

CHAPTER  
**5**

# Privacy

The relationship between privacy and freedom of expression has become one of the most important issues of our time, for three particular reasons:

- Technological advances in the past quarter of a century have enabled mass state surveillance to a previously unimagined degree. Where once interception of correspondence would have entailed a steam kettle in the back room of the post office, it is now the work of a few keystrokes on immensely powerful computers.
- The advance of technology also means that both governments and private companies hold much more data on private individuals than ever before.
- The media (and public) appetite for disclosures about the private lives of public figures has reached unprecedented proportions. The issue has grown from concern about the activities of *paparazzi* to a much more systematic scrutiny of the lives of “celebrities,” including a tolerance in some news organisations of blatantly illegal methods of intrusion.

We might add a third ingredient to the mix: many people today reveal private aspects of their life on a social media to an extent that previous generations would have found bewildering (and not only because they had not heard of Facebook). In other words, the conceptual boundaries between public and private have changed in the minds of many people.

Yet, just at the moment when interference with privacy becomes much easier (and, for some, more acceptable) the legal protections of privacy have developed rapidly. The organisation Privacy International claims that there are more than 130 countries with constitutional protections regarding the right to privacy, while over 100 countries have privacy and data protection laws.

## ***Privacy in International Instruments***

International human rights treaties offer fairly robust protections against intrusions into privacy – however, the African Charter does not make mention of the right to privacy.

Article 17 of the ICCPR states:

- 1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- 2) Everyone has the right to the protection of the law against such interference or attacks.

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms addresses the right to respect for family and private life:

- 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.

Article 11 of the American Convention protects the right to privacy in identical terms to the ICCPR.

### ***Developments of Privacy in National Law***

Despite the claim that privacy is constitutionally protected in a large majority of countries, the actual experience of national legal systems has been varied. At one end of the spectrum, France, in Article 9 of its Civil Code, guarantees the right to privacy. This reflects a media culture that has historically been much less intrusive on the private lives of public figures and even, in the nineteenth century, criminalised the publication of facts about private life. By contrast, in the United States there is no constitutional protection of privacy and any residual common law privacy rights are likely always to be trumped by the First Amendment and its protection of free speech.

This is not a matter of legal systems. Germany and Italy, both civil law jurisdictions, recognise a privacy right (at least a qualified one). The United Kingdom has imported an explicit privacy protection derived from Article 8 of the European Convention. Previously, protection of privacy under the common law would be through causes of action for breach of confidence (if the person could prove ownership of the material disclosed), malicious falsehood or trespass.<sup>197</sup>

The common law in the United States evolved in a slightly different direction. A law review article of 1890, written by Samuel Warren and his friend and colleague Louis Brandeis – later a Supreme Court justice and one of the country’s most renowned jurists – proposes a “right to privacy” within the common law. Also taking the starting point as the sanctity of the home, Warren and Brandeis’ concern was that the development of intrusive technologies (such as small cameras) and the aggressive approach of the press were posing new threats to privacy. The Fourth Amendment to the United States Constitution provides protection against arbitrary intrusion by the authorities (although it never uses the word privacy). Warren and Brandeis argued that such protection should be extended:

“The common law has always recognized a man’s house as his castle, impregnable, often, even to his own officers engaged in the execution of its command. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?”<sup>198</sup>

<sup>197</sup> See United Kingdom Court of Appeal: *Kaye v Robertson* [1991] FSR 62.

<sup>198</sup> Samuel D Warren and Louis D Brandeis, “The Right to Privacy,” *Harvard Law Review*, Vol IV, No 5, 1890.

This right is not an unlimited one. Indeed, Brandeis as a Supreme Court justice was famous as a defender of freedom of speech and the First Amendment. This article – justifiably described as the “most influential law review article of all” – argues that “[t]he right to privacy does not prohibit any publication of matter which is of public or general interest.” This is precisely the principle that continues to inform United States privacy jurisprudence to this day. Justice Brandeis called it “the right to be let alone.”

The right to privacy would not cover matters that were revealed legitimately in the course of official proceedings, such as a court case. It would not apply if the individual themselves revealed the information – so, once it is posted on your Facebook page it is no longer private.

Truth would not be a defence to a suit claiming a breach of privacy. Unlike in a defamation case, where truth would be an absolute defence, the right to privacy “implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all.”

Finally, according to Warren and Brandeis, “absence of malice” would not be a defence either. This is a point where later United States jurisprudence has moved on considerably.

