Privacy And 'Personality' In Irish And UK Law and the European Convention

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This is really an explosive subject. One can certainly start with easy questions. For instance, should it be private whether Professor Morgan wears a wig or not? Or can security officials bug suspected terrorists? Can a person who suspects that their spouse is having an affair retain a private detective to keep their partner under surveillance?

But once beyond these easy platitudes, one soon finds oneself in very deep waters and engaged with such questions as whether the State can impose its own ideas of proper behaviour, even on what an individual does in their own house. In short, one soon makes contact with such basic questions as: what should be the proper limits on the reach of the law or if you prefer, state power.

There are two major features which have made the law in this area very wide and unwieldy, more so than in any of the other particular human rights. The first feature is that no negative-positive demarcation line has been observed. Thus, beyond the wholly negative obligation of non-interference, that is not to spy or to control, other and positive obligations have been imposed. As is illustrated below, government authorities have been obliged to take positive steps to ensure that the right is effective, including certain rights over private persons.

Secondly, it has been remarked that:

'....private life extends beyond the narrow confines of the Anglo American idea of privacy, with its emphasis on the secrecy of personal information and seclusion. Indeed the ECHR has recognised that the guarantee afforded by Art. 8 is primarily intended to ensure the 'development without any outside interference, of the personality of each individual in his relations with other human beings[1].

(1) Harris, O'Boyle and Warbrick, Law of the European Convention (OUP (2009) 364)

The last few words of this quotation show how unlimited is the beast we are dealing with. For instance, the subjects of the present paper cover issues falling within the fields of: family and inheritance law, personal life and identity rights; adoption and paternity. But other subjects, put under the legal headline of privacy also cover: assisted reproduction, search and seizure, immigration law, prisoners' rights, the 'right to die' and even environmental protection. Many of these topics feature in the excellent papers given at this conference . To take a further example, I even noted recently that a proposed ban on alcohol in the State of Kerala in India(1) is being met by a court case claiming that such a ban amounts to an interference with a person's way of life and how they behave.

How did privacy get to be so wide? Now, privacy might have been limited narrowly to 'simple privacy' meaning that no one can: listen into to what someone is saying (electronically or otherwise); photograph someone who is unaware; or without permission read through a person's records. But privacy has long broken out from the 'simple privacy' position. The reason for this extension is that the argument has been accepted, though without much discussion, that usually, inspection or surveillance of the kind just mentioned, is not done for no reason; or out of academic interest. Rather it is done usually to gather information in order to lay the ground for some form of control over an individual's activities. This is quite a jump because it takes you from the idea that the state or possibly a private individual cannot spy to the notion that the state cannot control certain types of activity of an individual.

(1) Times of India (June 1 2014) P. 1

This jump is justified on the basis of such policies as: 'the police have no place in the bedrooms of citizens'; or 'an individual is entitled to some private space (or autonomy) in which to express their personality'. Within this space they should not be controlled provided that they are not harming anyone else. This extension is headlined in Article 8 of the ECHR by using instead of the word privacy the formula 'private and family life'. The extended concept of privacy, just explained, has been given, in US Constitutional Law, the title 'personality'. Its rationale has been well explained, in the UK Supreme Court, as follows(1):

'[apart from the inviolability of the home and personal communications there] is the inviolability of a different kind of space, the personal and psychological space within which each individual develops his or her own sense of self and relationships with other people. This is fundamentally what families are for and why democracies value family life so highly. Families are subversive. They nurture individuality and difference. One of the first things a totalitarian regime tries to do is to distance the young from the individuality of their own families and indoctrinate them in the dominant view.'

The reference in the proviso that no one else is harmed is of course hugely important and is sometimes expressed by saying that privacy only goes as far as the public interest will let it go. In most human rights instruments, for example the ECHR, Art 8 (2)(3)(2) has a fairly systematic and well known delineation of this qualification.

(1) R (Countryside Alliance) v AG [2007] 3 WLR, Para 116 (Lady Hale)

(2) This provision is as follows: "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….for the protection of health or morals or for the protection of the rights and freedoms of others."

This very radical policy extension to simple privacy means that the scope of what was anyway a rather wide concept was widened even further. In any case, the two substantive subjects, discussed here, come from what one can call the field of extended privacy, mainly from Irish law. They are: contraception ; and adoption-paternity (Parts 2 and 3 respectively).

