n.4 (1996).

and if”...associated with an action for libel or slander, copyright infringement, breach of contract, trespass, assault and battery, or similar type of action, the Anglo-American courts seem perfectly willing as a gratuitous bonus, to grant it protection. It is only where this right to seclusion stands naked and alone that many Anglo-American courts, and particularly the English, have encountered extreme difficulty in bringing themselves to recognize such a right, and allow a remedy for that alone.”<sup>39</sup> It is generally attested that English courts rather accept claims for an intrusion of privacy coming in conjunction with more established rights<sup>40</sup>, without recognizing a stand-alone privacy right. An example of this is the *Kaye v Rovertson* case. This case regards the well-known Bitcom star Kaye, who was photographed and interviewed while only partially conscious by a tabloid journalist while he was recovered in hospital from brain injuries after a car crash. The celebrity sought an injunction to prevent the publication of the article but even if the Court recognized he had experienced a “clamorous invasion of his privacy”, it concluded that “this invasion of his privacy which underlies the plaintiff’s complaint... does not entitle him to relief in English law”<sup>41</sup> and the Court stated that in the “... English law there is no right to privacy, and according there is no right of action for a breach of person privacy” (Court of Appeal, FSR 62, 1991). The only protection given in indirect way was the action of breach of confidence. An emblematic case for the use of breach of confidence tort is the *Prince Albert v. Strange* case in 1849. Even if this case is not the first one to utilize the breach of confidence, it is “the clearest example of a case relying on a theory of confidence because it involves famous plaintiffs and it extended the doctrine to cover breaches by third parties”<sup>42</sup>. In this case William Strange attempts to sell a catalog of etchings and drawings of the royal family made by Queen Victoria and her husband Prince Albert. His attempt was “originated in a breach of trust, confidence, or contract”, by the clerk of the royal printer who was having the duty of confidentiality to the Queen and Prince becoming the subsequent holder of the etchings<sup>43</sup>. In the 1969 *Coco v AN (Engineers) Limited* case it is possible to find the cornerstones of the law of confidence. It has been stated that three elements are necessary for the formulation of a breach if confidence claim: the information needs to have the necessary quality of confidence about it, it must have been imparted in circumstances importing an obligation of confidence and an unauthorized use of that

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<sup>39</sup> James K. Weeks, *Comparative Law of Privacy*, 12 CLEV.-MARSHALL L. REV. 484, 484–85 (1963).

<sup>40</sup> Stanley, James E. "Max Mosley and the English Right to Privacy." *Washington University Global Studies Law Review* 10 (2011): 641-48. Web. P 647

<sup>41</sup> Ibid p 650

<sup>42</sup> Stanley, James E. "Max Mosley and the English Right to Privacy." *Washington University Global Studies Law Review* 10 (2011): 641-48. Web. P 647

<sup>43</sup> Ibid.

information has to occur to the detriment of the party communicating it<sup>44</sup>. Through the the use of the breach of confidence to protect cases of intrusion of someone's privacy, the concept of privacy has evolved and the reach of the breach of confidence has been extended "from the protection of genuinely personal information's not previously disposed by the person who is its subject, to sensitive business information, until is now capable of covering also information about state agencies and information held by public authorities which people have disclosed to them (voluntarily or under compulsion) for particular purposes."<sup>45</sup> Since the 19<sup>th</sup> century, non commercial information's can be protected by the breach of confidence doctrine but even though the evolution of the jurisprudence has enlarged the extent of it, we will have to wait a century to see the new right to privacy protecting revelations which are considered intimate confidences. The Court, in fact, did not recognize a right to privacy that is not based on the confidentiality of the information. The breach of confidence does not focus on the nature of the information itself but on the nature of the relationship between the parties and it was not designed to protect private information's that were obtained by unfamiliar third parties<sup>46</sup>. Scholars of the English law started complaining the inadequacy of the breach of confidence to protect against the public revelation of private facts but the right to privacy has been always rejected. An important example is the 1991 famous case, described above, *Kaye v. Robertson*. This decision was firmly criticized and seen as "...the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens" as one of the jurists lamented. This decision disappointed a large part of public opinion and it also affected the view of young advocated, some of which are now lawyers<sup>47</sup>. It also contributed to foment the call for a for change in the law especially looking at how privacy is protected by the American law. In 1995 with the *Hellewell v. Chief Constable of Derbyshire* case, there has been an extension of the protection of the breach of confidence and the Court accepted the possibility that pictures could be considered as 'private information's' saying that "if someone with a telephoto lens were to take... a photograph of another engaged in some private act, his subsequent disclosure of the photograph would... amount to a breach of confidence... In such a case the law would protect what might

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<sup>44</sup> *Case Coco v. A.N. Claeck Engineers Ltd*, R.P.C, 1969, p. 41

<sup>45</sup> D. Feldman, *Information and Privacy*, in *Freedom of expression and freedom of information, Essay in Honour of Sir David Williams*, cit p. 19

<sup>46</sup> Stanley, James E. "Max Mosley and the English Right to Privacy." *Washington University Global Studies Law Review* 10 (2011): 641-48. Web. P 648

<sup>47</sup> Basil Markesinis et al., *Concerns and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)*, 52 AM. J. COMP. L. 133, 138 (2004)

reasonably call a right to privacy, although the name accorded to the case of action would be breach of confidence”<sup>48</sup>. Privacy was protected, but under another name.

Only after the introduction of the *Human Rights Act* the right to privacy has been fully recognized in the common law and the Convention became part of British law. The law was passed by Parliament in 1998 but did not go into effect for two years.<sup>49</sup> This new legislation declared that was outlawed “for a public authority to act in a way which is incompatible with a Convention right”. One of the first cases faced by the English courts after the incorporation of the *Human Rights Act* is the one of the 21<sup>st</sup> Dec 2000 *Douglas and Others v Hello!*. In this case, which involves the publication by a tabloid newspaper of pictures of Michael Douglas and Catherine Zeta Jones’s wedding that had already been sold to a rival magazine, the couple won an injunction and damages but on appeal the injunction was denied because too restrictive on press freedom. This decision is very innovative even if the Court rejected privacy to be the basis of recovery recognizing confidentiality as the appropriate basis for any remedy<sup>50</sup> and did not want to create a free-standing privacy right under English law. The Court recognized the existence of a right to privacy which is based on the action of breach of confidence that can protect someone’s interests even when there is no an obligatory relation between the injured part and the one who causes damages. In the next leading case *A v. B Plc*, the Court tried to give further guidelines to the doctrine of privacy protection through the use of confidence saying that it would protect privacy interests without explicatively categorizing them as such.<sup>51</sup> A case of great importance is the *Campbell v. Mirror Group Newspapers Ltd.* In this case the model had been photographed while leaving a Narcotics Anonymous meeting and these pictures had been published within a story on her battle against the use of drugs. In this case, as in the *Douglas* one, the Court re-affirmed that a free-standing English right to privacy did not exist but it stated however that “The continuing use of the phrase ‘duty of confidence’ and the description of the information as ‘confidential’ is not altogether comfortable. Information about an individual’s private life would not, in ordinary usage, be called ‘confidential’. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.”<sup>52</sup>

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<sup>48</sup> Corapi, Elisabetta. *Il Diritto Alla Privacy: Convenzione Europea Dei Diritti Dell'Uomo Ed Esperienza Inglese*. Salerno: CartoGrafiche, 2001. Print. P 72

<sup>49</sup> Stanley, James E. "Max Mosley and the English Right to Privacy." *Washington University Global Studies Law Review* 10 (2011): 641-48. Web. P 652

<sup>50</sup> Ibid 654

<sup>51</sup> Ibid 654

<sup>52</sup> Ibid 655

After the introduction of the *Human Right Act*, both in equity and common law, everyone has the right to have a private space and the tort of breach of confidence fully protects the right to privacy. The law does not have to protect only the people whose trust has been betrayed, but everyone who thinks it has been victim of an intrusion in its private sphere is now secured by the law. The Court who has to take into account all the fundamental rights protected by the Convention and utilizes the breach of confidence together with the art 8 of the *Human Right Act* to cover them<sup>53</sup>.

