

The Right of the Public to Know and Freedom of Entertainment: Information Seen from the Consumer's Angle

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Freedom of Expression and the Right to Privacy

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Introduction

The death of Diana, Princess of Wales, in August 1997 brought about renewed calls for greater protection for privacy and a shift in public perception about the role of the media and the importance of freedom of expression. These calls have focused on the intrusive nature of the Paparazzi and new technological developments, particularly visual and auditory enhancement devices.¹ It is perhaps instructive to recall Warren and Brandeis' reaction in 1890 to the "latest advances in photographic art" which for the first time made it possible to "take pictures surreptitiously," that is, without a formal sitting:

Of the desirability [of legal protection for privacy] there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. ... To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily newspapers.²

Ironically, Diana's death occurred in France, a country with some of the strongest privacy laws in Europe. This illustrates an important point, which is that the debate

¹ For example, Paragraph 14(vi) of Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe states that civil actions for privacy should cover the use by paparazzi of such devices.

² "The Right to Privacy" (1890) 5 *Harvard Law Review* 193, pp. 211 and 196, respectively.

about freedom of expression and privacy, though a matter of the greatest importance, is plagued with emotional calls for immediate action. These are very complex issues and it is essential that governments base their policy in this area on a realistic appreciation of the competing interests and the legal and social framework in which they operate. The British government wisely resisted calls for legislation in the aftermath of her death and it may have been unwise for the Parliamentary Assembly of the Council of Europe to pass a resolution on privacy in such haste.³

In many constitutions and under international conventions, privacy is protected as a human right. Courts, including the European Court of Human Rights, have elaborated the scope of this right. These cases, however, rarely involve conflicts between privacy as a human right and freedom of expression. As this paper illustrates, these cases focus primarily on State interference with privacy interests, for example through unwarranted surveillance or search and seizure actions.

Conflicts between privacy and freedom of expression commonly arise where non-State actors, such as the media or authors of books, publicise private matters. Publishers may claim that the revelations were a matter of public interest or that the individuals involved had forfeited their privacy interest by leading very public lives. The legitimacy of these claims has been tested in a number of cases in countries which provide legal protection for privacy. In such cases, courts have had to balance privacy interests against constitutional or international guarantees of freedom of expression. This paper will look at the way courts have balanced these interests, proposing a number of factors that need to be taken into account.

Complicating Factors

Balancing freedom of expression and privacy is complex for a number of reasons. First, there is still no real consensus on what the right to privacy embraces.⁴ Warren and Brandeis defined it as “the right to be let alone”.⁵ The Canadian Supreme Court has defined it as “the narrow sphere of personal autonomy within which inherently private choices are made.”⁶ The European Court of Human Rights has eschewed definition, stating: “The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of ‘private life’.”⁷

Second, the legal status of these interests varies depending on the context. Both are human rights, guaranteed for example by the European Convention on Human Rights (ECHR). But human rights guarantees relate primarily to the relationship between individuals and States, whereas privacy interests, as has already been noted, are commonly under threat from other individuals, particularly the media. As a result, balancing is usually a matter of assessing a privacy law which restricts the human

³ Resolution 1165(1998), Right To Privacy.

⁴ In 1992, Workman, R., wrote: “[A] solid definition of ‘privacy’ has eluded commentators”. “Balancing the Right to Privacy and the First Amendment” (1992) 29 *Houston Law Review* 1059, p. 1063.

⁵ *Op cit.*, p. 195.

⁶ *Godbout v. Longueuil (City)* [1997] 3 SCR 844, para. 97.

⁷ *Niemietz v. Germany*, 16 December 1992, 16 EHRR 97, para. 29.

right to freedom of expression. In such cases, the precise legal status of the privacy interest needs to be carefully assessed.

Third, any effort to balance privacy and freedom of expression interests ultimately has to take into account the amorphous concept of the public interest. Courts around the world have struggled to define the public interest, both generally and in the specific context of each case and issue. While courts have noted that the public interest is not necessarily what the public is interested in,⁸ it is difficult to define the concept in a positive way.⁹

Fourth, a variety of legal and social mechanisms are available to protect privacy interests. Invasion of privacy is a crime or civil wrong in some countries,¹⁰ while in others it is addressed primarily as a matter of journalistic ethics, either through statutory media councils or self-regulatory bodies.¹¹ Restrictions on freedom of expression are legitimate only if they are carefully tailored to serve a pressing social need.¹² This implies that only the least intrusive effective means of protecting interests, including privacy, are acceptable. Restrictions on freedom of expression to serve privacy interests must, therefore, take into account all available options.

