

ACTA

Instituti Upsaliensis Iurisprudentiae Comparativae

VIII

RIGHT OF PRIVACY  
AND RIGHTS OF  
THE PERSONALITY

A COMPARATIVE SURVEY

Working paper prepared for the Nordic Conference on privacy  
organized by the International Commission of Jurists,  
Stockholm May 1967

BY

STIG STRÖMHOLM

STOCKHOLM

P. A. NORSTEDT & SÖNERS FÖRLAG



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Edidit ÅKE MALMSTRÖM

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Boktryckeri AB Thule, Stockholm 1967

## PREFACE

One of the author's most eminent teachers in private law in the Uppsala Faculty of Law once claimed that an action in tort ought to lie against those legal writers who take up a subject to treat it broadly enough to deter others from writing about it but not deeply enough to give any final answers to the questions discussed. Were the law so severe, the present author would undoubtedly have to face a lawsuit for venturing to publish this short study on a topic which demands lengthy and careful consideration on almost every point and which has already given rise to an extensive body of case law and of legal writing. This preface can be considered as the author's *plaidoyer* in that action, fortunately imaginary.

The present study was prepared at the request, and with the most active personal and material support, of the International Commission of Jurists as a working paper for the Nordic Conference of Jurists, organized by the Commission in Stockholm in May, 1967. The initiative of the Conference, the work of which was devoted to the law of privacy, was taken by the Secretary General of the Commission, Mr. Seán MacBride, and the author is happy to acknowledge his indebtedness to that eminent jurist not only for this initiative and for the support given by the Commission, but also for personal encouragement and many valuable suggestions. The author is also most grateful to Mr. V. M. Kabes, Executive Secretary of the Commission, for much help and kindness in connection with the preparation of the report.

The study was prepared in close collaboration with the legal staff of the Commission, headed by Mr. L. G. Weeramantry. Without the numerous suggestions given by Mr. Weeramantry and his colleagues, and the material they put at the author's disposal, this book would never have been written. The author wants to thank, in particular, Miss Hilary Cartwright, M. Daniel Marchand, M<sup>me</sup> A. J.

Pouyat, Dr. Toth and Mr. Dominick Devlin, all of the legal staff of the Commission, for their precious collaboration.

Many distinguished lawyers, who are members of the Commission, have provided important material and valuable suggestions. Mention should be made, here, of Mr. A. J. M. Van Dal, Professor K. Takayanagi, Mr. J. T. Nabuco, Mr. P. Trikamdas and Chief Justice T. Wold, to whom the author extends his thanks for interesting contributions. Thanks are also due to Judge G. Petrén, of the Swedish Section of the Commission, for his encouragement and collaboration. Material has been graciously communicated by several Swedish and other organizations and private persons; the author has to thank these contributors without naming them all.

The present study served as the basis of the discussion at the Nordic Conference of Jurists referred to above. The conclusions adopted on that occasion, and intended to lay down such principles in this field of the law as could and ought to be adopted throughout the world, are printed as *Appendix IV* to the study.

The interest shown by the eminent lawyers present at the Stockholm Conference, and the need for a comparative survey on privacy, are the author's defences for publishing this hasty and inevitably superficial sketch of a field of law which develops rapidly in a great number of countries.

The Swedish State Council for Social Research—*Statens råd för samhällsforskning*—has granted a generous support for the printing of this volume. Thanks are also due to Dean Åke Malmström, of the Uppsala Faculty of Law, who has kindly accepted to have the book printed as a number in his series *Acta Instituti Upsaliensis Iurisprudentiae Comparativae*.

A few technical remarks shall conclude the author's *plaidoyer*. As all comparative lawyers know, it is extremely difficult to keep up with the rapid publication of new editions of standard works if several countries and fields of law must be covered. The author has had to quote, in a number of cases, old editions of textbooks which have recently been reedited. Considering the heterogeneity of the case material presented in this volume—and the shortness with which cases are usually dealt with—the author has felt that the making of a table of cases would create greater difficulties than



would be justified by its usefulness. Instead, a fairly detailed alphabetical index has been added.