Of particular practical importance in this area is: if there is change of law, how does it come about? It is suggested that there are three major sources. First, national legislation; and, second and third, national and international human rights instruments. As regards the last two of these sources, usually, the most important national human rights source is that country's written constitution. As to international instruments the most important source in Europe (and the two countries mainly dealt with here are the UK and Ireland) is the ECHR. However, it is of the nature of human rights, including privacy, that the communities interested in promoting them, have good communications and keep an eye on what is happening in other jurisdictions, not least, the jurisprudence of the ECHR. Accordingly, the ECHR's influence probably goes beyond the states that have ratified it.

In any particular case a certain amount is dependent on the wording of a particular instrument, however, in this area, the wording is usually so broad and imprecise that much more will depend on the policy attitude of the judge applying the instrument, at that particular point of legal development. In this general paper, the focus is on the policy attitude.

There is an intimate connection between legislation and human rights instruments, national or international, and the case-law made under them. I hope, as I go along, to illustrate the interaction between them.

PART 1 - CONTRACEPTION

At this point, we embark on a quick survey, of contraception, as the first of three significant areas in the broad family-social field.

As soon as it became possible to mass produce contraceptives (condoms), early in the early twentieth century, they were banned by law in most western states. But in almost every other state, apart from Ireland, this law was uprooted by legislation, in the late 1940s. By the 1960s, as smaller families became the norm in Ireland, this restriction was very unpopular. In some cases, it was possible to get around it by visiting the near-by UK and unlawfully (though no individual was ever prosecuted) importing packages of contraceptives. But some people, generally in poorer families, could not afford to do this.

Because of the rejection of contraception by the Catholic Church (the faith of the great majority of voters in Ireland), no Irish politician was prepared to touch the issue. It is true that a bill to change the law was brought forward in the Senate or Upper House by a member who was elected on a limited franchise by the graduates of the (Protestant) Trinity College Dublin. But the reaction of the Senate majority was to vote this proposal down at the legislative stage of the first reading. In other words the majority were preventing the measure from even being formally printed.

The matter was then taken to the courts. In McGee v Attorney General [1973] IR 357, a married woman, living in temporary accommodation whose health would have been affected if she had added to her already large family by another pregnancy, made a constitutional argument in the Supreme Court.

Mrs McGee's main successful argument was founded on Article 41 of the Irish Constitution. It is worth noting the substantial similarities between this provision, and its Kuwaiti equivalent, Article 9, both in its spirit and even in its wording. In each there is a reference to the family as (the cornerstone of society and the laws' obligation to protect motherhood and childhood). Given what, by the standards of both the Constitution and the law of privacy was quite a high level of precision in Art. 41, it was easy for the Supreme Court to deduce that the McGee couple ought to be allowed to purchase facilities to determine the size of their family.

This unexpected decision left a number of threads hanging which created later uncertainty. In the first place, there were five judgements. Some of the judges used the family provision just mentioned; but others relied upon the very open phrase 'personal rights' in a different provision (Art 40.3.2). Because of this, it was unclear if the right to access contraceptives was confined to all married couples or whether it extended to single people, or in the opposite direction some of the narrower judgements would have confined the right not just to married couples, but to those couples for whom pregnancy constituted a health risk to the wife.

These conditions lead on to the question of how was it to be settled that the conditions necessary for the right had been satisfied. Eventually, when, nearly 10 years later, a government did bring itself to legislate for this field, a license had to be issued by a doctor to permit the purchase of contraceptives. This is something to which we will return in Part 4.

There is another even more general point. At the start of part 1, it was stated that the subject of privacy is really a major question of public policy, namely how far can the state control private behavior? For, in the subject area talked about in this paper

there does not seem to be a definite state interest (such as public security, or a reduction in crime) which amounts to a positive reason for restricting privacy. Rather, the law in this area centers around the perceived need for the state to control private behavior simply in order to enforce the majority view of what was morally right. At the start of the decades, under scrutiny here, in Ireland and to a lesser degree in the UK, it was felt appropriate that the state should exercise quite far reaching intervention. Quite quickly, judicial, political, and public opinion on this important point of public policy, changed radically. The outcome was the legal changes summarized here. 'Privacy' provides a headline for these changes. But the changes were really the result of substantial changes of the ways in which people felt rather than a mere amendment of the law.

