

## **Revisiting Privacy and Dignity:**

### **Online Shaming in the Global E-Village**

To many of us, using shaming as a form of criminal sanction is intuitively barbaric.<sup>1</sup> Professor James Whitman explains this as society showing its contempt or disgust towards individual wrongdoing by subjecting the perpetrator to a form of peculiar vulnerability, which can deprive him or her of dignity and personhood.<sup>2</sup> Although most countries no longer use it in cases of the convicted, there seems to be a revival, on the Internet, of a form of 'shaming' acting as a method of social sanction.

This new form of shaming involves the exposure of acts that take place in public through wide Internet dissemination without consent. It is followed by a call for the identification of the transgressor by anonymous netizens, with further divulgence of the targeted individuals' personal identifiable information: this, for the purpose of humiliation, social condemnation and punishment against those who have transgressed social norms. Such behaviour easily escalates into a form of online mob trial, or of real life harassment. Hence, the individuals who transgressed and violated

---

<sup>1</sup> James Q. Whitman, 'What is Wrong with Inflicting Shame Sanctions?' (1998) 107 *Yale L J* 1055.

<sup>2</sup> *Ibid.*

social norms in the first place have now themselves become transgressor-victims. As a result, one must question who are the perpetrators here when such people are mercilessly tracked and ridiculed together with wide exposure to intimate embarrassing information. In such circumstances, the empowering nature of the Internet can become tyrannical as we witness blatant forms of online shaming in which individuals are able to invade the privacy of others in the name of freedom of expression.

Elsewhere, I have explained why common law understanding of privacy is inadequate to deal with the variety of infringements on the internet.<sup>3</sup> This is mainly because the right to privacy is dependent on the ‘reasonable expectation of privacy’ of those in the like position of the claimants,<sup>4</sup> but is open to subjective interpretation and difficult to apply. Furthermore, when objectionable acts take place in the plain view of the public, the claimants’ expectation is arguably lower. Even more difficult is the fact that the claimants themselves are at fault if they are violating social norms, thus apparently justifying a tilting of the balance in favour of freedom of expression. In other words, are social villains still able to claim protection to privacy rights?

In order to answer this question, we need to understand the underlying value of privacy and its relationship to dignity with particular relevance to the debate on online

---

<sup>3</sup>(to be filled in at a later stage).

<sup>4</sup> *Campbell v. MGN Ltd.*, [2004] UKHL22.

shaming. Drawing on emerging jurisprudence from the European Court of Human Rights regarding the right to private life and its relation to one's reputation and dignity,<sup>5</sup> I argue that dignity should be recognized as part and parcel of privacy right, which should not be compromised easily regardless of whether one is at fault or not.<sup>6</sup> What we should also bear in mind is that this concept of dignity is an intrinsic value in each human being which must allow for freedom from humiliation and the development of physical and psychological integrity. In this sense, therefore, dignity is inherent whereas issues of reputation and honour are conferred through estimation in the minds of society.

In what follows, there is a detailed discussion concerning the concept of 'shame': firstly, why does civilized society not use shame sanctions from a socio-legal perspective for protection of dignity, and against the dehumanizing effect on society as a whole. In the case of online shaming, there will be examples in this part. Although one may find that shame sanctions are objectionable, society needs a legal basis to prohibit such behaviour and give recognition to the value of dignity. Secondly, this article will outline various international legal instruments related to the concept of dignity and its close connection with the right to privacy. However, it becomes

---

<sup>5</sup> Richard Clayton and Hugh Tomlinson, *Privacy and Freedom of Expression*, Oxford University Press, Oxford, 2010, pp.105-107, 201.

<sup>6</sup> Kevin D. Haggerty and Richard V. Ericson, 'The Surveillant Assemblage' (2000) 51:4 *British Journal of Sociology* 605, at 619.

evident that in the English courts, the judicial interpretation of both dignity and privacy is in a nebulous state. In contrast, the rulings from the European Court of Human Rights on the meanings of reputation, honour, dignity and privacy have given us new insight, but the doctrine on dignity is not yet settled. The final part will address the issue of why the right to private life, including the aspect of dignity, should never be compromised in the face of so-called freedom of expression in online shaming. The exposure of truth in cases of wrongdoing does not justify the unrestrained disclosure of personal information, particularly in cases where one's physical security and psychological health could be severely threatened. What is needed, therefore, is the recognition and protection of the dignity and privacy of the individual in order to arrive at norms and values inherent in decent participation in the e-village.

## I. Shaming, Punishment and Social Sanctions

Shame is a highly complex, intriguing and nuanced concept. Toni Massaro, in her influential work on shame, points out that it covers a vast emotional terrain of shyness, defeat, alienation and guilt,<sup>7</sup> while at the same time, stretching into the

---

<sup>7</sup> Toni M. Massaro, 'The Meanings of Shame: Implications for Legal Reform' (1997) 3:4 *Psychology, Public Policy, and Law* 645, at 658.

normative realm in condemning the defeated self who has failed to reach an expected standard imposed either by society or by oneself.<sup>8</sup> It is closely linked to the awareness of inadequacy, strangeness, limitation and defeat.<sup>9</sup> In other words, shame is simultaneously an emotion, and a norm (condemning what is shameful). In an equally important work of scholarship on shame, Bernard Williams examines Homeric Greek shame culture and its relevance to contemporary time. He argues that shame has both internal personal and external societal dimensions that are closely intertwined.<sup>10</sup> For Williams, the experience of shame is ‘being seen, inappropriately, by the wrong people, in the wrong condition.’<sup>11</sup> But he also notes that shame does not merely operate at the level of being actually seen. A large part of it operates by conjuring up fear, in the anticipation of what others will think of one self, on the level of principle that one has failed.<sup>12</sup> The gaze is powerful because it has been internalized and the whole self is thus focused and evaluated by a prospective normative standard of how one will be admired, accepted or despised by a community with a certain view. Consequently, the experience of shame in both senses and the reaction to it will make one’s whole self seem diminished or lessened, thereby prompting a desire to disappear, to cover oneself and to hide.

---

<sup>8</sup> Ibid, at 651.

<sup>9</sup> Ibid, at 656.

<sup>10</sup> Bernard Williams, *Shame and Necessity*, University of California Press, California, 1993.

<sup>11</sup> Ibid, at 78.

<sup>12</sup> Ibid, at 79. Williams explains that the grammatical construction of the verbs shame can take the form of fear in Greek.

In the writings of both Massaro and Williams, shame is related to one's perception of self-worth, that is to say, self-esteem with a close affiliation to dignity,<sup>13</sup> a concept which will be later explained in the next section. While writing on official shaming or shame penalties other than explaining why official shaming will not be effective to achieve the aim of deterrence from a psychological perspective, Massaro has highlighted the key features of official public shaming as a call for public humiliation, an expression of disgust and contempt towards the offender by the public and a crude form of boundary-drawing to ostracize the offender from the community.<sup>14</sup> In other words, although what is central to 'shame' is a sense of self-awareness or self-consciousness, 'shaming' is essentially about directing community disapproval and hostility against an individual.

Different societies, such as Victorian England, colonial America, and pre-World War II Japan had state sanctioned shaming penalties.<sup>15</sup> In the aftermath of Maoist China, public trials and sentencing rallies have also been prominently used.<sup>16</sup> In modern times, we continue to witness attempts to bring back this practice by agents of the state. For example, in 2006, Judge James Kimbler from Ohio, in the US, posted videos of sentencing hearings on YouTube to shame the criminals and to educate the

---

<sup>13</sup> Massaro discusses one's individual sense of self and social esteem. Massaro, above n 7, at 658.