The process of acceptance of the *Human Right Act* in the common law has not been easy. This is not surprising considering that since the *Magna Charta* (1215 d. C) England had never introduced a document as important as the *Human Right Act* before<sup>54</sup>. England has been the first country to ratify the *European Convention on Human Rights* and, as a signatory, was required to protect the individuals' 'private and family life' as written in Article 8 of the Convention but it didn't introduce it into his internal right and did not give the Convention the force of law.<sup>55</sup> In the 1960s the Convention was the object of attention of jurists but they were underestimating the implications that it could have had on the internal law. In the 1970s the approach towards the Convention changed: the number of publications about it increased as well as the interests of the public opinion due to several important events as the case of Thalidomide and the entrance of England in the European Community in 1973. The Convention started to be used as a guide for decisions but jurists were still diffident. The Court of Appeal underlined "the duty of the Courts, as long as they do not defy or disregard clear and unequivocal provision, to construe statues in a manner which promotes, not endangers the basic rights to be found in ECHR"<sup>56</sup>, and stated that the Convention has to be "considered by the courts even though no statue expressly or impliedly incorporates in into our law"<sup>57</sup>. With the progress of jurisprudence, the Convention started to be used to have a better protection of human rights and as an instrument to clarify the cases of ambiguity or incertitude within the national law: where precedent cases or specific laws of reference do not exist, the judge has to pass decisions conforming to the Convention. (*Derbyshire Conty Council v. Times Newspaper ltd*). In the 1990s jurists agreed on the need of new ways to

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<sup>53</sup> Corapi, Elisabetta. *Il Diritto Alla Privacy: Convenzione Europea Dei Diritti Dell'Uomo Ed Esperienza Inglese*. Salerno: CartoGrafiche, 2001. Print. P 70-74

<sup>54</sup> Ibid. P 94

<sup>55</sup> David J. Seipp, *English Judicial Recognition of a Right to Privacy*, 3 OXFORD J. LEGAL STUD. 325, 351 (1983).

<sup>56</sup> *R.v Secretary of the State for the Home Dedpartment ex parte Begum*, 3 All ER , 1975 p. 511

<sup>57</sup> *Phansopkar and Pan American World Airways Inc. v Department of Trade*, in 1 Llyods Reports 257, 1976, p 261

protect human rights and they started thinking about introducing a Bill of Rights in the English law system. The inadequacy of the English system was also due to the fact that the right to hold the Strasbourg Court in case of incompatibility of the common law with the Convention was recognized but it was not the same for the contrary. Public opinion, though, was still belonging to the traditional conception of Jeremy Bentham and Lord Hailsham. Bentham in 1776 stated that “declarations of rights as merely so bowling upon paper” and Lord Hailsham said “show me a nation with a Bill of Rights and I will show you a nation with fewer actual human rights than Britain because the escape clauses are used, often quite ruthlessly...”<sup>58</sup>. The Convention was considered politically necessary but “as vague and woolly that it may mean almost anything”<sup>59</sup> and it has been also said that “any student from our legal institutions must recoil from this document with a feeling of horror”<sup>60</sup>. With the development in society especially during the government of Margaret Thatcher, the need to include the Convention into the internal law was felt both from the Conservative Party, the Liberals and Democrats and even the Labor Party and at the end the Human Rights Act was approved by the Parliament in October 1997. This decision was going against the traditional opinion that “under a Bill of Rights a government is not free to treat liberty as a commodity of convenience or to ignore rights which the nation is under a moral duty to respect...”<sup>61</sup> This act, described as “a domestication of human rights”, is a tempt to balance freedom with the sovereignty of the UK Parliament, which is the cornerstone of the English system. It does not want to create new rights but to give “further effect to those rights which we already enjoy under the Convention”<sup>62</sup>. The *Douglas* case has opened the way to recognition of the horizontal effects of the Act, not only between the people and the State but also between privates.

### **3. The European Convention for the Protection of Human Rights and Fundamental Freedoms**

The *European Convention on Human Rights* and has been signed in Rome the 4<sup>th</sup> November 1950 and adopted the 3<sup>rd</sup> September 1953 to protect human rights and fundamental freedoms.

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<sup>58</sup> House of Lords, Hansard, vol 69 col 784

<sup>59</sup> Corapi, Elisabetta. *Il Diritto Alla Privacy: Convenzione Europea Dei Diritti Dell'Uomo Ed Esperienza Inglese*. Salerno: CartoGrafiche, 2001. Print.

<sup>60</sup> Lord Chancellor Jowitt's speech

<sup>61</sup> R. Dworkin, *A Bill of Rights for Britain*, London, 1990 p.23

<sup>62</sup> Corapi, Elisabetta. *Il Diritto Alla Privacy: Convenzione Europea Dei Diritti Dell'Uomo Ed Esperienza Inglese*. Salerno: CartoGrafiche, 2001. Print. p. 62

Freedom of expression and the right to privacy are both protected by the Convention and there is a general agreement between the Strasbourg jurisprudence and the signatory States that Article 10 of the Convention, the right of freedom and the right to privacy under Article 8 are both of fundamental importance.

- **Article 10**

1. 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 by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 10 of the Convention is the primary statement of public international law concerning media in the member states of the Council of Europe.<sup>63</sup>

As stated in the first paragraph the protection of this article is extensive and it covers all expressions, independently from its content as well as the form and the means to express them. It also covers the press which is only mentioned in the last sentence of the paragraph as well as television broadcasting and cinema. Anyone who claims an invasion of the freedom of expression right can be protected by Article 10 as written in the second paragraph which established the criteria upon which occurs a violation of the right. Article 10 also protects against interferences caused by public authorities. By public authorities is generally meant the government and other public bodies as the legislator the judiciary, administrative or local authorities that could put barriers in the communication process. The right to receive is also protected by Article 10. The public has a right to be ‘properly informed’ and accentuate the

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<sup>63</sup> Herdís, Thorgeirsdóttir. *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the European Convention on Human Rights*. Leiden, the Netherlands: Martinus Nijhoff, 2005. Print. P 88

media have a big responsibility in balancing the information flow<sup>64</sup> and large diversity of sources of news and views available to the general public, to prevent press concentrations<sup>65</sup>. The individual right to freedom of expression is also protected because of its recognized democratic role: it contributes to the realization of human rights and of an effective democracy, it is one of the basic conditions for its progress and for the self-fulfillment of individuals and “It is in the interest of democratic society to enable the press to exercise its vital role of Public Watchdog”. (Godwin v United Kingdom 27 March 1996)<sup>66</sup>

### 3. Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. 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 national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The right to privacy is protected by the Convention with Article 8 that has to be linked to Article 3, the respect of the individual's dignity and Article 10, the freedom of expression

This article is also structured in two parts with the second part expressing the limits and the occasions in which can occur an invasion of private life. There have been several attempts of the Court of Strasbourg to give a definition of ‘private life’. The first definition of it can be found in a sentence regarding a hotelkeeper wanting to bring alcohol to his house. In that occasion, the Commission asserted that “the scope of the right to respect for private life is such that secures to the individual a sphere within which he can freely pursue the development of his personality. In principle, whenever the state enacts rules for the behavior of the individual within this sphere, it interferes with the respect for private life”<sup>67</sup>. The second attempt is represented by a decision made by the Strasbourg Court, *Niemietz v*

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<sup>64</sup> Herdís, Thorgeirsdóttir. *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the European Convention on Human Rights*. Leiden, the Netherlands: Martinus Nijhoff, 2005. Print. P 88

<sup>65</sup> Committee of Ministers Resolution, ON press Concentrations 16 December 1974

<sup>66</sup> Herdís, Thorgeirsdóttir. *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the European Convention on Human Rights*. Leiden, the Netherlands: Martinus Nijhoff, 2005. Print

<sup>67</sup> Corapi, Elisabetta. *Il Diritto Alla Privacy: Convenzione Europea Dei Diritti Dell'Uomo Ed Esperienza Inglese*. Salerno: CartoGrafiche, 2001. Print. P. 36