The author finally allows himself to hope that the present study will serve as a modest contribution to the protection of privacy in the spirit in which the International Commission of Jurists took the initiative of its preparation.

Uppsala, May 1967

STIG STRÖMHOLM



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## ABBREVIATIONS

A.	= Atlantic Reporter (U.S.A.)
BGB	= Bürgerliches Gesetzbuch (Germany)
BGHSt	= Entscheidungen des Bundesgerichtshofes in Strafsachen (Germany)
BGHZ	= Entscheidungen des Bundesgerichtshofes in Zivilsachen (Germany)
C.A.	= Court of Appeal (England)
C.civ.	= Code civil (France)
C.J.	= Chief Justice (U.S.A.)
C.&P.	= Carrington & Payne's Reports (England, 1823—1841)
Calif. L.R.	= California Law Review (U.S.A.)
Cass.civ.	= Cour de cassation, Chambre civile (France)
Cass.crim.	= Cour de cassation, Chambre criminelle (France)
Cass.req.	= Cour de cassation, Chambre des requêtes (France)
Ch.	= Chancery (England)
Ch.civ.	= Chambre civile (of the French Cour de cassation)
Ch.D.	= Chancery Division (England)
cmdnd.	= command paper (England)
D.	= Recueil périodique et critique Dalloz (before 1924) and Recueil Dalloz, parts "Jurisprudence" or "Législation" (after 1944; France)
D.A.	= Recueil analytique Dalloz (1941—1944)
D.C.	= Recueil critique Dalloz (1941—1944)
D.H.	= Recueil hebdomadaire Dalloz (1924—1940)
DM	= Deutsche Mark (Germany)
D.P.	= Recueil périodique Dalloz (1924—1940)
De G.&Sm.	= De Gex & Smale's Reports (England, 1846—1852)
Duke L.J.	= Duke Law Journal (U.S.A.)
e.g.	= <i>exempli gratia</i>
Eng.Rep.	= English Reports
et al.	= <i>et alii</i>
Ex.Div.	= Exchequer Division (England)
F.(2d)	= Federal Reporter (2d series; U.S.A.)
F.R.D.	= Federal Rules Decisions (U.S.A.)
F.Supp.	= Federal Supplement (U.S.A.)
GRUR	= Gewerblicher Rechtsschutz und Urheberrecht (Germany)

Gaz.Pal.	= Gazette du Palais (France)
H.C.	= House of Commons (England)
H.L.	= House of Lords (England)
Harv.L.R.	= Harvard Law Review (U.S.A.)
i.a.	= inter alia
I.C.L.Q.	= International and Comparative Law Quarterly (England)
Ir.	= Irish Reports (Ireland)
J.	= Justice (England, U.S.A.)
J.C.P.	= Juris-classeur périodique (part I, "Doctrine" and part II, "Jurisprudence"; France)
K.B.	= King's Bench (England)
L.J.	= Law Journal (England, U.S.A.)
L.Q.R.	= Law Quarterly Review (England)
loc.cit.	= loco citato
MDR	= Monatsschrift für Deutsches Recht (Germany)
Mer.	= Merivale's Reports (England, 1815—1817)
Montana L.R.	= Montana Law Review (U.S.A.)
NJW	= Neue Juristische Wochenschrift (Germany)
N.W.	= Northwestern Reporter (U.S.A.)
N.Y.S.	= New York Supplement (U.S.A.)
N.Y. Univ. L.R.	= New York University Law Review (U.S.A.)
op.cit.	= opus citatum
Ot.prp.	= Odelstingsproposisjon (Bill brought before the Norwegian Parliament)
P.C.	= Privy Council (England)
Pac.(P.)	= Pacific Reporter (U.S.A.)
Q.B.D.	= Queen's Bench Division (England)
RGZ	= Entscheidungen des Reichsgerichts in Zivilsachen (Germany)
R.T.D.C.	= Revue trimestrielle de droit civil (France)
S.	= Recueil Sirey (France)
S.Ct.	= United States Supreme Court Reporter (U.S.A.)
S.E.	= Southeastern Reporter (U.S.A.)
Somm.	= Sommaire (summary report in French reviews)
T.L.R.	= Times Law Reports (England)
Trib.(civ.)	= Tribunal (civil; France)
Tul.L.R.	= Tulane Law Review (U.S.A.)
UFITA	= Archiv für Urheber-, Film-, Funk- und Theaterrecht (Germany)
U.S.	= United States Supreme Court Reports (U.S.A.)
W.L.R.	= Weekly Law Reports (England)