<sup>14</sup> Ibid, 647, 649.

<sup>15</sup> Ibid, 676-683.

<sup>16</sup> Susan Trevaskes, 'Propaganda Work in Chinese Courts' (2004) 6:1 *Punishment and Society* 5.

public.<sup>17</sup> Again between 2000 and 2009, the media in Wellington, New Zealand, published the names of all convicted drink drivers in the region as part of a policy of ‘naming and shaming’ with state approval and endorsement.<sup>18</sup> Since April 2011, the Dongguan Court of Guangdong province, China, has been uploading photos of defendants who have defaulted or refused to pay damages in civil actions onto Sina microblogs.<sup>19</sup> Those photos often show the defendants being arrested or in handcuffs.

However, with the Internet and other information communication technologies, we no longer need to rely on state approval for shaming or on state laws to indicate which act should be condemned. For instance, in China, the Internet is being used as a ‘human flesh search engine’<sup>20</sup> in order to expose individuals who have transgressed social norms. These include exposing the identity of an unfaithful husband,<sup>21</sup> of a kitten torturer,<sup>22</sup> and of a university student regarded as a traitor for showing sympathy to the Tibetan independent movement.<sup>23</sup> In another Korean case, a

---

<sup>17</sup> TeevBlogger, ‘Judge YouTubes For Justice’ *BC Blog Critics*, 3 July 2006, at <<http://blogcritics.org/video/article/judge-youtubes-for-justice/>> (accessed 8 April 2011). At the time of writing, the video clips on YouTube is no longer accessible.

<sup>18</sup> Greer McDonald, ‘Privacy Fears end “Shame” Lists’ *The Dominion Post*, 17 August 2009, at <<http://www.stuff.co.nz/national/2757493/Privacy-fears-end-shame-lists>> (accessed 9 April 2011).

<sup>19</sup> 1st People’s Intermediate Court of Dongguan, China at <<http://t.sina.com.cn/2024295957/wr4kLEpUP3>> (accessed 10 April 2011).

<sup>20</sup> The term refers to the utilization of human participation on the Internet to filter search results and to identify specific individuals. Often, thousands of individuals are mobilized in a cyber relay with a single aim to dig out facts and expose the social delinquents to the baleful glare of publicity.

<sup>21</sup> The case ended up in Beijing court which ISP companies were held liable for privacy violations. *See* Wang Fei v. Zhang Leyi, Daqi.com and Tianya.com, No. 10930 (Beijing Chaoyang District People’s Court, 18 December 2008), at <<http://www.chinacourt.org:80/html/article/200812/18/336418.shtml>> (accessed 20 March 2011).

<sup>22</sup> Animal torture is not a crime in China. For an account of the kitten torturer scandal, *see* Anne S. Y. Cheung, ‘A Study of Cyber-Violence and Internet Service Providers’ Liability: Lessons from China’ (2009)18 *Pacific Rim Law & Policy Journal* 323, at 336.

<sup>23</sup> *Ibid*, at 340.

university student who refused to clean up the faeces of her dog in a subway train compartment was labeled as the Dog Poop Girl and her story was reported widely (including *The Washington Post*).<sup>24</sup> It was covered both in an academic book<sup>25</sup> and circulated in the Internet.<sup>26</sup> In the US, another female university student's identity was revealed without her consent after she had posted an ode in the social network site 'My Space' expressing her disdain for the town community in which she had grown up.<sup>27</sup> Because of this, not only was she harshly criticized, but also her family faced death threats and were eventually forced to relocate.<sup>28</sup> As we can see, therefore, the trend of using easy means to expose others' deeds via the internet can cause unexpected responses to say the least and uproar at most. Again, this is well illustrated in Clay Shirky's accounts of the 'StolenSidekick' story. This concerns a woman's attempt to get back a mobile phone which she had accidentally left in a New York cab. It was picked up by a teenage girl who refused to return it. Through successfully mobilizing all the social connections of the phone owner on the Internet, the personal information of the teenage girl and her family was exposed on the Internet. Eventually, she was arrested by the police.<sup>29</sup> This story was covered in the *New York Times*, CNN,

---

<sup>24</sup> Jonathan Krim, 'Subway Fracas Escalates into Test of the Internet's Power to Shame' *Washington Post*, 7 July 2005, at <<http://www.washingtonpost.com/wp-dyn/content/article/2005/07/06/AR2005070601953.html>> (accessed 8 April 2011).

<sup>25</sup> Daniel J. Solove, *The Future of Reputation*, Yale University Press, New Haven, 2007, p. 2-3.

<sup>26</sup> Famous Picture, 'Dog Poop Girl' <[http://www.famouspictures.org/index.php?title=Dog\\_Poop\\_Girl](http://www.famouspictures.org/index.php?title=Dog_Poop_Girl)> (accessed 9 April 2011).

<sup>27</sup> *Moreno v Hanford Sentinel, Inc* 172 Cal App (4th) 1125 (2009).

<sup>28</sup> *Ibid.*

<sup>29</sup> Clay Shirky, *Here Comes Everybody*, The Penguin Press, New York, 2008, pp 1-6.



over 60 newspapers, the radio, and more than 200 weblogs.<sup>30</sup>

In all these stories of so-called ‘human endeavour’<sup>31</sup> in the name of righting of wrongs, the public feels a strong sense to condemn the actions of the violators and to shame them by ‘showcasing social transgressions on websites.’<sup>32</sup> Whether we are referring to state sanctioned shame penalties or online shaming, these punishments are highly objectionable because they encourage citizens to resort to dehumanizing and brutalizing behaviour towards the offender or the social delinquent.<sup>33</sup> The latter is displayed as a labelled and defined object exposed to the public sphere in either the real or cyber world. The public is then enlisted to humiliate, ridicule and punish him/her all over again. As related in the earlier cases, the inevitable consequence is ex-communication of the ‘social untouchable.’<sup>34</sup> For example: the Dog Poop Girl in Korea withdrew from her University; the Kitten Torturer in China, who was a pharmacist, was dismissed by her hospital; and the American university student was forced to relocate following criticism of her home town.

In his work on shaming penalties, Whitman considers that the entire process of stirring up a mixture of public indignation and public merriment,<sup>35</sup> and inciting hatred,

---

<sup>30</sup> Ibid, p 9.

<sup>31</sup> This was the term that Evan, the friend who helped the original mobile phone owner to track down the teenage girl, used in the StolenSidekick story. Ibid, p 8.

<sup>32</sup> Marko M. Skoric et al., ‘Online Shaming in the Asian Context: Community Empowerment or Civic Vigilantism’ (2010) 8(2) *Surveillance & Society* 181.

<sup>33</sup> Chad Flanders, ‘Shame and the Meanings of Punishment’ (2007) at <<http://ssrn.com/abstract=967521>> at 16 (accessed 10 April 2011).

<sup>34</sup> Whitman, above n. 1, 1071.

<sup>35</sup> Ibid, 1090.

is akin to public spitting.<sup>36</sup> But what he finds the most objectionable is the arbitrary display of force which turns the victim into a ‘plaything,’<sup>37</sup> making him aware of societal disgust toward him. In other words, the message is that the violator is less than human and deserves our contempt.<sup>38</sup> This is why Whitman argues so forcefully that this is violation of individual dignity which runs ‘contrary to some deep norm requiring us to treat even criminals with respect.’<sup>39</sup> The state authorities, therefore, should only deprive offenders of property and liberty alone.<sup>40</sup> Furthermore, Whitman advocates a call for ‘transactional dignity,’ by which he means that citizens should never be forced to deal with wild or unpredictable responses from other fellow citizens.<sup>41</sup> This is tantamount to a form of ‘lynch justice’ subjecting an individual to the public exercise of enforcement of power,<sup>42</sup> and it breaches our commitment to maintain decent social institutions which do not humiliate people.<sup>43</sup> Whitman’s critique is equally applicable and valid to online shaming.