*Germany* which affirms that “the Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of ‘private life’. However, it would be too restrictive to limit the notion to an ‘inner circle’ in which the individual may live his own personal life as he chooses and to exclude there from entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings<sup>68</sup>”. The Court suggests that States utilize a prudent approach to fulfill their positive obligations to protect private life in general and it calls for a reorganization of the different methods to secure its respect.<sup>69</sup>

A lot of controversies have risen regarding the balancing between Article 8 and Article 10. This is because the Court of Strasbourg has to judge every case individually and it always has to level the individual interest with the community one. The Strasbourg jurisprudence established a number of criteria to assist the Court in determining the strength of the free speech claim and helping balancing it with the claim for privacy. As the Convention has constantly recognized, freedom of expression constitutes one of the essential foundations of a democratic society. (*Handyside v UK* 1976). Although the press must not infringe certain limits, it has to take into account its responsibilities and must respect other people’s rights and reputation and prevent the revelation and the diffusion of private information’s always with the exception regarding information’s that have public interest ( *Bladet Trmsi and Stesaas v Norway* 1999). The controversies between Article 8 and 10 usually arise in situations concerning private bodies such as newspapers and television stations rather than by the State, but individuals may be able to rely directly on Article 8 when the medium is a public authority like State broadcasting.<sup>70</sup> It has been said that individuals are protected under Article 8 “ to live as far as one wishes, protected from publicity”<sup>71</sup> but on the other hand, the Convention also protects the right to receive that can be held, for example, when readers want information’s concerning the private life of politicians before they cast their vote. Example of this equilibrium is the sentence 24<sup>th</sup> June 2004 *Von Hannover v Germany* where it is stated that “the key factor for a right balance between the protection of privacy and the freedom of press is represented by the possibility that the pictures and the articles contribute to create a

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<sup>68</sup> Ibid.

<sup>69</sup> Court p 29

<sup>70</sup> Herdís, Thorgeirsdóttir. *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the European Convention on Human Rights*. Leiden, the Netherlands: Martinus Nijhoff, 2005. Print.

<sup>71</sup> Application no 9228/80, X v. the Federal Republic of Germany, Commission’s decision 16 September 1982, DR 30, p. 132

general debate. Because in this case the community does not have a legitimate interest to know where was the subject ( the princess Carolina)... the general interest as well as the commercial interest of the newspapers to publish the pictures and the articles should cede in front of her right to privacy”( in *Danno e responsabilità*, 2005, 275)<sup>72</sup>.

### 3. MOSLEY CASE

An emblematic case of the precarious balance between the right to privacy and the freedom of expression is represented by the Mosley case with the two sentences *Mosley v. News Group newspapers* and *Mosley v. the United Kingdom*.

On 30 March 2008 the first page of the one off the Britain’s ‘red top’ tabloid newspapers, *News of the World*, owned by News Group Newspaper Limited, was entitled “F1 Boss Has a Sick Nazi Orgy with Hookers”. The article which opened with the sentence “Formula 1 motor racing Chief Max Mosley is today exposed as a secret sadomasochist sex pervert”<sup>73</sup> is a scandalous and salacious piece of journalism.<sup>74</sup> It talks about Max Mosley, the then-President of the Fédération Internationale de l’Automobile (FIA), the international governing body for motor sports, including Formula One auto racing, also well-known to be part of one of Great Britain’s most notorious political families and reveals his participation to a group sex session with five consenting prostitutes in a private residential property in Chelsea. Several pages of the newspaper were dedicated to the story reporting explicit details of the sexual activity as well as numerous photographs. The pictures had been taken from video footage which was recorded from one of the participants who had been paid in advance. Simultaneously at the print version of the article, the pictures and an edited extract of the video appeared on the *News of the World’s* website and elsewhere on the internet and the readers were invited to watch the video visiting the website address given directly by the tabloid newspaper. Max Mosley’s solicitors immediately made a complaint to the *News of the World* on the same day asking to remove the video available on the website that was voluntarily removed the day after. The news was under the world’s attention being *News of the World* one of the most

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<sup>72</sup> Carbone, Anna Maria Rosaria. "Rassegna Della Giurisprudenza Della Corte Europea Dei Diritti Dell'uomo Sulla Libertà Di Stampa." *Diritto Ed Economia Dei Mezzi Di Comunicazione* 2 (2009): 79-99. Print. P 86

<sup>73</sup> "Mosley v. United Kingdom Judgment ( Application No. 48009/09) Strasbourg 10 May 2011." *Scribd*. European Court of Human Rights, n.d. Web. 01 June 2012. <<http://www.scribd.com/doc/55082172/Mosley-v-United-Kingdom>>.p. 2

<sup>74</sup> Stanley, James E. "Max Mosley and the English Right to Privacy." *Washington University Global Studies Law Review* 10 (2011): 641-48. Web.

widely read English newspaper with a circulation around three million copies. The online version of the article was visited over 400,000 times and the video had already been watched 1,424,959 times over 30 and 31 March and copied to other websites. On 6 April 2008 *News of the World* also published an interview to one of the women involved in the sex acts. The legal proceedings against News Group Newspapers Ltd. commenced on 4 April Mosley was claiming damages for breach of confidence and the unauthorized disclosure of personal information”<sup>75</sup> affirming that its right to privacy, protected by Article 8 of the European Convention on Human Rights and Fundamental Freedoms had been infringed. He did not file suit for defamation of libel at the beginning because the facts of the story were mostly correct and the truth or ‘justification’ remains a defense for libel under English law. But, even if he did not deny about the sexual activity, he objected the tabloid’s allegations regarding the Nazi Role-play saying that they were untrue and injurious. The orgy would have had a “German military” or prison camp theme and not necessarily a Nazi one. During the trial, *News of the World* argued that there was a public interest in the revelations it had made to the world: it first referred to the Nazi theme of the orgy but this claim has soon evaporated. Then it pointed out how the public has the right to know the unconventional, “immoral, depraved and to an extent adulterous”<sup>76</sup> sexual conduct of Mosley that was severely attacked by the general opinion asking him to resign, to “go out of the responsibility for the institution he represents”<sup>77</sup>. The Court was presided over by Sir. David Eady, also known as Mr. Justice Eady or Eady J, who on April 9 refused to grant an injunction made by Mosley’s lawyers to arrest the diffusion of the edited video footage on the News of the World’s website. He recognized that the photographs were “intrusive and demeaning” and found no legitimate public interest in the publication of the pictures to overcome protection of Mosley’s right to privacy saying that “... the only reason why these pictures are of interest is because they are mildly salacious and provide an opportunity to have a snigger at the expense of the participants...”<sup>78</sup>. “There was no public interest or other justification for the clandestine recording, for the publication of the resulting information and still photographs, or for placing the video extracts on the *News of the World* Web site: all of this on a massive scale”

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<sup>75</sup> Mosely v News Group Newspaper LTD 2008 EWHC 687 (QB)

<sup>76</sup> Wragg, Paul. "A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley* and *Terry*." *Journal of Media Law* 2.2 (2010): 295-320. Web.

<sup>77</sup> Mosley’s Fight to Clear His Famous Name, BBC NEWS, JUmY 9, 2008

<sup>78</sup> Mosely v News Group Newspaper LTD 2008 EWHC 687 (QB)

the judge said<sup>79</sup> ; but, because the material was already widely diffused both in print and on the internet being “generally accessible ‘in the public domain’, “there was nothing left for the law to protect”<sup>80</sup> “such an injunction would make no practical difference...”as Mr. Millar pointed out, defending News Group Newspapers Limited ”...there are various ways to access it notwithstanding any order the Court may choose to make...the Court should guard against slipping into playing the role of King Canute...”<sup>81</sup>. The video was restored to the News of the World website shortly afterwards. Even if the injunction was rejected, Mosley did not give up in his “fight” and pursued his substantive claim for privacy invasion<sup>82</sup>. On 24 July 2008 the judgment was made. Mr. Justice Eady found no Nazi indicia to the sexual Role-play and “nothing which could justify the suggestion of ‘mocking’ concentration camp victims”, rejecting the argument for a lack of evidence<sup>83</sup> the accusations were based in part on the use of commands in German-accented English and there were also inevitably connected to his parents Nazi connections. Mosley’s father, in fact, Oswald Mosley was a leader of the Britain’s National Union of Fascists in the 1930’s and he had secretly married his mother, Diana, in the house of the Nazi propaganda chief Joseph Goebbels with Hitler as guest of honor<sup>84</sup> but Mosley had openly distanced himself from the activities of his father<sup>85</sup>. Eady J also concluded that there was no public interest or justification to overcome protection on Mosley’s right to privacy for the publication of such private material without a consensus and that “articles and pictures constituted a breach of the applicant’s right to privacy”<sup>86</sup>. The morality claim held by *News of the World* was considerate ironic due to the fact that the chief reporter of the newspaper, Neville Thurlbeck, had proposed the women involved in the orgy to either co-operate on the production of an additional story for £8,000 or have their identities