## INTRODUCTION

1. The purpose of the present study is to provide a basis for discussion on a legal problem which may be briefly described as the question of how to define and protect a person's legitimate interest in being, as an American judge has put it, "let alone", *i.e.* in defending his private sphere of life against intrusions committed by public servants or private subjects—particularly against such intrusions as do not fall, because committed in subtler ways, within the well-established definitions of torts and offences against persons and property committed by means of physical violence—and in defending himself against the publication of facts pertaining to that sphere of life, including such elements as his name and likeness.

The problem now referred to is a relatively recent one; it emerged independently in certain countries towards the end of the 19th century; its importance has increased and its scope has been considerably enlarged in the course of the last few decades. One would do well, as an introductory delimitation of its *portée*, to cast a glance at the sociological, ideological and technical conditions which determine its existence and actual form.<sup>1</sup>

In the village and small-town community, characteristic of most parts of Europe and the United States a hundred or a hundred and fifty years ago, the delimitation between "private" and "public" was of secondary interest; in a world of well-known faces, there were certainly jealously kept family secrets, but neither was there such a thing as anonymity, nor did the semi-publicity of all those facts—now considered as strictly private—which belonged to a life largely led in common with servants, friends and neighbours extend beyond the town or the village. Where it was known and respected, the principle that a man's home is his castle was certainly conceived in the first place as a bulwark against physical violence, particularly

<sup>1</sup> An excellent study of the sociological background is given by E. Shils in *Law and Contemporary Problems* XXXI (1966), pp. 281 ff.



by the inefficient and therefore often brutal agents of the community, bailiffs, tax collectors, customs officers and local police. Anonymity and seclusion are results—and needs—of a civilization where it is normal to live in large cities, to work in large factories and offices, and to move frequently from one place to another.

This sociological revolution was largely determined, as it was accompanied, by the industrial revolution. One aspect of technical progress is of particular interest here: the rapid development of the means of obtaining, reproducing and spreading verbal and pictorial information. This development met with—where it did not artificially create—an increasing demand for “news”. Village and small-town life was largely self-contained also in respect of such news; there was, of course, a thin stream of information about distant political events, but local life produced a sufficient variety of interesting news items to keep the ordinary consumer of that commodity and even the gossip reasonably satisfied. The metropolitan citizen, dividing his life between office, flat, bus and an occasional seaside resort, could not get his full share of news without the newspaper and, in later years, without the radio and television.

The middle-class of the 19th and 20th century who were both beneficiaries and victims of metropolitan civilization, took over and developed the “my home is my castle” philosophy. As the gulf between “private” and “public” widened, the ideology according to which the private sphere is entitled to sanctity grew stronger. The legal protection of that sphere became a creed, which fitted well into the individualistic pattern of liberalism, the prevailing political attitude of the class and the time.

Modern development should be seen against this background. There are, however, so many opposite tendencies in the evolution of the last forty or fifty years that it seems impossible to attempt a synthesis. An impressionistic sketch of the principal trends will suffice.