Privacy as a Human Right

It is important to distinguish between privacy as a human right and privacy interests as the object of statutory protection. Human rights serve to protect interests which are fundamental to human dignity. They are enshrined in constitutions and in international law and their status is such that States may pass no laws or take any action in breach of their guarantees. The protection provided by ordinary laws is of a lesser order. Ordinary laws may provide, for example, for certain contractual or delictual rights. Criminal laws prohibit certain types of conduct, such as littering or drunk driving. These laws, however, are not constitutional in nature and have no overriding status.

Privacy is clearly protected as a human right, under many constitutions and also by Article 8 of the ECHR. It is submitted, however, that the scope of this protection is limited and that it does not extend to many of the issues which commonly arise in the debate about privacy and freedom of expression.

Human rights govern primarily the relationship between individuals and States. Thus, Article 8(2) of the ECHR proclaims that there shall be “no interference by a public authority with the exercise” of privacy rights, subject to certain narrowly drawn exceptions. The European Court of Human Rights has emphasised in a number of

⁸ See, for example, *National Media Ltd. and Ors v. Bogoshi*, 1998(4) SA 1196 (SC), at 1212.

⁹ In *Aubry v. Éditions Vice-Versa Inc.* [1998] 1 SCR 591, para. 26, Canadian Supreme Court Chief Justice Lamer noted: “It is inevitable that the concept of public interest is imprecise.”

¹⁰ It is both a criminal and a civil wrong in France. See Article 226 of the New Penal Code and Article 9 of the Civil Code. It is a civil wrong in the US and in some Canadian jurisdictions, for example, British Columbia. See *Nader v. G.M.*, 307 NYS 2d 647 (1970), and the Privacy Act, RSBC 1996, c. 373, respectively.

¹¹ See Clause 4 of the Code of Practice of the UK Press Complaints Committee.

¹² See, for example, *Goodwin v. United Kingdom*, 27 March 1996, 22 EHRR 123, para. 40.

judgements that “the object of [Article 8] is ‘essentially’ that of protecting the individual against arbitrary interference by the public authorities”.¹³ The Canadian Supreme Court has noted an important reason for this:

The decisions of this Court ... recognize that there is a fundamental difference between a person’s reasonable expectation of privacy in his or her dealings with the state and the same person’s reasonable expectation of privacy in his or her dealings with ordinary citizens.¹⁴

In a series of judgements, the European Court has noted a number of types of State interference with private life, including laws prohibiting homosexual conduct,¹⁵ interception of telephone conversations¹⁶ and search and seizure operations.¹⁷

In general, this negative obligation does not, due to its very nature, come into conflict with freedom of expression. This is because it prohibits State actions which interfere with privacy rather than actions, including speech, by individuals. One area of potential conflict is in relation to information. Although the jurisprudence of the European Court of Human Rights has been somewhat ambivalent on the subject,¹⁸ ARTICLE 19 considers that the right to freedom of expression comprises a general right of access to information held by public authorities. This potentially conflicts with individuals’ interest in not having private information about them made public. It is quite clear, however, that here the privacy interest prevails and all freedom of information acts include an exemption for private information.¹⁹

The Court has also recognised limited positive obligations on States to ensure effective respect for Article 8 rights, including privacy: “in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life”.²⁰ Three factors limit the relevance of this to the question of balancing privacy and freedom of expression.

First, the Court has generally been cautious in finding positive obligations:

[E]specially as far as those positive obligations are concerned, the notion of “respect” is not clear-cut Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation²¹

In addition, “the choice of means calculated to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States’ margin of appreciation.”²² This means that it is up to States to decide how to protect Article 8 interests. Although the Court might theoretically question the adequacy of this protection, in practice this is rare, as we shall see.

¹³ See *Marckx v. Belgium*, 13 June 1979, 2 EHRR 330, para. 31.

¹⁴ *Aubry v. Éditions Vice-Versa Inc.*, *op cit.*, para. 8.

¹⁵ *Dudgeon v. United Kingdom*, 22 October 1981, 4 EHRR 149.