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<sup>79</sup> Burns, John F. "British Judge Rules Tabloid Report Tying Grand Prix Boss to 'Orgy' Violated Privacy." *The New York times* 2008: 5-6. Web

<sup>80</sup> Mosely v News Group Newspaper LTD 2008 EWHC 687 (QB)

<sup>81</sup> Mosley v. United Kingdom Judgment ( Application No. 48009/09) Strasbourg 10 May 2011." *Scribd*. European Court of Human Rights, n.d. Web. 01 June 2012. <<http://www.scribd.com/doc/55082172/Mosley-v-United-Kingdom>>.p. 2

<sup>82</sup> "Max Mosley, the Media and UK Privacy Laws." *Legal News and Opinion*. N.p., n.d. Web. 01 June 2012. <<http://www.lawgazette.co.uk/features/max-mosley-media-and-uk-privacy-laws>>.

<sup>83</sup> Stanley, James E. "Max Mosley and the English Right to Privacy." *Washington University Global Studies Law Review* 10 (2011): 641-48. Web.

<sup>84</sup> Burns, John F. "British Judge Rules Tabloid Report Tying Grand Prix Boss to 'Orgy' Violated Privacy." *The New York times* 2008: 5-6. Web.

<sup>85</sup> Ibid.

<sup>86</sup> Mosley v. United Kingdom Judgment ( Application No. 48009/09) Strasbourg 10 May 2011." *Scribd*. European Court of Human Rights, n.d. Web. 01 June 2012. <<http://www.scribd.com/doc/55082172/Mosley-v-United-Kingdom>>.

revealed to the public<sup>87</sup>. “ It is not for the state or for the media to expose sexual conduct which does not involve any significant breach of the criminal law” Eady J said, “...it is not for journalists to undermine human rights, or for judges to refuse to enforce them, merely on grounds of taste or moral approval. Everyone is naturally entitled to espouse moral or religious beliefs to the effect that certain types of sexual behavior are wrong or demeaning to those participating. That does not mean that they are entitled to hound those who practice them or to detract from their right to live as they choose”.<sup>88</sup> In other words, revealing immoral behavior is not, of itself, a legitimate public interest because it does not expose illegal activity or would make no contribution to a debate of general interest, it does not legitimize an intrusion of someone’s privacy. Mosley won his privacy claim and award £60,000 in compensatory found and recovered approximately £420,000 in costs. Even if the Court declined to award exemplary damage, the compensatory award was a record amount asserting a right to privacy<sup>89</sup>.

But “an infringement of privacy cannot ever be effectively compensated by a monetary award” and Mosley was no satisfied<sup>90</sup>. On 29 September 2008 Mosley made an application to the Court under Article 34 of the *Convention for the Protection of Human Rights and* against the United Kingdom of Great Britain and Northern Ireland. The applicant affirmed that the United Kingdom had violated its positive obligations to respect his right of privacy, protected by Article 8 of the Convention taken alone and together with Article 13. The basic argument was that the United Kingdom, had failed to ensure effective protection of Article 8 rights, not imposing a legal duty on the editors of *News of World* to notify him in advance and contact the subject of the article. That would give him the opportunity to apply for an interim injunction to prevent publication of stories invading their private lives. The need of a pre-notification requirement is strongly felt by Mosley who affirmed that not allowing the notification requirement would give complete discretion to the newspaper editors. Mosley underlined this danger saying that journalists cannot be the Soule judges of the balance between the right to freedom of expression and the right to respect for private life and the conflicts between competing interests under Article 8 and Article 10 must be solved by the

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<sup>87</sup> Wragg, Paul. "A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley* and *Terry*." *Journal of Media Law* 2.2 (2010): 295-320. Web. P 302

<sup>88</sup> Ibid p. 302

<sup>89</sup> Ibid p. 59

<sup>90</sup> Ibid

courts and not by newspapers<sup>91</sup>. He wanted to impose a legal duty on newspapers and other major media sources to notify subjects of their investigations before distributing potentially private information's to the public opinion. Once notified, those individuals would have the opportunity to seek injunctions restricting or limiting publication.<sup>92</sup> On 20 October 2009 the Court gave notice of the application to the Government and also decided to rule on the admissibility and merits of the application. The hearing took place in public in the Human Rights Building in Strasbourg the 11 January 2011. At the case participated also Third-party actors as the Media International Lawyers' Association and the Mass media Defense Centre. At the time of the trial the Select Committee on Culture, Media and Sport was conducting an enquiry into privacy and libel laws. The report called "*Press standards, privacy and libel*", was based on written submissions and oral evidences from a number of stakeholders, including the applicant and the editor of the *News of World*. The report was dedicated to privacy and breach of confidence and it also included considerations on the desirability of a notification requirement<sup>93</sup>. The Selected Committee concluded that " a legal or unconditional requirement to pre-notify would be ineffective, due to what we accept is the need for a 'public interest' ", but they invite the PCC ( Press Complaints Commission) to amend the Editor's Code including a requirement to prior notification for journalists about the subjects of their article, except for the one that have a public interest. During the trial the Government of United Kingdom was strongly affirming that Mosley was no longer a victim of any violation of the Constitution but, contrariwise, they questioned wheter this all affair had really affected him or it had made look as a 'champion of privacy' being celebrated in all press and media interviews after having awarded the highest damages in the United Kingdom for an invasion of privacy. They believed the remedies he has obtained were already enough, also considering the proceedings in Germany, which amount to Euro 250,000 and civilian and criminal proceedings in France and Italy regarding the publication<sup>94</sup>. The applicant, on the other hand affirmed that the damages were not adequate because the intimate facts as well as the

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<sup>91</sup> Mosley v. United Kingdom Judgment ( Application No. 48009/09) Strasbourg 10 May 2011." *Scribd*. European Court of Human Rights, n.d. Web. 01 June 2012. <<http://www.scribd.com/doc/55082172/Mosley-v-United-Kingdom>>.p 22

<sup>92</sup> Stanley, James E. "Max Mosley and the English Right to Privacy." *Washington University Global Studies Law Review* 10 (2011): 641-48. Web. p 663

<sup>93</sup> Phillipson, Gavin. "Max Mosley Goes to Strasbourg: Article 8, Claimant Notification and Interim Injunctions." *Journal of Media Law* 1.1 (2009): 73-96. Web.