PART 2 - ADOPTION-PATERNITY

So far we have talked about situations in which individuals want to keep confidential and free of control by the Government and the law, some act of which there is official disapproval.

Secondly, one can also have the reverse situation. This is where it is the Government which wants confidentiality for its action and it is some individual who wants to know. This field of law takes one into areas such as freedom of Information and various exceptions to it such as government or cabinet confidentiality, executive privilege against disclosure, security bans against publication.

The third scenario is where an individual wants to keep a secret, but it is not the Government but another private individual, who for (we assume) good reasons wants to get at the information. The situation could arise where a company claims privacy

against its shareholders but I want to focus on the area of the family. An example would be in regard to the ownership of property, for instance which child was given most gifts (whether in life or as a bequest at death) by a parent. Or, to take another example if an aged parent is living with one child, a brother or sister might want to know whether the parent is being properly treated.

But the particular situations covered here are two which have generated a lot of interest in Western Europe and substantial case law before the ECHR. These are adoption and paternity.

First, adoption. An adopted child often wishes to know who is their natural (birth) mother or less often their father. They may even wish to meet her. But the natural mother may not wish her identity to be disclosed. The usual reason is that frequently the child will have been born to a mother who was not married to the child's father. She may have been unmarried or married to someone else. So even though the mother has not committed a crime, she fears that there will be some societal disapproval.

This throws up the most difficult type of decision, namely where the human rights of two different persons are in conflict. On the one hand, the adopted child claims that as part of their search for their identity, they need to know who are their parents. Questions of race, religion or even cases of hereditary illness may be engaged. On the other hand, there is the birth mother: she will contend that the child's search for his or her identity also trespasses upon a most intimate matter of her privacy. All this may be going on twenty or more years after the birth of the child who was adopted. By then, the mother may even have established a new family. The last thing the mother may want is some 'stranger' crashing in on her privacy, from the distant past.

In Odievre v France (2004) EHRR 871, the facts were rather simple. An adopted child, who had been abandoned at birth by her natural mother, had signed a declaration. By French law, this resulted in a permanent inability of the child to discover the identity of his biological mother. When the adopted child sought out his birth mother's identity, by a majority of 10 to 7, the Grand Chamber of the ECtHR ruled that access to this information fell within the scope of Art 8 of the European Convention, quoted earlier. In short, the mother won.

There is a point, which needs teasing out here. It takes us back to the extended version of privacy, explained in Part 1. To elaborate, the applicant adopted child was relying on his 'family' right, that is his right, as a matter of personal identity and development and the capacity to establish relationships with other people, to know, 'where he came from'; in other words, who were his natural mother, brother and sister.

Eventually, however, faced with this conflict of rights, the Court majority gave priority to the natural mother' interest in her (simple) privacy. They noted that this french law had been the subject of anxious debate in France and was designed, in part to protect the anonymity of young North African women, who, without it, would suffer the shame of having given birth to a child out of wedlock. Thus, the consequence of disclosure could, in general terms, be to increase the dangers of unskilled abortion or even suicide. In addition, the majority judges also relied on the idea of the 'margin of appreciation' which, as a matter of respect to a state, the ECtHR always allows to the laws of the state.

By contrast, the dissenting judges concluded that if a tradition of anonymous births is to be allowed there should, at least be an independent authority with the power to make an exception in

exceptional cases. And the French law permitted no such exception. To this view, I shall return.

The next two cases were easier. The first, Jaggi v Switzerland (2008) 47 EHRR 702, was a case on paternity. Paternity means an authoritative statement, often on the birth certificate, of who is the father of a child. As we shall see, this may be of interest to either the father or the child. It may arise in the context of, for instance, divorce, maintenance payments for the child or even inheritance rights. In Jaggi, the applicant was a 67 year old man, who had been seeking authorisation for a DNA test to be carried out on the remains of the person whom he claimed was his father. The legitimate family of the deceased opposed granting this authorisation on the ground that it would violate their privacy.