A Supreme Court judgment of the 1970s spelled out four aspects to the right:

- The right not to be put in a “false light” by the publication of true facts;
- The right not to have one’s name or likeness appropriated for commercial value;
- The “right of publicity” on the part of a person whose name has a commercial value;
- The right to avoid the publicising of “private details.”<sup>199</sup>

The Supreme Court has also found that the same “actual malice” standard laid down in the well-known *Sullivan* case for defamation cases would apply to public officials in privacy cases.<sup>200</sup> In other words, public officials and other public figures have a lesser protection of their privacy than others.

There is a trend towards recognising the international human right to privacy within national legal systems. The consequence of this is that increasingly national courts will consider privacy not as a potential exceptional *limitation* to the right to freedom of expression, but as another equal and substantive right to be balanced against it. Not surprisingly, the jurisprudence of the ECtHR is once again particularly useful, since the Court has a long history of balancing the substantive Article 8 and Article 10 rights.

### ***Breaching Privacy by Covert Means***

At first sight, a media organisation would seem to be on the weakest ground when it used illegal means to violate the privacy of individuals. This was what happened in a series of British cases in which mobile phone accounts were hacked. The hacking scandal initially appeared confined to newspapers in the News International stable, owned by Rupert Murdoch. Indeed, it led to the closure of one of these papers, the *News of the World*. Later

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<sup>199</sup> United States Supreme Court: *Zacchini v Scripps-Howard Broadcasting Co*, 433 US 562 (1977).

<sup>200</sup> United States Supreme Court: *Time Inc v Hill*, 385 US 374 (1967).

it emerged that other companies, such as Mirror Group Newspapers, were also involved.

Most of the targets of phone-hacking were “celebrities”, although public concern about the issue was triggered by the revelation that a private investigator employed by one of the newspapers had hacked the voicemail of a disappeared child (later found to have been murdered), deleting messages and giving rise to the hope that she was in fact alive. Several of those involved were prosecuted and convicted under existing criminal law.

Beyond this, however, the phone-hacking cases prompted widespread revulsion about media intrusion into privacy and a judge-led inquiry that proposed a new system of media regulation.

However, in a case before the ECtHR involving the unlawful recording of a telephone conversation, the Court reached a rather different conclusion. The Court felt that the overriding concern was the public interest in the matters discussed. And, given the subject of the conversation, the privacy claim was not convincing:

“The context and content of the conversation were thus clearly political and the Court is unable to discern any private-life dimension in the impugned events... Equally, the Court finds that questions concerning the management and privatisation of State-owned enterprises undoubtedly and by definition represent a matter of general interest.”<sup>201</sup>

There were two crucial distinctions with the British phone-hacking cases. First, the media organisation had not itself illegally recorded a conversation or message. Secondly, the matter reported was of clear public interest.

In *Haldimann v Switzerland*,<sup>202</sup> the ECtHR addressed the issue from the angle of when covert recordings are made by the journalists themselves. The target was an insurance broker. He was not named or otherwise identified, but the recording was broadcast as part of an investigation into the advice brokers give to customers. Importantly, however – and this was a crucial difference from the British phone-hacking cases – the personal privacy of the broker was not at issue. The matter under investigation was one of broad public interest.<sup>203</sup>

### ***What are the Limits of Privacy?***

We have seen that there is an unambiguous right to privacy in international law and also that privacy is protected, at least to some extent, in many national legal systems. It is also apparent that privacy, like the right to a reputation, may be legitimately limited in the public interest. In other words, if the public interest so demands, the balance between freedom of expression and privacy will tilt in the direction of the former. Often, as is the case with defamation cases, the public status of the person whose privacy is infringed may affect the Court’s balancing exercise.<sup>204</sup>

<sup>201</sup> ECtHR: *Radio Twist v Slovakia*, Application No 62202/00 (2006) at para 58.

<sup>202</sup> ECtHR: *Haldimann and Others v. Switzerland*, Application No 21830/09 (2015).

<sup>203</sup> *Id.*

<sup>204</sup> See ECtHR: *Fressoz and Roire v France*, Application No 29183/95 (1999).

### Example: Publication of Photographs

The ECtHR considered a case of an Austrian newspaper that had been penalised for breaching the privacy of a politician. It had published a picture of him to accompany an article alleging that some of his earnings had been gained illegally. The national courts had found that although he was a member of parliament he was not well known to the public. The paper was breaching his privacy by publishing a picture of him *in the context of critical allegations*. The Court found that the newspaper's freedom of expression rights had been violated.<sup>205</sup>

In another case involving pictures the ECtHR reached a different conclusion. A man who had been captured carrying a knife on closed circuit television cameras argued that his privacy had been breached when the footage was broadcast on a crime prevention programme. Although he had used the knife in a suicide attempt, the broadcast claimed that his detection on CCTV had been a triumph of crime prevention resulting in the apprehension of a "dangerous" individual.<sup>206</sup> The ECtHR found that although the interference with his privacy was legal and pursued a legitimate aim – the preservation of public order and prevention of crime – it was disproportionate and was thus an interference with the applicant's privacy rights.