## II. In Search of a Legal Right: Dignity and Privacy

Convinced as we may be by arguments, any serious effort to prohibit or regulate

---

<sup>36</sup> Ibid, 1078.

<sup>37</sup> Ibid, 1075.

<sup>38</sup> Massaro, above n 7, 691.

<sup>39</sup> Whitman, above n 1, 1068.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid, 1090.

<sup>42</sup> Whitman, ibid at 1089.

<sup>43</sup> Avishai Margalit, *The Decent Society*, (trans. by Naomi Goldblum) Harvard University Press, Cambridge, 1996.

online shaming has to be anchored in legal principles. Massaro and Whitman may well have argued persuasively for a halt to public humiliation but the real challenge to be faced is to explain why the law must recognise and legally protect the need for dignity and why such dignity should prevail over the right of freedom of expression in the case of online shaming. Thus, I will argue that this concept of dignity should be embedded in the protection of privacy rights as part and parcel of one's personhood and integrity. Above all, it should not be conflated with the notion of dignity as mere reputation.

#### A. The Legal Concept of Dignity

Dignity as a legal principle or right has been enshrined in numerous international treaties. For instance, the Preamble of the *Universal Declaration of Human Rights* (UDHR) mentions the principle of dignity twice,<sup>44</sup> and Article 1 stipulates that 'all human beings are born free and equal in dignity and rights.' Likewise, the Preamble of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* states that 'the inherent dignity...

---

<sup>44</sup> The Preamble reads "[w]hereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world... Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom..." United Nations, *The Universal Declaration of Human Rights*, FA Res 217A(III). UN Doc A/810 (1948), at <<http://www.un.org/en/documents/udhr/index.shtml>> (accessed 12 April 2011).

of all members of the human family is the foundation of freedom, justice and peace of the world...recognizing that these rights derive from the inherent dignity of the human person.<sup>45</sup> Also, other local, regional and international legal documents that have recognized dignity as a core human rights principle or right have been neatly summarized by Christopher McCrudden.<sup>46</sup> The scope of such protection ranges from autonomy, equality, protection from degrading treatment to protection of group identity and culture. Despite this lack of an ‘agreed content’, there are two important lessons that we can draw from McCrudden’s detailed study of international legal documents and judicial interpretation on dignity.

First, after examining the historical development of the concept of dignity, McCrudden reminds us that dignity as a question of status, honour and respect differs entirely from the notion of the natural dignity inherent in any human being and is not, therefore, dependent on any particular additional status or achievement.<sup>47</sup> The former is tied to a person’s worth as judged in accordance to the estimation of others and their place in society, which is characterized as ‘prosaic dignity’ by another scholar.<sup>48</sup> In contrast, the latter refers to the intrinsic existential worth and value of the

---

<sup>45</sup> The ICCPR, GA Res 2200A (XXI), 21 UN GAOR Supp (No. 16) at 52 (1966), <[www2.ohchr.org/english/law/ccpr/htm](http://www2.ohchr.org/english/law/ccpr/htm)> (accessed 12 April 2011). The International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), 21 UN GAOP Supp (No. 16) at 49, UN DOC A/6316 (1966), at <<http://www.ohchr.org/english/law/pfd/cescr.pdf>> (accessed 10 April 2011).

<sup>46</sup> Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19:4 *The European Journal of International Law* 655.

<sup>47</sup> *Ibid*, at 657.

<sup>48</sup> Jeffrey Berryman, ‘Reconceptualizing Aggravated Damages: Recognizing the Dignitary Interest and Referential Loss’ (2004) 41 *University of San Diego L Rev* 1521, at 1522.

individual human being. In the words of other scholars, it is a form of ‘fundamental dignity,’<sup>49</sup> a kind of ‘interpersonal respect,’<sup>50</sup> and a principle of ‘inviolable personality.’<sup>51</sup> The distinction between these two understandings of dignity is particularly pertinent to our debate on online shaming because many may not feel sympathetic to the transgressor-victims. After all, they have breached the social norms in society, and have contributed to their own misery. Thus many may perceive that the protection of reputation under defamation law (which is based on falsity) are non-issues in that the notion of dignity as part of a right per se might be seen as rendering the culpability of the transgressor irrelevant. Nevertheless, in spite of wrongful or unlawful deeds, Reaume would argue that no one deserves to be mocked, degraded, humiliated or toyed with.<sup>52</sup>

In sum, therefore, McCrudden points to three elements as the basis for core dignity: (i) every human being possesses an intrinsic worth, merely by being human; (ii) this intrinsic worth should be recognized and respected by others, meaning that dignity has a relational claim on how one should be treated; and (iii) the intrinsic worth of the individual requires the state to recognise that it exists for the sake of the

---

<sup>49</sup> Ibid, 1535-41.

<sup>50</sup> James Q. Whitman, ‘The Two Western Cultures of Privacy: Dignity versus Liberty’ (2004) 113 *YALE L. J.* 1153, at 1164.

<sup>51</sup> Edward J. Bloustein, ‘Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser’ (1964) 39 *New York U L Rev* 962, at 971.

<sup>52</sup> Reaume in arguing for dignity based tort writes that each one is a bearer of human dignity not to be manipulated. Denise G. Reaume, ‘Indignities: Making a Place for Dignity in Modern Legal Thought’ (2002) 28 *Queen’s LJ* 62, at 81, 85.

individual and not vice versa.<sup>53</sup>

While McCrudden analyses various cases, it is to the specific association of dignity with freedom from humiliation to which he refers, in particular, ‘where restrictions are placed on the publication of information or data that would lead to a person being pilloried.’<sup>54</sup> This understanding of dignity also explains why torture, inhuman, degrading or ill-treatment against war criminals should be prohibited. Quoting *Ireland v. United Kingdom*, McCrudden draws our attention to the European Court of Human Rights’ (ECtHR) interpretation of degrading treatment, which is prohibited under Article 3 of the European Convention, defined as treatment ‘intended to denote something seriously humiliating, lowering as to human dignity, or disparaging, like having one’s head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked in front of strangers, forced to eat excreta...or dress up in a way calculated to provoke ridicule or contempt...’<sup>55</sup> In addition, relying on *Pretty v United Kingdom*, the European Court rules obiter that where treatment ‘humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance, it may be characterized as

---

<sup>53</sup> McCrudden, above n 46, at 679.

<sup>54</sup> *Ibid*, at 685.

<sup>55</sup> 2 EHRR 25, at para. 27, discussed in McCrudden, above n 46, at 686.

degrading.<sup>56</sup> Here it is important to note that the kind of treatment that would qualify as degrading has to reach an intense degree, involving exceptional, life-threatening conditions.<sup>57</sup> In *L v. Lithuania*, the applicant faced embarrassment, humiliation, severe hostility and taunts in daily life for being a transsexual who was unable to go through complete gender-reassignment surgery due to the lack of legal regulation on the matter in Lithuania.<sup>58</sup> Facing unbearable social ostracism, he brought an action before the ECtHR, arguing that the state had subjected him to degrading treatment and had violated his privacy rights. Nevertheless, the European Court held that the degree of severity for degrading treatment that he had to face had not reached the legal level required under Article 3. However, it ruled that there was violation of privacy right under article 8 because respect for private life includes the respect for human dignity and the quality of life.<sup>59</sup> Applying this to our discussion, though the state may yet not be a party in administering online shaming, arguably, it will have a positive obligation to prohibit such an act under the doctrine of horizontal effect.<sup>60</sup>

When the protection of dignity is based on the noble ideal of respect for each

---

<sup>56</sup> The case of *Pretty* was about whether one has a right to assisted suicide. 35 EHRR (2002) 1, at para. 52; discussed in McCrudden, above n 46, at 687.