The ECHR ruled for the applicant on the basis that that the right to identity includes the right to know one's parents. Refusal of the Swiss authorities to permit this was a violation of the claimant's private life. The Court observed (at par. 40) that 'an individual's interest in discovering his parentage does not disappear with age, quite the reverse'. I respectfully doubt that; but it is what the Court said. In assessing the weight of the opposing argument, the Court ruled, as regards uncovering the father's remains, that the private life of a deceased person would not be affected by anything done after death. And also that the privacy of the deceased's surviving family or their feelings for his body were outweighed by the applicant's right.

Take next Schofman v Russia (2007) 44 ECHR 741. Here a child was born of whom the applicant believed he was the father. Two years later, it was established through DNA that this was not true. The applicant immediately began, in a Russian

Court, divorce proceedings against his wife and proceedings to contest the paternity of the child.

But the paternity action was dismissed because Russian law said that a one year time limit operated, starting from the date that the putative father was informed that he was the father. In short, the applicant was ruled by the Russian Court to be out of time.

The ECtHR found there had been a violation of respect for the private life of the applicant; in that the determination of whether the child was indeed his child, plainly concerned his private life. The major point of the case was that it was not necessary in a democratic society to establish an inflexible time limit, like that in Russian law. The Court accepted a legitimate aim in order to establish legal certainty in family relations. However, it ruled that it should be possible in exceptional circumstance to bring paternity proceedings after the time had expired.

A general comment may be offered here, which applies not only to the result in Schofman but also to the attitude of the dissenting judges; in Odievre. The general tide in many jurisdictions in favour of human rights, is going, where it applies, to require a good deal of modification of traditional laws. The reason is that there is a tension between human rights and such traditional legal values as certainty, and the need to have a time limit fixing limits to the time within which legal claims can be brought.

To go a back to Odievre; there the dissenting judges ruled that if there is to be a system of anonymous births, in a national law, there must also be an independent authority with the power to grant access in an exceptional case. Whatever its virtues in bringing in a more discriminating attitude to human rights, such a recommendation naturally involves some uncertainty.

Rather similarly, the outcome in Schofman, means that to be in accord with the case, future limitations law would need to include an exception. And the operation of this, in each case would involve some uncertainty.

This disadvantage is not necessarily a reason for not having human rights: for it may be considered that this is a price worth paying. However, if and when the human rights revolution fully hits Kuwait, there will need to be fresh thought in fields such as time limits, damages and proving facts: you will have noticed that in Jaggi, the evidence required a DNA test on a body buried many years before. This is not an everyday decision for a court.

My conclusion is that for the kind of modifications of law and procedure, which will be required, law graduates will be needed who both have a feel for human rights and are resourceful, technical lawyers. We need to have this in mind, as we do, when we go about the important task of educating our students.

PART 3: CONCLUDING COMMENTS

If I were giving this paper on its own and not as part of this comprehensive Conference, I should perhaps, try to draw from it, some lessons for Kuwait. However, since there are others herewith a much better knowledge of the Kuwaiti law and Constitution, not to mention Sharia law. Accordingly, it seems better to leave it to them to decide whether there is anything here which resonates in Kuwait. There is some element here of obedience to the ancient wisdom regarding fools rushing in, where angels fear to tread

Instead, let me offer a few reflections on the experience of rapid legal change, in other jurisdictions, which is outlined in the Paper. In the first place, it shows that it can be useful to have

favourable persons in positions of influence, at a critical time. These may be judges or politicians. In Ireland, it happened to be judges. Take, for example, the background to the Irish case of McGee, mentioned in Part 2. This was only part of a strong wave of law change, by way of judicial review. Part of the origin of this arose when a long-serving head of Government resigned and was replaced by a younger man, who wanted to bring in reforms in several areas.

One of his methods was to appoint directly (not via promotion from an intermediate court) to two vacancies on the (five member) Supreme Court, two young and radical judges. It happened that, complementing this, for the first time in Ireland, there were practicing, as advocates, a number of able, youngish barristers, who had studied law, in the USA, the home of judicial review. This group was prepared to bring forward review applications to strike down laws, which had never been considered before. And, in a healthy number of cases, which included McGee, they were successful.

Sometime later, I interviewed one of these two judges and he remarked: 'I don't think there was any doubt that the horse was chosen for the course.' In other words, the prime minister had seen the judiciary as one of the ways of bringing about change in the country.