<sup>94</sup> Mosley v. United Kingdom Judgment ( Application No. 48009/09) Strasbourg 10 May 2011." *Scribd*. European Court of Human Rights, n.d. Web. 01 June 2012. <<http://www.scribd.com/doc/55082172/Mosley-v-United-Kingdom>>. p 19

photographs can never be expunged from the minds of the public opinion. What he wanted, though, it was not to pursue to award more damages but he was ‘fighting’ for what he perceived as a necessary change in the English law<sup>95</sup>: he wanted to establish a pre-notification requirement. Mosley, pointed out the ‘ unique nature of the tabloid press’ in the United Kingdom, underlining the illegitimate actions of some reporters and their critics to the new privacy laws and he showed how in other signatories States the consent plays a key role in the privacy laws. On the other hand the third-party actor concerned in the trial, Guardian News and Media Ltd, emphasized the absence of any European consensus on a pre-notification duty, showing how if some countries require a consent for information’s regarding private life that do not have a public interest, a similar number of countries do not demand it. The Court, in fact, lives the respect of this right within the discretion of the states, which can independently fulfill their positive obligation to ensure respect for private life in the context of regulating relations between individuals.<sup>96</sup> “ ...The notion of ‘ respect’ is not clear-out... the notion’s requirements will vary considerably from case to case...this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention, account be taken if the needs and resources of the community and if individuals.”<sup>97</sup> The Guardian News and Media Ltd and the Media Lawyers’ Association (MLA) agree that any pre-notification requirement would be unworkable in practice and they underlie the fact that prior-notification would constitute a serious inference with Article 10. The right of freedom of expression needs to be protected and they emphasize the role of the press as “public watchdog”. It would seriously restrict both the right of the press to publish and the right of the public to receive information’s and opinions on the public interest, and it would go against the principle of responsible journalistic freedom supported by the Court. In essence, all the third-party actors intervening in the trial, as the Global Witness and Media Law Resource Centre or the Media Legal Defense Initiative, agree on declining the introduction of the pre-notification requirement. Drawing attention to how this requisite would go against the tradition and the long-standing approach of the common law countries against prior restraints on publication, they believe the questions of privacy has been regularly debated ( as in the report of the Selected Committee)

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<sup>95</sup> Mosley v. United Kingdom Judgment ( Application No. 48009/09) Strasbourg 10 May 2011." *Scribd*. European Court of Human Rights, n.d. Web. 01 June 2012. <<http://www.scribd.com/doc/55082172/Mosley-v-United-Kingdom>>.p 20

<sup>96</sup> Phillipson, Gavin. "Max Mosley Goes to Strasbourg: Article 8, Claimant Notification and Interim Injunctions." *Journal of Media Law* 1.1 (2009): 73-96. Web.

<sup>97</sup> Armonas v Lithuania ( App no 36919/02) 25 November 2008 ; Johonson v Ireland ( 1986)

in the United Kingdom in recent times and they think that a appropriate balance has been reached. United Kingdom already has adequate laws to protect privacy: there is a system of auto regulation of the press to ensure protection on Article 8 with guidance provided in the Editors' Code and Codebook and oversight of journalists and editors' conduct by the PCC. This system reflects the 1970 declaration, the 1988 resolution and the 2008 resolution of the Parliament Assembly of the Council of Europe. It is also possible to seek an injunction to restrain publication of material concerning someone's private life but while the PCC itself has no power to award damages<sup>98</sup>, they can be claimed in a civil action to compensate for the violation caused by an intrusive publication. Aggravate damages can also be claimed if additional damages appeared to aggravate the original injury after the publication. The Court can order a delivery-up of the offending material or decide for an alternative to damages: an account of the profits made by the defendant. The protection of the privacy is also guaranteed by the Data Protection Act 1998, which regulates the use of the information's concerning individuals. It controls the way information's are processed, used, obtained and hold and creates eight data protection principles that data controllers in the United Kingdom have to respect. It stated for example that data's have to be accurate and up to date, have to be processed in accordance with the rights of data subjects under the Act and includes special requirements for 'sensitive personal data's' which include information's about a person's sexual life. It also provides for an exception in case of personal data's that supply a public interest.

On 10 May 2011 Court made a final decision. It emphasized the need to consider the general impact that the recognition of pre-notification requirement could have, going beyond the single case. It expressed significant doubts on its effectiveness and, analyzing the Convention, it concludes that Article 8 does not require a legally binding pre-notification requirement and that there has been no violation of Article 8 of the Convention by the absence of such a requirement in domestic law.<sup>99</sup> "The limited scope under article 10 for restrictions on the freedom of the press to publish material which contributes to debate on matters of general public interest must be borne in mind. Thus, having regard to the chilling effect to which a pre-notification requirement risks giving rise, to the significant doubts as to the effectiveness of any pre-notification requirement and to the wide margin of appreciation in this area, the

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<sup>98</sup> Mosley v. United Kingdom Judgment ( Application No. 48009/09) Strasbourg 10 May 2011." *Scribd*. European Court of Human Rights, n.d. Web. 01 June 2012. <<http://www.scribd.com/doc/55082172/Mosley-v-United-Kingdom>>. p 33

<sup>99</sup> *Ibid*. p 37



court is of the view that article 8 does not require a legally binding pre-notification requirement”.<sup>100</sup>

- **3.1 Celebrity gossip and public interest**

The Mosley case has been really controversial and it has triggered off a lot of debates drawing the attention of experts on the new role of celebrities regarding libel and right to privacy. Taking the *Mosley v New Group* as an example Eady J as well as the Court and the Parliamentary Assembly have all agreed on the fact that the “the private lives of those in the public eye have become a highly lucrative commodity for certain sectors of the media”<sup>101</sup>. These individuals have always had more social and financial prominence in modern society and an analysis of the role of today celebrities needs a “ interdisciplinary set of conceptual tools that can juggle a variety of often competing and contradictory symbolic, interpretative, cultural, ideological, and commercial factors”<sup>102</sup>. The celebrity culture began in the early 1960’s when the society’s preoccupation changed from the achievement-based fame to the media- driven renown<sup>103</sup>. In fact, “while fame has existed for centuries, celebrity did not appear until fame became big business” in the twentieth century<sup>104</sup>. The public started being always more devoted to their idols thanks also to the diffusion of television and during that time the U. S Supreme Court created its first own conception of fame and celebrity. Public figures are defined as those persons who are “intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large”.<sup>105</sup> The Court started creating analyses to filter varying levels of fame and to grant each corresponding rights in the defamation law<sup>106</sup>. The emergence of business celebrity culture has made the boundaries between public and private figures more elusive than ever<sup>107</sup> and it’s always harder to determinate the outcome of a privacy/ free speech dichotomy.

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<sup>100</sup> Mosley v. United Kingdom Judgment ( Application No. 48009/09) Strasbourg 10 May 2011." *Scribd*. European Court of Human Rights, n.d. Web. 01 June 2012. <<http://www.scribd.com/doc/55082172/Mosley-v-United-Kingdom>>.

<sup>101</sup> Ibid p. 37

<sup>102</sup> Eric Guthey et al, *Demystifying Business Celebrity* 25 2009

<sup>103</sup> Ellis Cashmore, *Celebrity/Culture* 257

<sup>104</sup> Eric Guthey et al, *Demystifying Business Celebrity* 25 2009

<sup>105</sup> Associated Press v Walker 388 U S 130, 163 ( 1967)

<sup>106</sup> Abril, Patricia Sánchez. "The Evolution of Business Celebrity in American Law and Society." *American Business Law Journal* 48.2 (2011): 177-225. Web.

<sup>107</sup> Ibid.

The particular case of public figures has been tackled in different law systems. The Italian jurisprudence maintains an ambiguous stance regarding celebrities and their sphere of privacy has a special warship. Some jurists say the celebrities' right to privacy should have some specific limitations for "well-known individuals as politicians, actors, etc..."<sup>108</sup> Other jurists have a completely different opinion and think that the private life of celebrities should be even more protected due to the fact that what they do are "facts whose procedure and notoriety of the individuals cause an uproar and national dimension".<sup>109</sup> Information's concerning their private lives can have a social utility and their behaviors can be used as a yardstick to evaluate their personal function.<sup>110</sup> In our society, which is always more turning into a show, it is hard to delimitate the legitimacy of information's related to someone's private life<sup>111</sup> because the borders between a legitimate and an illegitimate information gets always thinner. Important examples of this are the sentences Pret. Milan, 26 March 1986 and 27 May 1986, *Vanoni/Rizzoli* and Pret. Rome, 15 July 1986, *Cardinale/Rizzoli*. These two sentences were regarding a case of publication and the diffusion of a 'VIPs' map' containing addresses, telephone numbers and places celebrities were usually attending. In the first sentence the judge said that the 'map' did not constitute an infraction of privacy, being the information's already known by the general opinion and the same information's were only reported in a different way. For the other judge, on the contrary, the 'map' was a 'synoptic table' of private information's concerning personal and familiar aspects that should not be shown like that. It is the way the information's are published that make them prejudicial for the right to privacy<sup>112</sup> In the central sentence of 1975 for the case *Soroya Esfandiary* , it also talks about the particular case of celebrities saying that "the principle of the implicit renunciation to the defense of their privacy by celebrities cannot be generalized. They conserve it within the limits of the sphere of interests and of personal actions that are not linked at all with the facts or the reasons of their popularity". It has also been established that in the Italian jurisdiction the prove of the truth of an information is not a justification as well as the fact that the public is already aware of that news, because it's the way you put the information's together that make them be

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<sup>108</sup> V Trib. 20 Gennaio 1986, in *Diritto Inf. e Informat.* 1986, 906

<sup>109</sup> Abril, Patricia Sánchez. "The Evolution of Business Celebrity in American Law and Society." *American Business Law Journal* 48.2 (2011): 177-225. Web.