<sup>57</sup> *L v. Lithuania*, (2008) 46 EHRR 22, para. 46.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*, para. 56.

<sup>60</sup> It is generally understood that international human rights documents are binding on the states and public authorities only. However, the courts being public authorities have a duty to act in accordance with the human rights law, thus leading to the consequence that their decisions dealing with private parties may be affected, giving rise to a form of “horizontal effect.” See Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act*, Oxford University Press, Oxford 2006, pp 124-126.

human being, whether of achievement or wrongdoing equally, its scope necessarily becomes diverse and broad. For the present, therefore, I will concentrate on the role of dignity in informing the development of privacy right in cases influenced by the ECtHR jurisprudence in the English court and the ECtHR itself where the value of dignity has played a distinctive role especially in the context where the plaintiffs could be said to be partly at fault as transgressor-victims. Although the English court uses the term 'privacy' while the ECtHR adopts more commonly 'the right to private life,' I will use those terms interchangeably.

#### B. Dignity and Privacy under English Common Law: The Right of 'Liars'

English common law does not recognize a separate cause of action for infringement of dignity, and has also been slow in recognizing a full right of privacy.<sup>61</sup>

It was not until 2004 that the House of Lords of the United Kingdom breathed new air into this area in the landmark case of *Campbell v. MGN Ltd*,<sup>62</sup> a case concerning the world renowned supermodel, Naomi Campbell whose photos were taken in a public street at a moment when she was leaving a Narcotics Anonymous clinic. The photos

---

<sup>61</sup> There has been a long fought debate about whether breach of confidence under common law was encompassing enough to include privacy protection, Nicole Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 *Law Quarterly Rev.* 628

<sup>62</sup> [2004] UKHL 22. The case was further appealed to the European Court of Human Rights. The finding on substantive law was confirmed while new ruling was given on calculation of damages. *See Case of MGN Limited v. The United Kingdom*, European Court of Human Rights, (*Application no. 39401/04*), 18 January 2011 at <<http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/HUDOC+database/>> (accessed 14 April 2011).



were then published by a tabloid newspaper, *the Daily Mirror*. While Campbell conceded that since she had misled the public before, *the Daily Mirror* was entitled to publish that she was an addict, she objected to publication of any further details. The defence counsel for the paper argued that since the act took place in public and any members of the public passing by at that particular moment would have easily noticed it was Campbell. Any claim based on privacy violations should, therefore, be defeated. The case was plagued with difficulties because Campbell was a public figure who maintained that she had not succumbed to the habit of taking drugs before and the photos were taken in an unobtrusive manner on a pavement.

Though the Court was split in reaching its decision in favour of Campbell, all five judges agreed that English law recognizes the right to protection of private information. In the words of Lord Nicholls, the essence of the tort is better encapsulated as misuse of private information.<sup>63</sup> The judges noted at the time that the European Convention of Human Rights had been incorporated into the local law of the United Kingdom and the court, therefore, has an obligation to respect private life.<sup>64</sup> The House of Lords' famous ratio indicates that '[t]he touchstone... is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.'<sup>65</sup> However, the exact legal basis for this right remains controversial.

---

<sup>63</sup> Per Lord Nicholls, above n 62, at para. 14.

<sup>64</sup> Per Lord Hope, above n 62, at para. 93.

<sup>65</sup> Per Lord Nicholls, *supra* note 62 para. 21-22; Lord Hope also adopted a test of reasonable person of

Ironically, it was Lord Hoffmann, one of the dissenting judges, who was the only one to discuss the relationship between respect for dignity and privacy, but he decided to rule against Campbell. In his judgment, Lord Hoffmann often used the term autonomy and dignity together.<sup>66</sup> He ruled that '[w]hat human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity.'<sup>67</sup> To him, this protection consists of 'the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.'<sup>68</sup> Although he considered one's state of health to be part of human autonomy and dignity and any unauthorized disclosure constituted a plain and obvious violation of the citizen's autonomy, dignity and self-esteem,<sup>69</sup> he concluded there was sufficient public interest to override this right because Campbell had lied in this regard before.<sup>70</sup> While he considered the widespread publication of a photograph of someone in a situation of humiliation or severe embarrassment, making a direct reference to the judgement of *Peck v United Kingdom*, to be an infringement of one's privacy and an affront to one's personality,<sup>71</sup> he ruled that there was nothing

---

ordinary sensibilities, para. 99-100. This approach was also endorsed by Baroness Hale, para. 137. Moreham characterized the new standard set in Campbell to be the "obviously private test" referring to nature of information or activity; the test for reasonable expectation of privacy; and the highly offensive to a reasonable person of ordinary sensibilities test. See Nicole Moreham, 'The Protection of Privacy in English Common Law: a doctrinal and theoretical analysis' (2005) 121 *Law Quarterly Review* 628, 630-634.

<sup>66</sup> Per Lord Hoffmann, above n 62, at para. 50, 51, 53 and 56.

<sup>67</sup> Ibid, at para. 50.

<sup>68</sup> Ibid, at para. 51.

<sup>69</sup> Ibid, at para. 53 and 56.

<sup>70</sup> Ibid, at para. 58.

<sup>71</sup> Ibid, at para. 74-75. The *Peck Case* was concerned about the applicant who attempted to commit

embarrassing about the printed photos of Campbell by narrowly focusing on the fact that the photos had only revealed Campbell neatly dressed and smiling.<sup>72</sup> By doing so, he had ignored the entire context in that Campbell was attending a Narcotics Anonymous therapy meeting.

From the above perspective, Lord Hoffmann's interpretation of dignity and privacy has, in fact, treated dignity to be on par with one's honour and reputation as perceived by the world. It would be lost, however, if one had lied, thereby proving Campbell to be unworthy of such protection. As discussed above, this is only the first aspect of dignity in the prosaic sense. In contrast, the majority of the judges found that the disclosed information concerning Campbell was obviously of a private nature since it was about an individual seeking medical therapy. In addition, the court also noted the distress and the psychological and emotional harm that would be caused to a drug addict if her sense of security and respect were threatened at that very critical time of treatment.<sup>73</sup> The fact that Campbell had lied was peripheral in the Court's opinion and the media's desire to set the record straight had to be subordinated to the interest of her private life.<sup>74</sup> Indeed, the outcome of the case is laudable. Arguably, the majority judgment is closer to the spirit of respecting one's right of innate dignity

---

suicide at night in the public. The process was captured by CCTV camera, and later broadcast in local and national television programmes (2003) 36 EHRR 41.

<sup>72</sup> Ibid, at para. 76.

<sup>73</sup> Per Lord Hope, above n 62, para. 98; per Baroness Hale, para. 155.