The evolution of metropolitan civilization goes on uninterruptedly. The press, and more generally, “mass media”, have to adapt their style and the information they provide to the tastes of an increasingly broad public. That public seems to demand, on the one hand, full and detailed descriptions of extraordinary events of all

kinds, irrespective of the anonymity or notoriety of the persons concerned, and on the other hand continual and equally detailed information about the life and habits of a group of people, the composition of which defies any rational definition but which is kept together by the common feature of notoriety. If the first kind of information, which lifts suddenly and brutally the veil of anonymity and places unknown persons on the national or international stage, seems to satisfy the need for strong emotions and sensational revelations, the latter serves as vicarious day-dreaming. Crowned heads, film stars, prize-fighters and financiers are the knights and sorcerers of modern lore. In fact, it may be claimed that these favoured persons justify their exceptional and glorious existence by feeding the gossip columns of the popular press. Never being left in peace is their tribute to egalitarianism, they share their splendour with millions. On the other hand, there are two more serious facts which make it difficult to pass an outright verdict on both these kinds of information. Firstly, prevailing democratic ideologies stress the need for continuous debate on matters of public interest. Secondly, the complexity of modern society and the subtle interwovenness of facts and interests within its framework have led to the feeling that almost everything concerns everybody in one sense or another. Thus any unimportant event may touch upon matters in which the public may claim a legitimate interest. At the same time, the rigid Victorian concept of privacy and of the sacredness of seclusion—indeed, the complete silence which was imposed particularly in matters of sex—has given way to a more “open” approach. The “man in the street”, accustomed to spend increasingly long holidays and hours of leisure on crowded beaches or on organized travels, is not likely to understand the Victorian middle class idea of the sacredness of seclusion. And the importance of the “man in the street” cannot be minimised, for, whoever he may be, he possesses not only buying power, but also a political power which influences strongly the acting legislators.

The sociological revolution brought about by modern metropolitan civilization was not, at first, reflected in the field of law. The principles applicable to the protection of seclusion, privacy and, more generally, certain interests considered as “natural” rights of

the personality were very largely the results of 17th and 18th century legal thinking in the domain of public law<sup>2</sup>; they were intended to protect the individual against society. The rule of law permeating, in the course of the 19th century, all branches of the public services, the danger of unwarranted state interferences could at that time have been considered as small. The rise and growth of the “yellow press”—and to a lesser extent, of the younger members of the family of “mass media”—captured the attention of lawyers interested in the protection of privacy from the turn of the century onwards. However, recent experience has taught us that it is not only in dictatorial police States, where the time-honoured principles forbidding or limiting state intervention by use of physical violence are cast aside, that government and its agents—disposing of more power and more efficient means than ever—may encroach upon the sanctity of the private sphere. Modern technology makes the most subtle and ingenious methods of surveillance possible. Psychologically, the ground for various forms of state intervention in private life is prepared not only by the temporary concentration and extension of power granted to the executive during the two Great Wars and the economic crisis between them, but also, and more permanently, by the immense increase of state activity in all fields and by the growing acceptance of the idea of the supremacy of the community, considered as the omnipotent “big brother” looming over all individual interests. The permanent international tension strengthens the claims of States to keep an eye on almost any person or group who may be considered as a “safety risk”. It should be added, to do justice to States, that the resources of organized crime have also grown, thereby necessitating more efficient methods of fighting it. The “collectivisation” of important aspects of life goes hand in hand with the “nationalization” of other, equally important aspects.

“Commercialization” should be added as the third element of modern development, which implies serious dangers to the protection of human personality. Two aspects of the evolution of business should be mentioned here.

<sup>2</sup> *Vide* Nerson in *Travaux de l'Association Henri Capitant*, vol. XIII (1959—1960), pp. 64 f.

In the first place, the increasing concentration of economic power in a few enterprises with resources comparable to those of governments, and the harder climate in which these surviving giants struggle to maintain and, if possible, enlarge their share of the market tend to make the methods of competition at once more refined—since the public eye is watchful—and more ruthless. Here again, the progress of technology opens the possibility of highly developed surveillance and spying realized by methods which older legal rules may prove insufficient to keep in check. Among the pioneers in this doubtful course of progress, the popular press may once more be mentioned, although its principal victims are the cannon fodder of the gossip columns rather than business competitors. In the atmosphere of general distrust which is part of the modern business climate, employees are often considered—and surveyed—as “safety risks” as much as the supposed enemies of a State.