<sup>110</sup> Razzante, Ruben. *Manuale Di Diritto Dell'informazione E Della Comunicazione: Con Riferimenti Alla Tutela Della Privacy, Alla Diffamazione E All'editoria On-line*. Padova: CEDAM, 2005. Print. p.317

<sup>111</sup> Bevere, Antonio, and Augusto Cerri. *Il Diritto Di Informazione E I Diritti Della Persona*. Milano: Giuffrè, 1995. Print. p 142

<sup>112</sup> Ibid p 143

prejudicial for the privacy of the individual.<sup>113</sup> The general belief of the Italian jurisprudence is that every case has to be considered balancing the right of the celebrity not to be ruined his identity and the right to citizen to be informed looking carefully not to confuse a public interest with the “pathological curiosity of the public for the scandalous events, occurred in the private life of celebrities” 5 Cass, 27<sup>th</sup> /5/1975).<sup>114</sup>

Looking at a European level, relevant is the *Resolution 1165* adopted on 26 June 1998 by the Parliament Assembly of the Council of Europe. Concerning the right to privacy, this resolution especially focuses on public figures. It stated that “ it is often in the name of a one-sided interpretation of the right to freedom of expression, which is guaranteed in Article 10 of the European Convention on Human Rights, that the media invade people’s privacy, claiming that their readers are entitled to know everything about public figures.”<sup>115</sup>, it is true that sometimes “ certain facts relating to private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts”; but we need to find a balance between these two rights because privacy of public figures is always more often invaded, being a very profitable product for the media.<sup>116</sup> Examples of this difficult balance between the right to privacy and the freedom of expression concerning celebrities are the two cases *Mosley* and *Tierry* which have been faced with a completely opposed approach, with two opposed views on the free speech value of celebrity gossip. While in the *Mosley* case, as we have seen, Eady J uses a sceptical approach which seems to be against the freedom of press, in the case *Tierry (previously LNS) v persons Unknown*, the approach adopted is completely opposed and it seems more generous towards the Medias. In this case, which has been described as “ a resounding victory for free speech” , the High Court lifted a super injunction over the footballer Terry, Chelsea FC and England Captain, allowing the media to report on his affair with his team-mate’s girlfriend. In this latter case, the Mr. Justice Tugendhat spent time considering the role of the media and the potential social utility of revealing private information’s about well-known figures such as *Tierry*. He commented “There is much public

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<sup>113</sup> Zaccaria, Roberto. *Diritto Dell'informazione E Della Comunicazione*. 7th ed. Padova: CEDAM, 2007. Print. P 12

<sup>114</sup> Razzante, Ruben. *Manuale Di Diritto Dell'informazione E Della Comunicazione: Con Riferimenti Alla Tutela Della Privacy, Alla Diffamazione E All'editoria On-line*. Padova: CEDAM, 2005. Print. p.317

<sup>115</sup> *Mosley v. United Kingdom Judgment* ( Application No. 48009/09) Strasbourg 10 May 2011." *Scribd*. European Court of Human Rights, n.d. Web. 01 June 2012. <<http://www.scribd.com/doc/55082172/Mosley-v-United-Kingdom>>.p 16

<sup>116</sup> *Ibid*.

debate as to what conduct is or is not socially harmful... There is no suggestion that the conduct in question in the present case ought to be unlawful... But in a plural society there will be some who suggest that it ought to be discouraged... Freedom to live as one chooses is one of the most valuable freedoms. But so is there freedom to criticize... the conduct of the other members of society as being socially harmful, or wrong... It is as a result of public discussion and debate that public opinion develops.<sup>117</sup> In the *Terry* case has given a lot of attention to the importance of right to criticize saying that the newspaper not only can report on celebrities' actions but can also comment their behavior debating what that behavior say about the individual's standards or morality.<sup>118</sup> It has been also added, though, that the main reason for the repudiation of prior restraints in this case is because *Tierry* had failed to demonstrate that he was actually concerned about his privacy and not merely concerned with losing sponsorship deals.<sup>119</sup> We can find other numerous examples of these two different approaches towards the media: a skeptical one and a more generous one. The first can be found in the *Campbell v Mirror Group Newspaper Ltd* case and in the *Jameel v Wall Street Journal Europe* case in the judgment of Lord Hope and Baroness Hale. In Lord Hope's decision has been stated that the revelations about the model's private life did not cause political or democratic values to be in stake<sup>120</sup>. Baroness Hale said that "the political and social life of the community and the intellectual, artistic or personal development of individuals are not obviously assisted by poring over the intimate details of a fashion model's private life"<sup>121</sup>. The same approach has been utilized by Baroness Hale in the *Jameel* case defining public interest something very different to what interests the public but saying that "the most vapid tittle-tattle about the activities of footballer's wives and girlfriends interests large sections of the public but no one could claim any real public interest in our being told about it"<sup>122</sup>. The opposite approach has been used in the *A v B plc* case where an extra-matrimonial relation by a Premiership football player has been considered in public interest since the footballers are taken as role model for young people and their behavior can be taken as a bad example. Lord Woolf MR, who is the first Lord Chief Justice to be President of the Courts of England and Wales, also took into consideration a really banal but important

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<sup>117</sup> *Tierry ( previously LNS) v persons Unknown*, n 5 2010

<sup>118</sup> Wragg, Paul. "A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley* and *Terry*." *Journal of Media Law* 2.2 (2010): 295-320. Web. P 299

<sup>119</sup> *Tierry ( previously LNS) v persons Unknown*, n 5 2010

<sup>120</sup> *Campbell v Mirror Group Newspaper Ltd* N11

<sup>121</sup> Wragg, Paul. "A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley* and *Terry*." *Journal of Media Law* 2.2 (2010): 295-320. Web. P 299

<sup>122</sup> *Jameel v Wall Street Journal Europe SPRL* 2006

concept: "... if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest"<sup>123</sup>. The dichotomy privacy/ freedom of speech has been recently debated also by Lady Justice Arden, the Head of the International Juridical Relations for England and Wales, who commented that "(the decision in) *Campbell* undoubtedly extended the law in a way that resulted in a restriction on the freedom of the press... in particular, we can see the House of Lords moving the law on and moreover doing so...by imposing new restrictions on freedom of speech. This was so even though, to use the words of the Lord Chief Justice, lord Judge, 'free speech is bred in the bone of the common law'<sup>124</sup> In 2005 the European Court of Human Rights have tried to solve this controversial issue concerning the privacy of celebrities in the well-known case that we have already analyzed of *Von Hannover v Germany*, a sentence that is still taken as an example in a lot of privacy cases. In this occasion it has been stated that when the "...sole purpose (of the expression is ) to satisfy the curiosity of a particular readership regarding the details of the application's private life, (the expression) cannot be deemed being known to the public... in these conditions freedom of expression calls for a narrower interpretation".