But individuals in positions of authority are not enough to bring about change if the change is unwanted by a large number of the population. In other words, it seems axiomatic that, in a democracy, legal change should not get too far ahead of public opinion.

In this context, I want to refer back to the fact, mentioned in Part 2, that in 1970, a measure decriminalising contraceptives

was so unpopular that the Irish Senate refused it permission even to be printed. The name of the Senator who wanted to bring forward this Bill for debate was Mary Robinson. In 1990, she became the first Irish President, who was not a male, retired government minister. And one should stress that, although this is a non-executive Presidency, the holder is chosen at an election, at which all citizens had a vote. In other words, Mary Robinson had to be pretty popular to win. It seems reasonable to deduce from her victory that Irish public opinion had changed a lot in the 20 years since 1970. It is true that it could be said that this evidence came later than the law changes. But as against this, we know that different people have different rates of change and one can never know what is going on inside the mind.

The next point is to compare the two types of law-making in the field of privacy: constitutional judicial review, as against legislation. My starting point is that privacy is a very political field in that it draws on major value choices, requiring different heads of the public interest to be weighed against each other. In contrast, judges are supposed to be able to base their judgments not on their personal choice, but on established and precise legal principles. Where, as here, there are no such principles, then the decisions do not carry very much authority with public or politicians.

The short point is that, it is better, where possible, if the law of privacy, which requires huge value judgements, is made by the legislature.

But what if the legislature simply refuses to make a law or to revoke an out of date law, despite a definite social need? A rather good example of that was the situation in Ireland, during the period before the Supreme Court heard the McGee contraceptive case, outlined in Part 2. The old law was giving rise to substan-

tial difficulty, especially among poorer families. Yet the Senate refused even to allow the subject of reform even to be raised, by way of publishing Mary Robinson's bill. A judge who was involved in McGee accepted that this was dangerous ground for a court, but said to the present writer: 'what we did had to be done for the want of any better alternative.'

There is a second disadvantage to judicial law-making. Because the judgment of a court has to be directed to the particular person and case, which happens to come before it, the judgment is unlikely to be a complete statement of law. Thus, in the McGee contraceptive case, because the judgements probably only covered married couples and possibly also situations in which the wife was sick, it was considered to be necessary for the law to include some kind of a check, to ensure that contraceptives only reached those persons who were constitutionally entitled to them. In other words some kind of a licensing system was necessary.

But a court is not equipped to introduce a licensing system. The establishment of the licensing system, with its detail and comprehensiveness was naturally something which had to be left to the legislature. Eventually, after some years of delay and dither, the political organs did pick up the baton and bring before the legislature the necessary bill to set up a licensing system. But the conservative prime minister failed to support his own Government's bill. This, as can be expected, nearly brought down the Government.

Where one is dealing with Common Law courts there is a further difficulty. This is that even assenting judges will insist on giving separate, full judgements. The result of this is that sometimes one can never be entirely sure of the basis on which the judge-

ment was given. In other words, where (say) the right to privacy is concerned it is not entirely clear how complete or qualified this is.

On the other hand, sometimes, there is a positive link between various types of law-making. For instance, a court case, even if it fails to get a law struck down, will sometimes publicise the need for a law-change and so force the political organs to take some effective action.

So, to sum up, my simple proposition here is that privacy is a very complicated area of lawmaking. The bloc of law, which is misleadingly given the simple title, privacy really consists of several sub-fields, which are very different in character. In addition, each has its own neighbours. Thus for instance the piece of privacy under consideration here is a part of the bigger subject of family law. Other parts are best regarded as related to criminal law, property or commercial law. If one is contemplating a development of the law in one field of privacy it by no means follows that there will be an equivalent development in another field. In each case, the attitudes of governmental authorities, judges and the public have to be taken into account. These will usually differ from one field to another; from one country/culture; and from one historical period to another.

The short point is that different precedents or developments in one area will, quite likely not be true in another.

References:

- Harris, O'Boyle and Warbrick, Law of the European Convention (OUP (2009) 364)
- Times of India (June 1 2014) P. 1
- R (Countryside Alliance) v AG [2007] 3 WLR, Para 116 (Lady Hale)

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