<sup>74</sup> Lord Hope, above n 62, para. 117, per Baroness Hale, para. 151-154.

since it is about protecting one's self-esteem and feelings from being intruded or assaulted by the public. The essence of preventing misuse of information in *Campbell* is not about protecting truth or correcting falsity; what is unfortunate is that the Court had simply stated that certain kinds of information, including information about health, personal relationships or finance, are clearly private while the protection of other types of information would be dependent on one's reasonable expectation of privacy. Without delineating the underlying rationale for privacy protection, this approach is unsatisfactory. Not only has it created uncertainty for future claimants whose information fails to fall within the established recognized protected categories of information, the subsequent award of remedies to compensate for injured feelings from psychiatric or psychological harm considered by the Court also needs to be grounded in legal principles.<sup>75</sup>

If revealing a lie concerning one's painful dependence on drugs has failed to convince all the law lords of the importance of privacy right and its relation to one's innate dignity, how does this compare with the case of the unenviable position of Max Mosley, the President of Formula 1? In 2008, unauthorized photos were published which showed him indulging in sado-masochistic activities with five dominatrix

---

<sup>75</sup> Bloustein, above n 51, at 1002, and Reaume, above n 52. Bloustein's and Reaume's articles were not on *Campbell* but their discussion is equally valid to the present discussion.

prostitutes.<sup>76</sup> Other than covering the story with photos in its printed version, the *News of the World* had published video footage on its online website. The allegations alluded to Nazi overtones of concentration camp role-play which was ruled to be unfounded by Justice Eady from the High Court. At this point, it is relevant to give a brief background of Mosley which is helpful for us in understanding the controversy of the case. Max Mosley is the son of Oswald Mosley, who founded the British Union of Fascists in the 1930s and had close ties to Hitler.<sup>77</sup> Mosley and his family were interned in 1940 soon after World War II had broken out. In public, Max Mosley had always shown strong disapproval of Nazi belief and practice.<sup>78</sup> Against this background, the tabloid news had a field day - in effect, accusing Mosley of being a sexual pervert and a hypocrite. Understandably, Mosley was outraged and brought an action for breach of confidence and invasion of right to private life under article 8 of the European Convention of Human Rights. Although the English High Court sided with Mosley, the support was not unreserved. As the analysis of the judgment will show below, its interpretation on privacy and dignity seems to have suggested that

---

<sup>76</sup> *Max Mosley v News Group Newspaper Ltd* ([2008] EWHC 1777 (QB) at <<http://www.bailii.org/ew/cases/EWHC/QB/2008/1777.html>> (accessed 15 April 2011). Although Mosley was awarded damages for privacy violations by the English court, he argued before the European Court of Human Rights for a right of prior notification before publication so that he could have a chance to apply for injunction. The European Court ruled against him in May 2011. *Case of Mosley v. The United Kingdom* (Application no. 48009/08), at <<<http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=72354602&skin=hudoc-?en&action=request>> (accessed 15 June 2011). In 2008, Mosley was the President of the Federation Internationale de l'Automobile.

<sup>77</sup> Caitlin Fitzsummons, 'Max Mosley Profile: "in F1, No One Cared Who My Father Was"' *Guardian*, 24 July 2008 at <<http://www.guardian.co.uk/media/2008/jul/24/privacy.newsoftheworld1>> (accessed 27 April 2011).

<sup>78</sup> *Ibid*, para. 26, 27.

Mosley himself should be held partly responsible, if not in law, at least for his own 'misfortune' and downfall.<sup>79</sup>

It is well-known that *News of the World* is a tabloid publication so the headline they chose to cover the Mosley story was not only 'saucy' but with heavy moral overtone. It read - 'FORMULA One motor racing chief Max Mosley is today exposed as secret sado-masochist sex pervert,'<sup>80</sup> with a sub-heading 'SHAME' to follow.<sup>81</sup> It labelled Mosley as a liar,<sup>82</sup> and its defence counsel described his activities as 'immoral, depraved and to an extent adulterous.'<sup>83</sup> Thus, in the public sphere and in the court room, *News of the World* played the role of a moral crusader in condemning a public figure for disrespectful and deceitful behaviour. Its whole legal defence rested on the fact that freedom of expression should prevail over privacy rights because there was public interest in exposing 'lies,' including private sexual behaviour.

Eady J made it clear, at the outset of the judgment, that the action was not 'directly concerned with any injury to reputation' because it was not a claim in defamation.<sup>84</sup> He further pointed out that sexual activity is inherently private and the law protecting private life is there precisely to prevent the violation of a citizen's

---

<sup>79</sup> Ibid, para. 224-225.

<sup>80</sup> Ibid, para. 26.

<sup>81</sup> Ibid, para. 40.

<sup>82</sup> Ibid, para. 38.

<sup>83</sup> Ibid, para. 124

<sup>84</sup> Ibid, para. 3.

autonomy, dignity and self-esteem.<sup>85</sup> By their nature, photographs and visual images are particularly intrusive as a means of invading privacy since they ‘enable the person viewing the photograph to act as a spectator.’<sup>86</sup> In the particular context, Justice Eady elaborated that sexual activity in private places between consenting adults indisputably engages the rights of private life under article 8 of the European Convention for it is ‘an essentially private materialisation of the human personality.’<sup>87</sup> He made it very clear that despite the fact that the relationship may have been adulterous, or was perceived to be ‘unconventional or perverted’, it did not mean one would lose the right to privacy.<sup>88</sup> Justice Eady pushed it even further in ruling that even for those who have committed serious crimes, it does not necessarily mean that they would become the ‘outlaws’ of privacy protection.<sup>89</sup> He then cited the specific example of Campbell’s illegal behaviour of drug usage which had not barred the House of Lords in recognizing her privacy right,<sup>90</sup> before concluding that the fact that Mosley might have violated the *Sexual Offences Act* in paying for sexual services was irrelevant to privacy protection.<sup>91</sup>

It is of particular relevance to our discussion on dignity that when Justice Eady

---

<sup>85</sup> Ibid, para. 7.

<sup>86</sup> Ibid, para. 19. Justice Eady quoted *Douglas v Hello! Ltd (No.3)* [2006] QB 125.

<sup>87</sup> Ibid, para. 99.

<sup>88</sup> Ibid, para. 128.

<sup>89</sup> Ibid, para. 118.

<sup>90</sup> Ibid, para. 119.

<sup>91</sup> Ibid, para. 121. The court ruled there was lack of conclusive evidence that Mosley had paid for sexual services in the case concerned.

acknowledged that privacy rights are there to protect one's personal dignity and autonomy, he also addressed directly the fact that while a particular sexual activity or inclination may seem undignified, it should not compromise one's personal dignity,<sup>92</sup> and to take away that dignity strikes at the core of Mosley's personality.<sup>93</sup> He ruled accordingly that damages awarded should compensate for one's distress, hurt feelings and loss of dignity. If we had actually stopped reading the judgment at this point, we might have thought Mosley was going to win a full legal victory. Yet, it was at this stage of considering the award of damages that Justice Eady suddenly decided to slip back into defamation law analysis.

On substantive law, Justice Eady clarified that a privacy claim is not directly concerned with compensating for, or vindicating, injury to reputation.<sup>94</sup> As a result, on calculating the damages to be awarded, he drew analogy to the award criteria under defamation law and personal injury actions, which might well be justified.<sup>95</sup> But midway in his analysis, he suddenly changed his tone. First he agreed there was no doctrine of contributory negligence in this area of privacy invasion but then he ruled that the extent to which Mosley had 'contributed to the nature and scale of the distress *might* be a relevant factor on causation.'<sup>96</sup> Following this, he raised the question of

---

<sup>92</sup> Ibid, para. 214-215.

<sup>93</sup> Ibid, para. 216.

<sup>94</sup> Ibid, para. 214

<sup>95</sup> Ibid, para. 218-223.