¹⁶ *Malone v. United Kingdom*, 2 August 1984, 7 EHRR 14.

¹⁷ *Funke v. France*, 27 January 1993.

¹⁸ See *Gaskin v. United Kingdom*, 7 July 1989, 12 EHRR 36, para. 52.

¹⁹ See, for example, Article 28 of the Freedom of Information Act, No. 13 of 1997, Republic of Ireland.

²⁰ *Airey v. Ireland*, 9 October 1979, 2 EHRR 305, para. 32.

²¹ *Abdulaziz, Cabales and Balkandali v. United Kingdom*, 28 May 1985, 7 EHRR 471, para. 67.

²² *X and Y v. Netherlands*, 26 March 1985, 8 EHRR 235, para. 24.

Second, the Court refers to positive obligations in two quite different situations. Most commonly, the Court uses positive obligations in cases in which “it is not that the State has acted but that it has failed to act”.²³ These cases deal with the relationship between individuals and the State, or the ‘vertical’ application of rights. *Gaskin* is an example of this, where the Court held that a public authority was obliged to release certain personal information to protect a privacy interest.²⁴

On the other hand, in a small number of cases, the Court has referred to States’ positive obligation to regulate relations between non-State actors, the ‘horizontal’ application of rights. In such cases, it is not the relationship between the State and an individual, either because of an action the State has taken or the failure of a State to act, that is in issue. Rather, the claim is that the State has failed to regulate relations between non-State actors, in particular by failing to provide a legal remedy against privacy invasions. Even in these cases, however, there has generally been some direct State involvement. For example, in *López Ostra*, the Court held that the failure of the authorities to take action to prevent the detrimental effects of severe environmental pollution arising from a waste-treatment plant breached Article 8. However, the Court specifically noted that the legality of the plant under Spanish law was in question and focused on the fact that the authorities had not only failed to protect Mrs. López Ostra but had also contributed to prolonging the situation.²⁵ In *X and Y v. Netherlands*,²⁶ the Court held that a civil remedy was insufficient to protect individuals against sexual assault and that a criminal remedy should be available. However, the Netherlands did normally provide a criminal law remedy for sexual assault – it was not applicable in this case only because the victim was mentally handicapped.

Third, the Court has not yet considered a privacy claim which involved restrictions on freedom of expression, so they have not yet had to undertake a balancing exercise. It must be assumed that the Court, already cautious about inferring positive obligations, would be even more so where such an obligation would limit other rights, perhaps particularly freedom of expression.

The question of States’ obligation to provide positive, horizontal protection for privacy by limiting individuals’ freedom of expression has arisen directly in two applications to the European Commission. In *W. v. United Kingdom*,²⁷ the applicant complained that under British law he had no effective remedy for gross invasions of his privacy from certain statements published in a book. The statements included very intimate references to the applicant, and his wife and marital life. The Commission noted that he had received compensation for defamatory statements but held that this did not exhaust the privacy claim. However, the Commission rejected the application as manifestly ill-founded. Although the law did give greater protection to freedom of expression, the applicant’s privacy did find some protection in the law of defamation and his own liberty to publish. This illustrates the very low burden States have to discharge where a claim for horizontal protection for privacy is balanced against

²³ *Airey*, *op cit.*, para. 37.

²⁴ *Op cit.*, paras. 41 and 49.

²⁵ *López Ostra v. Spain*, 9 December 1994, 20 EHRR 277. See paras. 54-6.

²⁶ *Op cit.*.

²⁷ Application No. 10871/84, Decision of 10 July 1986.

freedom of expression.

Earl Spencer and Countess Spencer v. the United Kingdom,²⁸ raised a very similar issue. Three British newspapers had published stories and photographs about the Spencers, focusing on the treatments the Countess was having for eating disorders and referring to a number of marital problems. The UK Press Complaints Committee had upheld complaints against the newspapers and all three published an apology. Despite this, the applicants applied to the European Commission, claiming that the United Kingdom was in breach of its obligations for failing to provide an effective remedy against intrusions by the media into their private lives. In this case, the Commission held that the applicants had failed to exhaust domestic remedies by not bringing breach of confidence actions against the newspapers and did not, therefore, deal with the case on its merits.