The other aspect of the evolution of business which is of particular interest for present purposes is the growth of advertising and its use of the name, likeness and, if possible, opinions of well-known or obscure persons in order to promote commercial interests. All these elements of individuality are commercialized to a very high degree. The result would seem to be a diminished respect for the sphere of privacy; like any goods, it is to be had for money.

These influences, tending to bring about what a Swiss jurist has called the “deprivatisation” (*Entprivatisierung*) of human life<sup>3</sup>, contrast singularly with a trend of development in modern law which a French lawyer once characterized as “*l'avènement de la personne au centre du droit contemporain*”<sup>4</sup>: a marked tendency to attach importance to human needs, interests and even feelings in those fields of law where man was often conceived, in the eyes of 19th century lawyers, as a mere peg to which were duly attached economic rights and duties, the sole objects worthy of legal attention. Modern labour law, and also such fields as torts, and the relations between landlord and tenant, insurer and insured, buyer and

<sup>3</sup> Professor Oftinger, quoted by Professor Nipperdey, in *Verhandlungen des 42. Deutschen Juristentages*, vol. II, p. D7.

<sup>4</sup> Professor Savatier, in *Les Métamorphoses économiques et sociales du droit civil d'aujourd'hui*, 3rd series, 2nd ed., 1959, p. 5.

seller, show distinctly the marks of this development towards legal humanitarianism, which may perhaps even deserve the wider and richer name of legal humanism. The only possible explanation of this phenomenon would seem to be a refinement of sensitivity which contrasts strangely with the other trends we have sketched.

The clash between the humanization of law on the one hand and the collectivisation, nationalization and commercialization of life on the other gives rise to the modern problem of privacy.

2. Although the conditions for the existence of the problem of privacy are undoubtedly present in most modern States—with considerable variations which are of interest not only to sociologists but also to lawyers<sup>5</sup>, the legal questions involved have not attracted the same attention in all countries. As will appear from this study, the problem has been most extensively discussed, and most frequently brought before the courts, in the U.S.A. and in Germany, followed—at some distance—by England and France. For this reason—apart from such obvious reasons for limiting the scope of this study as the practical difficulty in collecting and using material from the whole world—it seems justifiable to deal principally with the development of the law of “privacy” in these four countries. Scandinavian material has also been used, but references to other legal systems are relatively scarce. The author wishes to emphasize the unevenness of the material used in this study; interesting problems, suggestions and solutions may certainly be found elsewhere, but the material now submitted may at least suffice to serve as a basis for discussion.