<sup>96</sup> Ibid, para. 224.



whether Mosley had ‘put himself in a predicament by his own choice which contributed to his distress and loss of dignity? To what extent is he the author of his own misfortune?’<sup>97</sup> Justice Eady then commented on Mosley’s behaviour as ‘reckless and almost self-destructive.’<sup>98</sup> In his opinion, although this would not excuse the intrusion into the defendant’s privacy,

[it] ‘might be a relevant factor to take into account when assessing causal responsibility for what happened. It could be thought unreasonable to absolve him of all responsibility for placing himself and his family in the predicament in which they now find themselves. It is part and parcel of human dignity that one must take at least some responsibility for one’s own actions.’<sup>99</sup>

So, on the one hand, Justice Eady ruled that one’s sexual taste, preference and activities in private are not for anyone to judge, and should warrant the protection of privacy law based on the notion of dignity. On the other hand, he himself was passing judgment onto the plaintiff, and in ruling that the plaintiff should not be granted full compensation for privacy invasion because he had not proven himself entirely worthy of dignity protection. This is contradictory to our previous analysis on innate dignity right.

Consequently, in both *Campbell* and *Mosley*, we find that some English judges

---

<sup>97</sup> Ibid, para. 224-225.

<sup>98</sup> Ibid, para. 226

<sup>99</sup> Ibid, para. 226.

have confused the concept of innate dignity with the notion of reputation. Plaintiffs have to prove their own worthiness, as if they have to come to the court with clean hands in equitable actions. Moreover, the failure to appreciate and to articulate dignity interests, and to understand its relations with privacy protection has compromised unfairly the rights of the claimants. Taking the facts in the two cases discussed, other than the nature of the activities, the claimants had only been involved either alone or with other consenting adults. As such, the courts should have emphasized that the principal values behind privacy rights is the protection of individual autonomy in the pursuit of self-realization and innate dignity. The misuse of information was based on the violations to private, intimate, intense and sensitive subjective feelings,<sup>100</sup> and on activities that had not interfered with the interest of a third party. Also, the unauthorized disclosure and wide dissemination of the information, especially in the form of images, was particularly intrusive. The additional fact that both parties might be perceived to be insincere and had misled the public in this regard would not be sufficient grounds of justification because the media's methods of revealing the so called-truth would constitute public shaming and massive character attacks in holding the claimants to ridicule, severe embarrassment or contempt. The intensity had reached such a level that their self-esteem, self-respect and innate dignity were

---

<sup>100</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel Publisher, Kehl am Main, 2005, p 387.

tarnished. The devastating impact on Mosley, is well illustrated by the continuing wide circulation of the sexual images and video in cyberspace even at the time of writing. Worse, there is no way of stopping them. In the words of Justice Eady, it is ‘hardly exaggerating when [Mosley] says that his life was ruined.’<sup>101</sup>

### C. European Court of Human Rights: Reputation, Honour and Dignity

Until we can identify the core values behind privacy protection, including the entitlement to dignity as one’s self-respect and innate value, we will be continually challenged by the legal conundrum of privacy rights. To a certain extent, this is understandable or even forgivable. While Article 17 of the *International Covenant on Civil and Political Rights*,<sup>102</sup> and Article 12 of the *Universal Declaration of Human Rights*,<sup>103</sup> have mentioned the protection of one’s honour and reputation under privacy right, Article 8 of the *European Convention of Human Rights* only states that ‘everyone has the right of respect for his private and family life, his home and his correspondence.’ Despite this rather brief elucidation of the content of privacy rights, the jurisprudence which emerged from the Council of Europe and

---

<sup>101</sup> *Mosley v News Group Newspaper*, above n 76 at para. 236

<sup>102</sup> Article 17 of the ICCPR states that “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks. at <<http://www2.ohchr.org/english/law/ccpr.htm#art17>>(accessed 18 April 2011).

<sup>103</sup> Article 12 of the Universal Declaration of Human Rights reads “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.” at <<http://www.un.org/en/documents/udhr/index.shtml#a12>> (accessed 18 April 2011).

the European Court of Human Rights (ECtHR) is rich. Back in 1970, the Council of Europe had already defined the right to privacy to be

‘the right to live one’s own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection from disclosure of information given or received by individual confidentiality.’<sup>104</sup>

The high watermark on privacy protection from the ECtHR came in *Von Hannover v. Germany*, concerning Princess Caroline of Monaco asserting her privacy rights against the tabloid media.<sup>105</sup> The Court unanimously stood by the Princess on the ground that the protection of private life includes not only aspects relating to one’s personal identity, name and photograph, but also one’s physical and psychological integrity.<sup>106</sup> The Court’s protection is intended to ‘ensure the development, without outside interference, of the personality of each individual in his relations with other human beings ... even in a public context.’<sup>107</sup> To subject the Princess to the camera’s

---

<sup>104</sup> Council of Europe, Cons. Ass., 21<sup>st</sup> Ordinary Session (Third Part), texts adopted (1970).

<sup>105</sup> (2005) 40 EHRR 1, para 10.

<sup>106</sup> Ibid, para 50.

<sup>107</sup> Ibid.

lens at almost any time, with the resulting images being widely disseminated to a broad section of the public, was detrimental to the development of her personality as a human being.

While the contours of the right to private life which touch on various aspects of an individual's development are gradually becoming clearer, the growing jurisprudence elaborating on the relationship between reputation, honour and dignity under the right to private life has remained blurred.<sup>108</sup>

In defamation cases, the debate is about whether attacks on one's reputation based on false statements has violated one's right to a private life. This position was elucidated in *Karako v Hungary*,<sup>109</sup> in which the ECtHR made a clear distinction between reputation and personal integrity, and ruled that both could come under the umbrella of the right to private life. The applicant in *Karako* was criticized by the media of compromising the interests of his own electoral district when he was a candidate. He brought an action in libel and argued there was a violation of Article 8. The Court considered that the protection to reputation could come under Article 10(2) of the Convention which has provided a ground for the restriction of freedom of

---

<sup>108</sup> Huge Tomlinson QC, 'Strasbourg on Privacy and Reputation, Part I: "A Positive Obligation"' *Inform's Blog* (2010) 7 March 2010 at <<http://inform.wordpress.com/2010/06/18/revisited-strasbourg-on-privacy-and-reputation-part-1-%E2%80%9Ca-positive-obligation%E2%80%9D/>> (accessed 19 April 2011). Brid Jordan, 'Reputation and Article 8: Karako v Hungary' (2010) 21:3 *Entertainment L. R.* 109. Loukis Loucaides (Judge of the European Court of Human Rights), 'Freedom of Expression and the Right to Respect Private Life' *Media Law Resources Centre London Conference*, 17 Sept. 2007 at <[http://www.medialaw.org/Content/NavigationMenu/About\\_MLRC/Events2/Past\\_Events/JudgeLoucaidesSpeech.pdf](http://www.medialaw.org/Content/NavigationMenu/About_MLRC/Events2/Past_Events/JudgeLoucaidesSpeech.pdf)>

<sup>109</sup> Application no. 39311/05, 28 April 2009.

expression,<sup>110</sup> and could also come under protection of private life under Article 8.<sup>111</sup>

In addition, in the Court's opinion, the right to personal integrity which is part of privacy right is covered by the concept of 'the rights of others,' and provides a justified ground to restrict freedom of expression under Article 10(2).<sup>112</sup>

The Court acknowledged that the protection of reputation 'has traditionally been protected by the law of defamation as a matter related primarily to financial interests or social status.'<sup>113</sup> Yet, in order for reputation to fall also within the ambit of privacy right, the Court ruled that the factual allegations must be 'of such a seriously offensive nature that [the] publication had an inevitable direct effect on the applicant's private life.'<sup>114</sup> It is on this ground that the Court finally concluded that the right to private life of the applicant had not been breached because he had not shown that 'the publication in question, allegedly affecting his reputation, constituted such a serious interference with his private life as to undermine his personal integrity.'<sup>115</sup> Directly on the distinction between reputation and personal integrity, the Court explained –

'personal integrity rights falling within the ambit of Article 8 are unrelated to the external evaluation of the individual, whereas in matters of reputation, that

---

<sup>110</sup> Ibid, para. 24. Article 10 provides that "1. Everyone has the right to freedom of expression...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 ...the protection of the reputation or rights of others..."