The jurisprudence of the European Court illustrates a reluctance to impose positive obligations on States and a willingness to allow States a great deal of freedom in deciding how and how far to protect privacy interests. Threats to privacy from the exercise of freedom of expression usually involve non-State actors such as the media or publishers. In general, positive obligations have been imposed only in the context of vertical rights claims, involving a public actor. Where claims of a breach of Article 8 have involved the exercise of freedom of expression by non-State actors, the European Commission has demonstrated a clear preference for freedom of expression, declaring one application manifestly ill-founded even though the national law favoured freedom of expression.

Balancing Privacy and Freedom of Expression

As noted above, legal conflicts between privacy and freedom of expression rarely arise in cases based on privacy as a human right. Such conflicts are far more common in the converse situation, where a law protecting privacy is being challenged as an unacceptable restriction on freedom of expression. This is perhaps natural given that the vast majority of cases involving privacy are claims between individuals for redress for breach of legally protected privacy interests.

Privacy laws, where they restrict freedom of expression, must meet the three part test for such restrictions outlined by the European Court.²⁹ In particular, the restriction must be “necessary in a democratic society” in the sense that it serves a pressing social need, the reasons given to justify it are relevant and sufficient and it is proportionate to the legitimate aim pursued.³⁰ In particular, States are obliged to ensure that the measures adopted to serve a legitimate aim are carefully designed do not go beyond what is necessary to achieve the objective.³¹

²⁸ Application Nos. 28851/95 and 28852/95, Decision of 16 January 1998.

²⁹ See *Lingens v. Austria*, 8 July 1986, 8 EHRR 103, para. 35.

³⁰ *Sunday Times v. United Kingdom*, 26 April 1979, 2 EHRR 245, para. 62. These standards have been reiterated in a large number of cases.

³¹ Significantly, in *Observer and Guardian v. United Kingdom*, 26 November 1991, 14 EHRR 153, the Court held that a UK ban on publication of material affecting national security was legitimate before the material had been published in the United States but ceased to be legitimate once the material was

Chilling Effect

Regardless of the test one seeks to apply, it is clear that in assessing privacy laws as restrictions on freedom of expression, courts cannot focus only on the narrow interests that are present in an individual case but must take into account the broader implications of their decision on freedom of expression. In particular, courts must look at whether a particular standard or approach which is being advocated might, if adopted, potentially deter the media from publishing information in the public interest in future. This is known as the ‘chilling effect’, something that courts around the world, including the European Court, have frequently adverted to. In particular, courts have noted that restrictions prevent not only harmful expression but also a penumbra around the prohibited zone as journalists and editors steer well clear of it to avoid even the possibility of legal sanction.

A key consequence of the ‘chilling effect’ is that it is better to tolerate some excesses in expression, even where they may cause some harm, than to limit publication in the public interest. This is clear from the following quotation from James Madison, cited by the US Supreme Court. It may be noted that this quotation dates from 1791, long before US courts elevated freedom of speech to the pre-eminent position it now occupies:

Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits.³²

The Public Interest

Courts have identified four different types of privacy interest worthy of protection: unreasonable intrusion upon the seclusion of another, appropriation of one’s name or likeness, publicity which places one in a false light and unreasonable publicity given to one’s private life.³³ Conflicts with freedom of expression have arisen most commonly in relation to appropriation of one’s name or likeness and unreasonable publicity given to private life. In these cases, the basic issue is whether publication can be justified in the public interest. Although no clear definition of public interest has emerged, the case law points to a number of relevant factors. To avoid a chilling effect, the public interest must be defined broadly so that journalists and editors are not forced to make excessively fine distinctions with the result that the flow of important information to the public is diminished.

The public interest is a notoriously vague phrase which is probably incapable of precise definition. I will not attempt to define public interest but I will note some factors that are relevant when assessing whether or not it is engaged. Perhaps most importantly, discussion of matters of public interest should not be restricted in the

effectively available in the UK.

³² *Near v. Minnesota*, 283 US 697 (1931), p. 718.

³³ See, *Lake v. Wal-Mart-Stores Inc.*, 30 July 1998, Minnesota Supreme Court, C7-97-263. See also, *Restatement (Second) of Torts*, § 652B-E (1977).

name of privacy interests. As has already been noted, this means that the public interest should be defined broadly. Indeed, it may be noted that in other areas which engage a freedom of expression interest, such as defences against claims of defamation, courts have interpreted the public interest very broadly.