- **3.2 The importance of the Mosley case in the English privacy law**

Despite the numerous efforts made by Mr. Justice Eady not to describe the Mosley decision a landmark but as "simply the application to rather unusual facts of recently developed but established principles"<sup>125</sup>, the Mosley case with the two sentences *Mosley v News* and *Mosley v United Kingdom* has signed an important turning point in the English privacy law and the decisions taken during the trials will have ramification for the whole of the modern media landscape<sup>126</sup>

The reason why the Mosley case as seen as an emblematic case compared to the precedent cases symbols of the 'conflict' between Article 8 and Article 10 is not only because its salacious and seedy context, colorful and memorable facts, the articulations of interests at

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<sup>123</sup> <sup>123</sup> Wragg, Paul. "A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after *Mosley* and *Terry*." *Journal of Media Law* 2.2 (2010): 295-320. Web. P 299

<sup>124</sup> 'Freedom of Expression and the Rome of a Supreme Court- Some Issues from Across the World », open session 31 July 2009

<sup>125</sup> *Mosely v News Group Newspaper LTD* 2008 EWHC 687 (QB)

<sup>126</sup> Goswami, Nina. "Mosley's Libel Manoeuvre Puts Right to Privacy Back in Spotlight. (cover Story)." *The Lawyer*. 4 Aug. 2008. Web.

stake and the comprehensive synthesis of doctrine that is presented,<sup>127</sup> but it is Mosley's insistence that his "right to privacy" had been violated<sup>128</sup> and his "unwillingness to settle for victory in the English High Court".<sup>129</sup> Olswang's partner Dan Tench said the Mosley case "is quite novel", "not only using a privacy claim as a precursor to a libel action, but indeed using any type of action as such a precursor"<sup>130</sup>. As the sentence *Prince Albert v. Strange* is looked as a landmark case for English confidentiality law even if there were preceding cases utilizing the theory, so should *Mosley* be seen as the hallmark case for an English right to privacy.<sup>131</sup> In this case, in fact, the Court, decided that privacy and not confidentiality was the right to rely on, showing how Mosley had "a reasonable expectation of privacy"<sup>132</sup> regarding his sexual activities happened on his private property and between consenting adults and did not involve a violation of the criminal law. After this scandal Mosley is not longer only a name related to the world of cars or to the fascist's links of his family but it now stands for a new approach towards privacy in the United Kingdom. It refers to a broader principle of sexual privacy between consenting adults<sup>133</sup> which helped to diffuse a strong presumption that any sex act, if the behavior does not amount to a "serious crime", would be protected by Article 8. *Mosley* also stands for a new right to information privacy. After this case, even if still technically called 'confidence' it exists now a distinct right to privacy regardless of celebrity status or of the existence of a prior relationship with the discloser. Anyone who has private information taken and diffused without his permission for reason that do not refer to a public interest, has a reasonable expectation of privacy and can successfully ask for damages<sup>134</sup>. The success of its 'battle for privacy' in his first trial had an immediate and devastating effect in the media field and other celebrities still take it as an example for their cases. The second case which sees Mosley suing the Government of the United Kingdom had also a great resonance in the public opinion due to the unusual nature of the applicant's

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<sup>127</sup> Andy McSmith, £60,000 for Mosley's Pain As Newspaper Loses Cases, *INDIPENDENT (UK)*, July 25, 2008 and Stanley, James E. "Max Mosley and the English Right to Privacy." *Washington University Global Studies Law Review* 10 (2011): 641-48. Web. p 667

<sup>128</sup> Stanley, James E. "Max Mosley and the English Right to Privacy." *Washington University Global Studies Law Review* 10 (2011): 641-48. Web. p 642

<sup>129</sup> Goswami, Nina. "Mosley's Libel Manoeuvre Puts Right to Privacy Back in Spotlight. (cover Story)." *The Lawyer*. 4 Aug. 2008. Web. p 662

<sup>130</sup> *Ibid.*

<sup>131</sup> Stanley, James E. "Max Mosley and the English Right to Privacy." *Washington University Global Studies Law Review* 10 (2011): 641-48. Web. P 658

<sup>132</sup> *Mosely v News Group Newspaper LTD* 2008 EWHC 687 (QB)

<sup>133</sup> Stanley, James E. "Max Mosley and the English Right to Privacy." *Washington University Global Studies Law Review* 10 (2011): 641-48. Web. p 659

<sup>134</sup> *Ibid.*

complaint<sup>135</sup> and for the shocking effect that decision could have had for the future of privacy. A few commentators described the Mosley case as “a major threat to press freedom”<sup>136</sup> and Eady J’s decision creates a general debate and was strongly criticized especially from the popular press. Many complains were held from editors of majors newspapers in the United Kingdom, saying that their ability to run controversial stories and engage in serious investigative journalism had been chained by the Mosley decision<sup>137</sup>. Some legal experts have also said that “the ruling have shifted the balance in United Kingdom in favor of celebrity plaintiffs and against newspapers and other media organizations in invasion-of-privacy cases”<sup>138</sup>. Paul Decree, editor of the *Daily Mail* complained that “The British press is having a privacy law imposed on it, which – apart from allowing the corrupt and the crooked to sleep easily in their beds- is undermining the ability of mass-circulation newspaper to sell newspapers in an ever more difficult market. This law is not coming from Parliament – no, that would smack of democracy- but from the arrogant and amoral judgments- words I use very deliberately – of one man... Justice David Eady.<sup>139</sup>” He added that “the freedom of press... is far too important to be left to the somewhat desiccated values of a single judge, who clearly has an animus against the popular press and the right of people to freedom of expression”. The British media has been “strangles by stealth” as a result of the decisions made by judges in Strasbourg who are unfriendly to freedom of expression<sup>140</sup> He goes especially against what Mosley said, affirming that are the journalists not the judges to decide when a person’s private life should be laid bare to the public. “From time immemorial, public shaming has been a vital element in defining the parameters of what are considered acceptable standards of social behavior, helping ensure that citizens ... adhere to them for the good of the greater community. For hundreds of years, the press has played a vital role in that process. It has the freedom no identify those who have offended public standards of decency... and hold the transgressors up to public condemnation.”<sup>141</sup> The decision of the *Mosley* case had two opposite consequences : in one hand it served as the launching pad for a campaign for greater

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<sup>135</sup> Mosley v. United Kingdom Judgment ( Application No. 48009/09) Strasbourg 10 May 2011." *Scribd*. European Court of Human Rights, n.d. Web. 01 June 2012. <<http://www.scribd.com/doc/55082172/Mosley-v-United-Kingdom>>.p. 2p 20

<sup>136</sup> Stephen Glover, *Privacy v Morality*, DAILY MAIL (UK), July 12, 2008, at 16

<sup>137</sup> Brian MacArthur, Max Mosley Verdict Tightens Chains on the Press, DAILY TELEGRAPH ( UK) July, 24, 2008

<sup>138</sup> Burns, John F. "British Judge Rules Tabloid Report Tying Grand Prix Boss to 'Orgy' Violated Privacy." *The New York times* 2008: 5-6. Web.

<sup>139</sup> ‘ The Threat to our Press’ The Guardian, 10 November 2008

<sup>140</sup> Phillipson, Gavin. "Max Mosley Goes to Strasbourg: Article 8, Claimant Notification and Interim Injunctions." *Journal of Media Law* 1.1 (2009): 73-96. Web. p 88

<sup>141</sup> Pual Decree’s Speach, [www.societyofeditors.com](http://www.societyofeditors.com)

protections of privacy,<sup>142</sup> but it also encourage the lawyers fighting for press freedom, that have seen the Mosley case as a bellwether for a news media restrictive era.<sup>143</sup> The biggest debate occurred during the trial *Mosley v United Kingdom*. As it has been suggested by the Court, jurists as well as the media started considering the broader impact that pre-notification could have on the general environment, going beyond the facts of the present cases.<sup>144</sup> Many experts have debated on the need of a pre-notification requirement and they all agreed on the fact that imposing this restriction would make an enormous change in a country with a long history of open journalism and free press as United Kingdom.<sup>145</sup> In that Mosley decision the Court could have had the possibility to established the injunctive relief as the first and natural remedy of choice for invasions of privacy but in that specific case it rejected the pre-notification requirement considering the “chilling effect” on freedom of expression that it could have had and doubting about its effectiveness having England already enough remedies against these such of intrusions.