<sup>111</sup> Ibid, para. 23 and 25.

<sup>112</sup> Ibid, para. 25.

<sup>113</sup> Ibid, para. 22.

<sup>114</sup> Ibid, para. 23.

<sup>115</sup> Ibid.

evaluation is decisive: one may lose the esteem of society – perhaps rightly so – but not one’s integrity, which remains inalienable.’<sup>116</sup>

Analyzing the above quote from our previous discussion, the Court’s analysis on personal integrity is in fact referring to the innate dignity of an individual.

In contrast to the recognition and development of reputation as part of privacy right in defamation lawsuits, privacy right is also invoked when one faces attacks of true allegations. This was addressed in *Sidabras and Dziatuas v. Lithuania* and *A v. Norway*.<sup>117</sup>

The first case concerned two former KGB officers who had faced discrimination having been barred from engaging in professional activities in various areas of the private sector following the implementation of the local KGB Act after the downfall of the Soviet Union. They had been dismissed from their jobs as tax inspector and prosecutor respectively. Their claim concerned the negative publicity caused by the KGB Act. They had suffered constant embarrassment because of past history, as a result of which they had great difficulty in finding jobs.<sup>118</sup>

Since the ECtHR had ruled that there had been violation of the anti-discrimination principle under Article 14 taken in conjunction with Article 8, it held

---

<sup>116</sup> Ibid.

<sup>117</sup> *Sidabras and Dziatuas v. Lithuania*, Applications nos. 55480/00 and 59330/00, 27 July 2004. *A v. Norway*, Application No. 28070/06, 9 April 2009.

<sup>118</sup> *Sidabras and Dziatuas v. Lithuania*, *ibid*, para. 35.

that it was unnecessary to rule whether there had been violation of Article 8 alone. Nevertheless, the Court had elaborated on the meaning and application of Article 8 to the specific case. First, it reiterated that the right to private life is ‘a broad term not susceptible to exhaustive definition.’<sup>119</sup> But it is established that it includes one’s right to live privately, away from unwanted attention, to pursue freely the development and fulfillment of one’s personality, and to establish and develop relationships with others.<sup>120</sup> Second, in applying the interpretation of private life to the case at bar, the Court noted that the applicants had been ‘marked in the eyes of society on account of their past association with an oppressive regime.’<sup>121</sup> The constant embarrassment and the continued burden that they had to face amounted to ‘possible impediment to their leading a normal personal life,’ which are relevant factors to be taken into account in the consideration of Article 8 violations.<sup>122</sup> In the reasoning, the Court made it clear that Article 8 could not be invoked by the applicants to protect reputation for the loss was foreseeable.<sup>123</sup> Following this logic, the likely consequence that we can deduce is that the ECtHR would reach the conclusion that Article 8, on its own, had been violated.

In the second case of *A v Norway*, the claimant was a convicted murderer, and a

---

<sup>119</sup> Ibid, para. 43.

<sup>120</sup> Ibid, para. 43-44.

<sup>121</sup> Ibid, para. 49.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.



substance abuser with an underdeveloped mental capacity. Shortly after he had served his prison term, a horrific murder took place involving the rape of two young girls in the same area where he had lived. During that period, the claimant was living in his family's cabin and had been working on a rehabilitation scheme. Because of the murder of the young girls, he was interrogated by the police. Not only had the murder attracted much media attention, but the claimant's interrogation by the police and his background were also reported in three national newspapers and a TV station. In one national television broadcast, the news broadcast stated that 'possibly the most special candidate of these persons (former convicted...) is precisely this 42-year old.'<sup>124</sup> Though the claimant was not named, he was filmed from behind and partly from the side. His place of residence and his past history were also revealed. He was the only candidate featured in that story. Other newspapers had published information about his work place, photos of him going to work, and going home.<sup>125</sup> Eventually, two young men were later arrested and convicted of the murder. But the claimant's life had been severely disrupted - he was dismissed from his job, and forced into relocation in an isolated place. Because of all this, he suffered from serious psychological problems.<sup>126</sup> As a last resort, he brought an action in defamation before the local courts but was unsuccessful, so he appealed to the ECtHR for violation of his

---

<sup>124</sup> A v. Norway, above n117 , para. 9

<sup>125</sup> Ibid, para. 51.

<sup>126</sup> Ibid, para. 29 and 53.

right to protection of reputation under Article 8 of the European Convention.

The case was vexed with difficulty, partly because the murder of the young girls was of legitimate and serious public interest, and partly due to the fact that what the media had disclosed was largely based on true facts. Yet none of the media had mentioned the name of the claimant, or stated that he was a suspect. One even printed the claimant's claim of innocence stated in an interview.<sup>127</sup>

Despite the legal intricacies, the ECtHR framed the case as an issue of protection of honour and reputation and as part of the right to respect for private life. At the outset of the analysis, the Court reminded us that, before Article 8 could come into play, 'the attack on personal honour and reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life'.<sup>128</sup> The fact that the applicant had not been mentioned by name was not considered by the Court to be a decisive factor, because the Court pointed out that the photographs and details of his work and residence had made it possible for all those who knew him to identify him with a crime particularly reprehensible and sensitive. Furthermore, the court ruled that though the media had reported largely factual information about the investigation 'the way it was presented wrongly conveyed the impression that there was a factual basis justifying the view that the

---

<sup>127</sup> Ibid, para. 69.

<sup>128</sup> Ibid, para. 64.

applicant could be considered as a possible suspect.’<sup>129</sup> Finally, the Court did not consider that the serious public interest could justify the defamatory allegation against the claimant with consequent harm done to him. The Court described the claimant as ‘persecuted by journalists against whom he found it difficult to protect himself.’<sup>130</sup> He was in a critical phase of rehabilitation and social reintegration after serving his prison sentence but was ‘driven into social exclusion’ by the media.<sup>131</sup> What the publication had done was a ‘particularly grievous prejudice’ against a person’s honour and reputation that was ‘especially harmful to his moral and psychological integrity and to his private life.’<sup>132</sup>

The reasoning of *A v. Norway* has provided valuable insight for our present study on online shaming because the ECtHR ruled that literally true statements, conveying false implications, could amount to defamation. And the way of media coverage could amount to a form of persecution if causing serious disruption and interference to the victim’s private life. Yet, what is left unclear is that the Court has not elaborated in detail whether there is any distinction between honour and reputation in the protection of the right to private life. Do both concepts refer to estimation in the minds of third parties? Or did the European Court use the term ‘honour’ to refer to one’s inherent

---

<sup>129</sup> Ibid, para. 70.

<sup>130</sup> Ibid, para. 72.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid, para. 73.

dignity, while ‘reputation’ refers to the estimation is in the minds of third parties?