Many cases in which privacy interests arise involve a public figure, and such cases usually engage the public interest. As was noted at the outset, public figures often play an important social role and this should be taken into account in determining whether the public interest is engaged. It is also important to allow a certain latitude to journalists and editors here. In several cases, the European Court has indicated that it will not second-guess journalists about matters that are central to their job, such as the most appropriate manner to present information to the public.³⁴ This is relevance to privacy, as well, as part of the job of editors is precisely to determine what material is of public interest.

Regarding appropriation of one's name or likeness, in a number of French cases, courts have held that everyone, including politicians, has an absolute right to his or her image.³⁵ In these cases, however, it would appear that the use of the images was purely commercial. In another case, where the images were used as part of a story about a famous photographer, thus arguably engaging the public interest, the court weighed the competing interests more carefully. In holding that pictures taken while the plaintiff was on a yacht violated a privacy interest, the Court noted that the boat was not on a port or near a beach, so that its occupants had a **reasonable expectation of privacy**.³⁶

A Canadian case, *Aubry v. Éditions Vice-Versa Inc.*,³⁷ involved a claim based on the right of an artist to publish photographs without the consent of the subject. In that case, the photograph was of a unknown 17-year old in a public place. The majority of the Supreme Court noted:

The public's right to information, supported by freedom of expression, places limits on the right to respect for one's private life in certain circumstances. This is because the **expectation of privacy** is reduced in certain cases. ... Only one question arises, namely the balancing of the rights at issue. It must, therefore, be decided whether the public's right to information can justify dissemination of a photograph taken without authorisation.³⁸ [emphasis added]

The Court noted a number of circumstances in which freedom of expression might prevail, including where the subject is a public figure or "whose professional success depends on public opinion", where a previously unknown individual is called upon to play a high-profile role and where the individual is accidentally or incidentally included in a photograph, for example as part of a crowd.³⁹ In the circumstances of the case, it would have been relatively simple for the photographer to have obtained the consent of the subject, perhaps by paying him, so the privacy interest prevailed.

³⁴ See, for example, *Jersild v. Denmark*, 23 September 1994, 19 EHRR 1, para. 31.

³⁵ See *Pompidou v. L'Express*, 4 April 1970, *Dorléac v. Sté Presse Office*, 14 May 1975 and *d'Estaing v. M. Ways*, 15 October 1976, all decided by the Paris Court of Appeal.

³⁶ *Schneider v. Sté Union Editions Modernes*, 5 June 1979, Paris Court of Appeal.

³⁷ *Op cit.*

³⁸ *Ibid.*, paras. 57 and 61.

³⁹ *Ibid.*, paras. 58-9.

The Court's reference to cases where "success depends on public opinion" bears further scrutiny. It is certainly the case that the success and marketability of many modern celebrities is largely dependent on their ability to remain in the public eye which, in turn, depends on their frequent portrayal in the media. A great deal of money and effort is spent trying to attract media interest, including by publicising events which are normally considered to be very private, such as weddings or the breakdown of relationships. This begs the question of whether such individuals, having opened up their private lives to public scrutiny in pursuit of fame and wealth, can simply decide to exclude the media whenever it suits them. The phrase, "he who lives by the sword shall die by the sword" is harsh, but perhaps not entirely inappropriate here.

In this regard, it is significant that in the Spencer case, noted above, the UK Press Complaints Committee held that Earl Spencer's past relationship with the press – namely of seizing every opportunity to put himself in the public eye and of selling private stories to the media – affected his right to privacy. This did not, however, mean the press were free to publicise private details regarding his wife.

The most contentious area of conflict between privacy and freedom of expression is almost certainly the scope of the prohibition on unreasonable publicity of one's private life, which to some extent comprises publicity which places one in a false light. The standard commonly applied in this context in the United States is whether the matter publicised is of a sort that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.⁴⁰

One issue which has frequently arisen before the courts is whether bans on publication of certain material raised in legal proceedings, particularly the identity of rape victims, breach the guarantee of freedom of expression. Another is the use of visual or auditory enhancement devices, which effectively allow for collection of information that would normally be unavailable without committing a trespass.