Recently, the ECtHR has become increasingly protective of privacy rights. In the case of *MGN v United Kingdom*,<sup>207</sup> the model Naomi Campbell had sued the *Daily Mirror* over a story entitled: "Naomi: I am a drug addict". The newspaper detailed Campbell's treatment for narcotics addiction, despite her previous public denials of drug use. The story included pictures of her near the Narcotics Anonymous centre she was attending.

In her case, a British High Court found in Campbell's favour. This decision was overturned on appeal, before being restored by the House of Lords. Mirror Group Newspapers took the case to the ECtHR which held that although the article itself was in the public interest, the publication of secretly taken photographs was an intrusion into Campbell's privacy. However, the Court did find a breach of the freedom of expression right in the size of the costs award.

In the area of privacy, to an even greater extent than other media law issues, the European Court has generated the greatest amount of case law out of all the regional human rights courts (not least because one other regional system, the African system, has no such protection of privacy).

The Inter-American Court has offered a particularly robust defence of the right of journalists to intrude on the privacy of public figures in certain instances when this may be in the public interest.

In *Fontevicchia and Another v Argentina*,<sup>208</sup> the applicants had published an article about a personal relationship of former President Carlos Menem, including the financial arrangements between him and the mother of his illegitimate child. The Court found that

<sup>205</sup> ECtHR: *Krone Verlag GmbH & Co. KG v Austria*, Application No 35373/97 (2002).

<sup>206</sup> ECtHR: *Peck v United Kingdom*, Application No 44647/98 (2003).

<sup>207</sup> ECtHR: *MGN v United Kingdom*, Application No 39401/04 (2011).

<sup>208</sup> Inter-American Court: *Fontevicchia & D'Amico v Argentina supra* note 156.

while the state should take action to protect privacy, including against media intrusion, it must also take into account:

- “a) the different threshold of protection for public officials, especially those who are popularly elected, for public figures and individuals, and b) the public interest in the actions taken.”<sup>209</sup>

The Court saw a clear public interest in the disclosure of these facts:

“This information relates to the integrity of political leaders, and without the need to determine the possible use of public funds for personal purposes, the existence of large sums and costly gifts on behalf of the President of the Nation, as well as the possible existence of negotiations or interference in a judicial investigation, are issues that involve a legitimate social interest.”<sup>210</sup>

Another interesting aspect of ECtHR case law on privacy is that the Court is increasingly willing to see the public interest in disclosing the “personality traits” of public figures. For instance, a politician’s approach to a romantic relationship can “[raise] the question of whether he had been dishonest and lacked judgment in that regard.”<sup>211</sup>

### **Privacy and Medical Confidentiality**

The Naomi Campbell case skirts round the edge of an issue where the definition of privacy is at first sight very clear: information about medical conditions. While the confidentiality of medical records would generally be regarded as a completely valid application of the right to privacy, in the Campbell case the fact of her drug dependency was regarded as a matter of public interest.

In a case involving medical records, however, the ECtHR found a legitimate public interest in their exposure. *Le Grand Secret* was a book co-written by the personal physician to President Francois Mitterrand of France and published a few days after the President’s death. It detailed the progress of the cancer that Mitterrand was diagnosed to have shortly after he became President in 1981. The French courts had issued a temporary injunction against the circulation of the book, which was then made permanent some months later.

The Court made a distinction between the temporary injunction and the permanent ban on publication.<sup>212</sup> The former did not constitute an interference with Article 10, since it was imposed within days of Mitterrand’s death out of respect for his family. By the time of the second decision, nine months later, the Court determined that two factors had changed. One, following the reasoning in earlier cases, such as *Spycatcher*,<sup>213</sup> was that the content of the book was already public knowledge and so medical confidentiality could no longer be maintained. Secondly, the passage of time meant that the hurt to the family was lessened.<sup>214</sup>

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> ECtHR: *Ruusunen v Finland* Application No 73579/10 (2014) at paras 49-50; ECtHR: *Couderc v France* Application No 40454/07 (2015) at para 99.

<sup>212</sup> ECtHR: *Éditions Plon v France* Application No 58148/00 (2004).

<sup>213</sup> ECtHR: *Observer and Guardian v UK*, Application No 13585/88 (1991).

<sup>214</sup> Note, however, that the judgment related to the right of the publisher to circulate the book, not the author’s breach of medical confidentiality, for which he received a criminal conviction that was not appealed.