Scholars have provided insightful guidance on this issue. Manfred Nowak argues that although there is overlapping between honour and reputation, they are different in nature.<sup>133</sup> Prima facie, both terms are related to the ‘conformity of a person’s conduct with the moral or social requirements’ of society.<sup>134</sup> However, on a careful look, Nowak observes that honour ‘tends to give expression more to this person’s subjective opinion of himself or herself (subjective feeling of honour).’<sup>135</sup> Hence, attack on a person’s honour is a condemnation of the moral character of a person, and an impairment to a person’s self-esteem that interferes severely with one’s ‘dignity, integrity and privacy than the mere injury to reputation.’<sup>136</sup> Furthermore, a ‘massive attack’ on one’s honour may constitute a form of degrading treatment and may amount to a violation of the right to respect for dignity.<sup>137</sup> By comparison, Nowak further explains that reputation is about the appraisal of one by others. It can only be harmed by an attack accessible to the public.<sup>138</sup>

This view is supported by David Feldman, who further analyzes the distinction between honour and reputation, and their relation to dignity. He writes, ‘honour and reputation together are akin to dignity in allowing one to develop a flourishing social

---

<sup>133</sup> Nowak, above n 100 , 404.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

and business life, and honour is a particularly significant contributor to the self-respect and dignity which form a major part of one's view of oneself.<sup>139</sup> While the legal action of libel will protect one's reputation from false allegation, the protection of one's dignity is not dependent on the truth or falsity of the statement. Feldman considers that 'unrestrained publication of unpleasant personal truths' has a definite impact on private life, self-respect and public order, which rightly explains why Lord Mansfield once said 'The greater the truth, the greater the libel.'<sup>140</sup> He further suggests that, unless there is strong public interest to disclose, there should be legal remedies for the harm done to reputation, dignity and self-respect by publication of true information where an aspect of a person's private life is likely to be held up to ridicule or contempt because he should be entitled to protect his dignity, including both 'self-respect and the esteem of others, from assault on the basis of activities which are nobody else's business.'<sup>141</sup>

In our discussion, what Nowak and Feldman describe as 'honour' is in fact innate dignity. Both of them refer to honour as self-esteem, related to one's subjective self. Assaults on it are unjustified regardless of whether the attacks are based on true facts or falsity.

---

<sup>139</sup> David Feldman, 'Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty' in M. D. A. Freeman with R. Halson (Eds), *Current Legal Problems* Volume 47 Part II, Oxford University Press, Oxford, 1994, pp. 41-71

<sup>140</sup> *Ibid*, 56.

<sup>141</sup> *Ibid*, 57.

### III. Freedom of Expression

The protection of people's privacy based on autonomy and dignity, and of respect as *qua persona*, may make us wonder whether these above propositions would place undue restraint on freedom of expression. While it is beyond the scope of this article to draw the exact dividing line between right to privacy and freedom of expression, suffice is it to say that privacy right is never absolute, neither is freedom of expression. Specifically, privacy should yield to freedom of expression when overriding public interest is at stake, namely when life threatening or unlawful behaviour has taken place. For instance, in 2001, US police abuse of power in an incident concerning a black taxi-driver, Rodney King, was rightly filmed and exposed by private citizens.<sup>142</sup> In 2011, in China, the son of a senior official hit two university students on campus with his car. It was alleged the young man attempted to flee and bragged to the crowd present that his father was Li Gang, the deputy police chief of that region. The incident was reported on the Internet by netizens who were determined to bring the young man to justice. At the end, he was sentenced to six years of imprisonment for

---

<sup>142</sup> Rodney King was a black taxi driver whom was detected speeding on the highway by police officers in Los Angeles in 1991. When he was eventually stopped, he was beaten by four white police officers with their batons. This was filmed by George Halliday who lived nearby. The police officers were later charged but acquitted which led to a widespread riot in Los Angeles causing the death of 55. See Eric Deggans, 'How Rodney King Video Paved the Way for Today's Citizen Journalism' *CNN NEWS*, 7 March 2011 at <<http://www.cnn.com/2011/OPINION/03/05/deggans.rodney.king.journalism/index.html?iref=allsearch>> (accessed 20 April 2011).

manslaughter.<sup>143</sup> Netizens in China are known to use the Internet to expose the corrupt and immoral behaviour of officials so as to bring about their downfall.<sup>144</sup>

Yet having conceded that public interest and freedom of expression should prevail under certain situations (for instance when serious crime is being committed or when abuse of power by officials is involved) is not equivalent to endorsing the practice of hunting down perceived wrongdoers, exposing their personal details, harassing them or administrating justice as one's wish. It is entirely disproportionate to the aim of revealing and correcting social wrongs. And there is no public interest to be served in making a vicious attack on an individual which is likely to threaten his life and security in reality. What we have to guard against is the abuse of freedom of expression on a public interest matter which becomes a form of online violence, spilling into threats in real life.

## **Conclusion**

It was Marshall McLuhan, writing in the 1960s on the phenomenon of electronic media, who already had foretold that we would live in a state of 'new electronic interdependence' in a 'global village.'<sup>145</sup> To him, the speed of this electronic media

---

<sup>143</sup> Associated Press, 'Son of Senior Chinese Policeman Jailed over Fatal Hit and Run' *The Guardian*, 30 January 2011 <<http://www.guardian.co.uk/world/2011/jan/30/son-chinese-policeman-sentenced-hit-and-run>> (accessed 20 April 2011).

<sup>144</sup> Michael Wines, 'Court Brings Swift Victory to Netizens in China' *International Herald Tribune*, 17 June 2009 at 1, 3.

<sup>145</sup> Marshall McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man*, Routledge & Kegan

would wire us up to act and react to global issues instantaneously, continuously and collectively.<sup>146</sup> McLuhan warned us that the global village has every potential to become a place where totalitarianism and terror may rule due to the sacrifice of individualism and lack of in-depth reflection.<sup>147</sup> He left us with a piece of advice, asking us to be vigilant towards the dynamic that technology would bring and to the impact of the influence of the media on our social interaction, lest we would find ourselves locked ‘in a small world of tribal drums, total interdependence, and superimposed co-existence.’<sup>148</sup>

Sadly, McLuhan’s prophesy holds true for the 21<sup>st</sup> century cyber global village because we have seen that the Internet is replete with examples of those tribal drums in the form of online shaming. New information communication technologies have led to an increasing popularity and fascination with capturing others’ images, exposing others’ wrongdoing, and bringing the people concerned to a brand of online justice in the form of a manhunt which, in both the cyber and real world, can easily and quickly spin out of control, often descending into various forms of shaming, humiliation, character assault, and even harassment. Hence, a distorted form of freedom of expression is enjoyed by an anonymous online mob at serious heavy cost

---

Paul, London, 1962, pp 31-32.

<sup>146</sup> Marshall McLuhan, *The Medium is the Massage: An Inventory of Effects*, Gingko Press, California, 2001, p 63

<sup>147</sup> Ibid, p.32.

<sup>148</sup> Ibid.



to the dignity of others, a core element of one's privacy. As a result, this practice of online shaming has raised unanswerable ethical and legal questions. In our attempt to search for legal guidance from the European Court of Human Rights, we have noticed an emerging jurisprudence on the recognition of one's innate dignity and its relation with privacy regardless of the wrong of the transgressor-victim. Yet in all those cases, the defendants could be clearly identified, while the perpetrators of online shaming are likely to be an anonymous crowd from different jurisdictions. Indeed, another research project would be necessary to do justice to the issues of accountability and responsibility but it is hoped, at least, that this article has laid the ground work for the recognition of a legal right to privacy, based on the right to dignity.

Dignity has been described vividly by Reaume as a guardian angel hovering over our laws.<sup>149</sup> It is, perhaps, time now to call upon our legal guardians for protection in favour of a proper responsible participation in the E-village.

---

<sup>149</sup> Reaume, above n 52, 62.