Two Canadian cases provide some insight into the permissible scope of court publication bans. In one case, the Supreme Court struck down a wide ban on publishing matters relating to marital cases.⁴¹ The Court quoted with approval from an earlier judgement:

Many times it has been urged that the 'privacy' of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. ... As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.⁴²

The Court went on to say that in modern society, the openness of court processes was effectively guaranteed by the media, so broadly to prevent publication was effectively to close the court to the public. While privacy was a "pressing and substantial" concern, such interests could be met by vesting a discretionary power in judges to

⁴⁰ *Lake v. Wal-Mart-Stores Inc.*, *op cit.* See also, Workman, *op cit.*, pp. 1079-80.

⁴¹ *Edmonton Journal v. Alberta (Attorney General)* [1989] 2 SCR 1326.

⁴² *Attorney General of Nova Scotia v. MacIntyre* [1982] 1 SCR 175, p. 185.

prevent publication of certain matters.

In assessing the nature of the privacy interest at stake, Wilson J. made an interesting point. The press are generally only interested in publishing details about individuals' private lives in two instances: where the individual is well-known or where the activities involved were somewhat abnormal, in the sense of immoral or aberrant. In other words, legal protection is not necessary to protect the privacy of the vast majority of people.

In *Canadian Newspapers Co. v. Canada (Attorney General)*, the Supreme Court upheld a provision that required a judge, upon request, to ban the publication of information that would identify the victim in sexual assault cases.⁴³ The provision did not leave the judge any discretion, unlike similar provisions in other jurisdictions. However, since the goal of the provision was to encourage reporting of sexual assault, and since victims would need to be sure in advance that their identity would not be publicised, the mandatory ban was justified. In addition, the ban did not prevent the media or members of the public from attending trial proceedings or from otherwise reporting on the trial. It is perhaps significant, however, that the privacy of the victim was not considered to be the objective of the provision; the aim was to "favour the suppression of crime and to improve the administration of justice."⁴⁴

The US Supreme Court has come to a different conclusion in two cases, albeit on very narrow grounds, and has protected the publication of the names of victims of sexual assault.⁴⁵ In both cases, although significant weight was attached to the privacy interest in question, the Court focused on the fact that the defendant had obtained the information legally from a public authority. In *Cox Broadcasting*, the defendant obtained the name of the victim by examining the indictments which were available for public inspection. In *The Florida Star*, the name of the victim was included in a police report which had been placed in the Sheriff's Department's pressroom. A crucial consideration for the Court was that the government could have safeguarded the information by not releasing it in the first place, a less drastic solution than punishing publication. This was particularly the case, given that the issue was generally a matter of public interest. In addition, the laws in question did not require that publication be highly offensive, a requirement normally associated with US privacy laws, as noted above.

In 1999, California passed so-called "anti-Paparazzi" legislation banning both physical and constructive invasion of privacy.⁴⁶ The latter extends the existing law by providing for a right of action in cases where visual or auditory enhancing devices are used to record personal or family activity that could not otherwise have been obtained without committing a trespass. Significantly, even the Council of Europe Parliamentary Assembly resolution on the Right to Privacy limits liability for the use of enhancement devices to situations where the information could not otherwise have

⁴³ [1988] 2 SCR 122.

⁴⁴ *Ibid.*, p. 130.

⁴⁵ *Cox Broadcasting Corp. v. Cohn*, 420 US 469 (1975), and *The Florida Star v. B.J.F.*, 491 US 524 (1989).

⁴⁶ California Civil Code, S. 1708.8, The Right to Privacy, 1 January 1999.

been obtained without committing a trespass.⁴⁷

The California law limits the scope of constructive invasion of privacy to situations where the attempt is offensive to a reasonable person and where the individual being recorded had a reasonable expectation of privacy. Investigations into illegal activities, whether undertaken by public or private bodies, including the media, are exempted. In addition, broadcasters and publishers are not liable for using actionable material unless they were involved in the breach.

Resolution (74) 26 of the Committee of Ministers of the Council of Europe also provides some guidance as to the factors to be taken into account in balancing privacy and freedom of expression interests. That resolution recommends effective remedies against the publication of material which interferes with a privacy interest unless consent has been given, publication is in the circumstances a generally accepted and legal practice or, significantly, publication is justified by an overriding legitimate public interest.

These cases, laws and resolutions suggest a number of factors to be taken into account when assessing the legitimacy of privacy laws which restrict freedom of expression. A recurring theme is that publication should generally be allowed where the material relates to a matter of legitimate public concern. Publication of material of significant social interest, for example relating to illegal activities, should be absolutely protected.