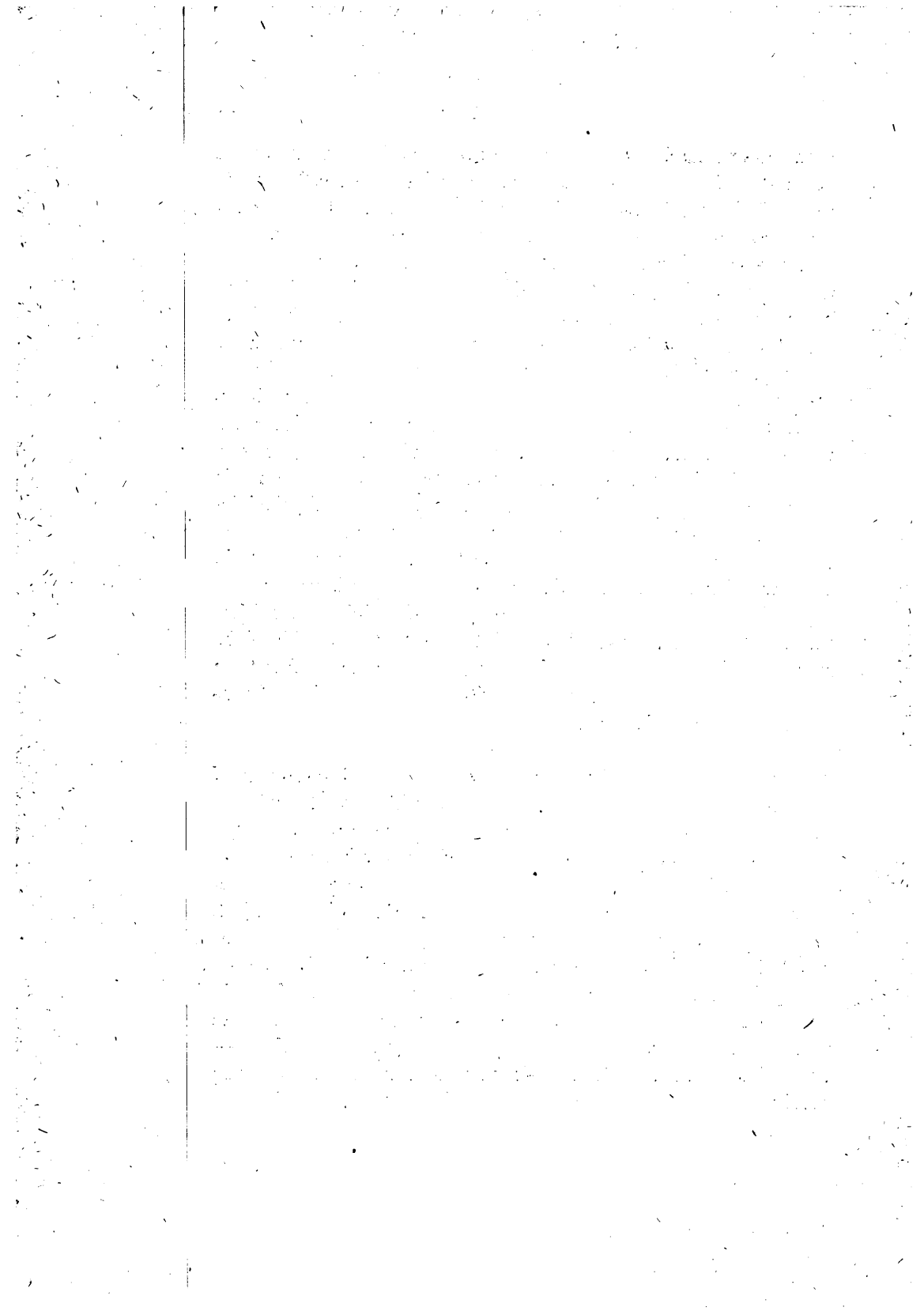
There is a further point of view from which the choice of material would seem to be justified for the purposes of a comparative survey. Although the *facts* giving rise to the legal problem of privacy are the same everywhere, there are notable differences in the *approach* and *techniques* of the Anglo-American, French and German lawyers who have set out to solve the problem. These differences, although many of them concern form rather than substance, have frequently resulted in different solutions. In a comparative study, it would certainly be unrealistic to argue, in a general way, for the adoption of the one or the other legal technique—for technical ap-

<sup>5</sup> Cp. L. Brittan, in *Tul. L. R.*, vol. XXXVII (1963), pp. 240 ff.

proaches and habits of thought are usually more deeply rooted in national legal systems than are substantive solutions—but the author would shirk his responsibility if he did not try to point out the advantages and disadvantages attending the different methods used to deal with the problems of privacy. In fact, there are cases where the adoption of a given technical approach may be criticized as based upon a doubtful analysis of the facts or the interests involved.