Even after the final decision of the Court polemics and debates did not stop and the need of pre-notification remains a controversy theme. Article 10 of the Convention does not in terms prohibit the imposition of prior restraint on a publication, as it can be seen in use of words as 'condition' and 'restriction' in the second paragraph of the text of the Article but it has been stated in the *Observer and the Guardian v. United Kingdom* case that: “...On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for short periods, may well deprive it of its value and interest.” (26 Nov 1991)

Both the signatory States and the Strasbourg Court agree on the fact that an injunction is the only effective remedy to most cases regarding unauthorized publication of private information's. In practice, though, this is hard to realize due to the fact that most newspapers do not give notice not assuring the “practical and effective” protection of Article 8 that asked by the Court. Some tabloids do not notify in purpose to avoid the possibility of an injunction:

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<sup>142</sup> Burns, John F. "British Judge Rules Tabloid Report Tying Grand Prix Boss to 'Orgy' Violated Privacy." *The New York times* 2008: 5-6. Web. p 663

<sup>143</sup> Ibid.

<sup>144</sup> *Mosley v. United Kingdom* Judgment ( Application No. 48009/09) Strasbourg 10 May 2011." *Scribd*. European Court of Human Rights, n.d. Web. 01 June 2012. <<http://www.scribd.com/doc/55082172/Mosley-v-United-Kingdom>>. p 37

<sup>145</sup> Stanley, James E. "Max Mosley and the English Right to Privacy." *Washington University Global Studies Law Review* 10 (2011): 641-48. Web. p 663



they make a “spoof” first edition, in which they do not insert the contentious story but then they include it in the second edition which appears during the night, making impossible to stop the publication of the story.<sup>146</sup> The English law established strong legal incentives upon media bodies to notify the subjects of story in advance: individuals involved in the story have the opportunity to comment and the media and it has also been proved that especially celebrities often do not want to take legal proceedings afterwards, being aware that their privacy has been already damaged and the litigation would aggravate their exposition and it would be add to the original revelations.<sup>147</sup> A prior notification could also give the opportunity to the editors to verify if the story contains a public interest to be able to avail them of the public interest defense to defamation. A prior notification requirement has not yet been established in United Kingdom but in accordance with the Strasbourg jurisprudence the United Kingdom believes that, journalism must be exercised responsibly and with due consideration for the rights of others, the exercise of free speech rights ‘carries with it duties and responsibilities’., the press must no overstep the bounds set for the protection of the reputation of others<sup>148</sup>.

#### 4. Conclusion

It has been stated that “The *Mosley* case marks the furthest extent of the English right to privacy to date in the United Kingdom”<sup>149</sup>. Being preceded by almost a century of discussion about how the right to privacy might be implemented, doctrinal and interpretive analysis and other important causes have led to this case which represents the culmination of a movement. The English common law, in fact, has gradually took important cues from the European statute, and some American theories to provide more meaningful protection and control over private information<sup>150</sup> As it has been underlined by the several journalists, though, even if it is generally recognized that the *Mosley* case had a fundamental role in the English privacy law, “the most dramatic concerns about the muzzling of the press are unwarranted” and as Eady J has said, his decision “cannot reasonably be suggested that will inhibit serious investigative

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<sup>146</sup> Phillipson, Gavin. "Max Mosley Goes to Strasbourg: Article 8, Claimant Notification and Interim Injunctions." *Journal of Media Law* 1.1 (2009): 73-96. Web. p 81

<sup>147</sup> Ibid p 82

<sup>148</sup> Ibid. p 84

<sup>149</sup> Stanley, James E. "Max Mosley and the English Right to Privacy." *Washington University Global Studies Law Review* 10 (2011): 641-48. Web. p 667

<sup>150</sup> Ibid.

journalism”<sup>151</sup>. The *Lawyer's* partner of the year, Gideon Benaim, reasserts this point affirming that “even the judge points out that there is nothing ‘landmark’ about it and that it cannot reasonably be suggested that it will inhibit serious investigative journalism... whether the tabloids like it or not, freedom of expression does not trump everything else. It as to be balanced against other rights, such as the right to privacy.”<sup>152</sup> The balance between the two rights continues to be really precarious in the United Kingdom as well as in other European countries. In Italy, for example, privacy is still going through a phase of “work in progress”. After the juridical recognition, in fact, privacy has not fully permeate into the society and it has still not became part of our shared values<sup>153</sup> as it happened in other countries as, for example, the United States of America. It has been fully proved that the Convention, with Article 10 and 8 is able to protect both freedom of expression and the right to privacy but it is still uncertain if the jurisprudence of Strasbourg will be able to answer to the new technologic innovations. The significance of privacy has changed a lot during recent times and the new technologies have transformed the notion of public sphere: the borders between the inside and outside space disappeared.<sup>154</sup> In a way the protection of privacy has enlarged, safeguarding the individual’s rights not only inside its private property but even outside of it but at, the same time, experts have started talking about “the death of privacy”.<sup>155</sup> With the new technologies as RFID’s Radio Frequency identification devices, CCtv, radio or television frequencies at closed circuit and satellite shootings, the privacy has changed in two ways: the new surveillance his deeper and more extensive and it also easier to collect and elaborate a lot of data’s, more importantly with the new technologies the controller owns a lot of information’s about the person controlled who is no longer aware to be controlled as it was in the past. It is because all these new innovations that experts affirm that we have already lost our privacy that we had gained with a lot of efforts . Emblematic is the declaration made by Scott McNealy, head of the Sun Microsystems when he invented Jini, a wireless product that can monitor all the movements made by individual, “you have Zero privacy. Get over it!”

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<sup>151</sup> Mosley v. United Kingdom Judgment ( Application No. 48009/09) Strasbourg 10 May 2011." *Scribd*. European Court of Human Rights, n.d. Web. 01 June 2012. <<http://www.scribd.com/doc/55082172/Mosley-v-United-Kingdom>>.

<sup>152</sup> Goswami, Nina. "Mosley's Libel Manoeuvre Puts Right to Privacy Back in Spotlight. (cover Story)." *The Lawyer*. 4 Aug. 2008. Web.

<sup>153</sup> Artipilo, Michele. *Le Notizie E La Persona: Dalla Diffamazione Alla Tutela Della Privacy*. Bari: Cacucci Editore, 2005. Print. P. 141

<sup>154</sup> Pagallo, Ugo. *La Tutela Della Privacy Negli Stati Uniti D' America E in Europa*. Giuffrè, 2008. Print

<sup>155</sup> *Ibid.* p 208

The rise of the twitter or blog exposé has called into question in numerous countries whether privacy injunctions can be enforced in a meaningful way.<sup>156</sup> It has been shown that the peculiarity of the European law in terms of privacy is that the juridical system is based on Codes of conduct and auto- regulation practices utilized by authorities and organizations in different countries. This auto regulation mechanisms and the Code of conducts are useful ways to form a conscience, to get to know the different rights and principles of a democratic society talking about freedom of expression and to try to be respond to the new needs of a technologic society. These codes are the base of the journalistic activity and create a common code of conducts for all European journalists living in different states where different are the requirements for the access to the profession.<sup>157</sup> Journalists have today a really hard duty: they have to inform the community and stimulate the public opinion but they must also allow people the right to live their own life with a minimum of interference<sup>158</sup> in a day and age where the private life of individuals, especially the one of celebrities, has become a highly lucrative commodity for certain sectors of the media.<sup>159</sup>In choosing what information's have to acquire a public dimension, the individual determines congruence between the information's and his role<sup>160</sup>. The information when becomes public is a double sided coin: in its democratic acceptance it is at the service of the community, it updates it with news that has public interest and creates a lively public opinion. On the other hand, though, only in this point of view of the building of personality is possible to justify and accept some limits of the right to information<sup>161</sup>. This concept should always be kept in mind because it represents the hearth of the 'fight' between the right of the information and the right to privacy, a fight that will always be hard to solve.

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<sup>156</sup> Ibid. p 666

<sup>157</sup> Artipilo, Michele. *Le Notizie E La Persona: Dalla Diffamazione Alla Tutela Della Privacy*. Bari: Cacucci Editore, 2005. Print.

<sup>158</sup> Parliamentary Assembly Resolution 1165 (1998) Right to Privacy Adopted 26 June 1998

<sup>159</sup> Herdís, Thorgeirsdóttir. *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the European Convention on Human Rights*. Leiden, the Netherlands: Martinus Nijhoff, 2005. Print.

<sup>160</sup> G. P Cirillo, *Il codice sulla protezoine dei dati personali*, Giuffré, Milano, 2004 p 17

<sup>161</sup> Ibid.

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