Another consideration is whether the individual in question had a reasonable expectation of privacy, based on location and other circumstances. Public figures should tolerate a greater degree of intrusion into their private lives than ordinary citizens. This is particularly apposite in relation to individuals whose professional success depends on public opinion, especially where they have willingly exposed themselves to media scrutiny of their private lives.

Special considerations apply to constructive invasion of privacy, using visual or auditory enhancement devices. Here, it seems to be accepted that a reasonable expectation of privacy extends to situations where the information could not otherwise have been obtained without committing a trespass. Otherwise, however, no special liability should flow from the use of such devices.

Privacy laws should prohibit only the publication of material that is offensive to a reasonable person. This ensures that restrictions on freedom of expression are based in general societal values rather than special sensitivities asserted by individuals. Significant in this regard are established journalistic standards or, to use the words of the Committee of Ministers, situations “where publication is in the circumstances a generally accepted practice”. It may be assumed that publication will rarely be offensive to a reasonable person where it can be shown to be an accepted professional practice.

The US rape victim decisions raise the question of State responsibility for invasions of

⁴⁷ *Op cit.*, Paragraph 14(vi).

privacy. Where a public authority has somehow been complicit in publication, for example by providing information that it could have kept secret, it seems unreasonable to impose liability on the media. In particular, effectively shifting responsibility to the media in such cases cannot be considered to be necessary in a democratic society.

The balancing of interests takes on a slightly different hue where reporting of court matters is involved. Here, the interest in securing open access to the courts may complement the privacy interest in prohibiting publication. On the other hand, the fundamental importance of openness of the courts is a countervailing consideration. While it seems reasonable to prohibit the publication of certain individuals' names, for example juveniles and victims of sexual assault, it is more difficult to justify broader publications bans, particularly where these relate to court processes or issues before the courts.

Remedies

The above reasoning should not be taken as an argument that individuals should not have a remedy in cases where their privacy has been infringed. This would be contrary to the practice and principles established in every country in Europe. However, the scope and nature of remedies are also limited by the guarantee of freedom of expression. In particular, authorities should only prescribe the least intrusive, effective remedy in any given situation.

Many countries provide for civil and even criminal sanctions for invasions of privacy. It is significant, however, that Princess Diana died in France, a country with some of the strongest privacy laws in the world. This implies that such laws may not be as effective as their proponents argue. It has been noted that the pictures that the paparazzi were taking that day could not be published in France and that standardisation of privacy laws would solve the problem. I suggest that this would be almost impossible in practice even within Europe, due to widely diverging views about the importance or otherwise of protecting privacy in this manner. One might in any case question the effectiveness of even pan-European privacy laws, given the global nature of the media business, and the easy availability of information across frontiers. In addition, it may be noted that civil law remedies are in practice often inaccessible, so they are not the panacea that some claim.

In certain countries, such as the United Kingdom, self-regulatory or professional mechanisms provide the primary remedy for an invasion of one's privacy in the media. I submit that these remedies are largely, albeit not entirely, effective in preventing the worst abuses by the media without unduly restricting freedom of expression, and that they should, therefore, be promoted.

Conclusion

Although privacy is often referred to as a human right, conflicts with freedom of expression are far more common in the context of privacy as the subject of statutory

protection. This is because as a human right, privacy relates primarily to State, not private, actions. The obligations human rights guarantees impose on States to protect individuals against possible invasions of their privacy by other individuals are very limited.

The need to balance these key interests arises most commonly where privacy laws restrict freedom of expression. Broadly speaking, the balance between privacy and freedom of expression depends on one's assessment of what the public interest demands. Some indication as to the content of this notoriously vague phrase can be gleaned from the jurisprudence. Factors to be taken into account include whether the subject matter is of legitimate public concern, whether the circumstances give rise to a reasonable expectation of privacy, whether publication would be offensive to a reasonable person and any role public authorities have played in the publication.

Constitutional and international guarantees require that restrictions on freedom of expression, even in the interests of privacy, must meet a high standard of legality and necessity. This implies, among other things, that States must use the least intrusive means available to protect privacy interests. Given the signal failure of strong criminal and civil privacy laws in France to protect Diana, Princess of Wales, one cannot help wondering whether ethical self-regulation is not a more appropriate way of addressing these concerns.