Although it would undoubtedly be appropriate to attempt, at the very beginning of this study, a definition of privacy fuller and more precise than the indications given above, it follows from the diversity of the national approaches that such a definition—which could not be formulated without a premature choice in favour of one particular legal system—cannot be submitted until we have made a survey of the origin and evolution of the relevant legal principles in the countries covered by the study. It should be stressed, therefore, that the use of the term “privacy”—practically inevitable in a paper written in English—does not mean that we have adopted, *a priori*, the Anglo-American way or ways of defining the subject under consideration. It should be pointed out that in the title of the study, we also speak about “Rights of the Personality”; that term refers to the Continental, in particular the German, method of analysing the problems facing us.

3. This survey can hardly claim to be more than a collection of material with commentaries on selected topics felt to be of particular interest. The law of privacy involves, in all the countries covered, a great deal of highly technical problems which it is impossible, and not very rewarding, to set out fully in a comparative survey. Moreover, even in what may be called the focal points of the subject, many important principles are either vague or still under discussion; it would be necessary to enter into lengthy descriptions of connected legal principles (e.g. in the field of copyright, or in that of tort in general) in order to lay the foundation for any contribution to these national discussions. Finally, the mass of legal writing on privacy—or “rights of the personality”—is very considerable and growing rapidly.



I.

THE GENERAL PROBLEMS  
OF THE RIGHT  
OF PRIVACY



## A. THE ORIGINS OF THE RIGHT OF PRIVACY AND OF THE CONCEPT OF "RIGHTS OF THE PERSONALITY"

4. In Anglo-American legal writing, the search for the origins of the notion of privacy as a legal institution causes little difficulty. In 1890, Samuel D. Warren, a Boston lawyer and business man, reacted against the publicity given by the "yellow press" of those days to the social life of his family. Married to the daughter of a Senator, and a wealthy man, he had given up his practice of law to run a family business. As a lawyer, he had had for partner one of the great American lawyers of his generation, Louis D. Brandeis. The two men in collaboration wrote an article which has been characterized as the most influential law review article ever published: "The Right to Privacy."<sup>6</sup>

The Warren and Brandeis article has been analysed extensively in American legal writing; it lends itself to more than one interpretation on important points.<sup>7</sup> For present purposes, however, it is sufficient to state that the authors, having stressed the need for a protection of private life against the excesses of the press and referred to a number of English and American decisions in which various acts which implied in fact intrusions into the sphere of private life had been held actionable on different grounds—violation of property, breach of confidence, etc.—concluded that these decisions were in reality, if not explicitly, based upon a general principle which it was now time to recognize: a right of privacy, which had the function of protecting "involute personality".<sup>8</sup> Warren and Brandeis did not set out in detail the contents and characteristics of that right, but the seed they had sown nevertheless proved extremely viable.

<sup>6</sup> *Harv. L. R.*, vol. 4 (1890), pp. 193 ff.

<sup>7</sup> *Vide* E. J. Bloustein in *N.Y. Univ. L.R.*, vol. 39 (1964), pp. 966 ff.

<sup>8</sup> Warren and Brandeis, *op. cit.*, p. 205.

Approving articles,<sup>9</sup> state legislation,<sup>10</sup> and a broadening stream of judicial decisions—the first fairly certain case being decided in 1905<sup>11</sup>—followed the suggestions of the two authors.

One of the cases quoted by Warren and Brandeis in support of the recognition of privacy in the common law was a well-known English decision of 1849, in which Vice-Chancellor Knight Bruce not only mentioned the portentous term “privacy” but also went as far as to claim “leave to doubt whether as to property of a private nature, which the owner, without infringing on the right of any other, may and does retain in a state of *privacy* (italics supplied), it is certain that a person, who, without the owner’s consent, express or implied, acquires a knowledge of it, can lawfully avail himself of the knowledge so acquired to publish without his consent a description of the property”.<sup>12</sup>

In spite of this and other judicial dicta to which we shall return in due course, it must be stated that in the law of England, one can neither point out, as in respect of American law, a precise moment or a given decision by which “privacy” comes into the world as a legal concept distinct from other interests protected by actions, nor claim that the notion of privacy has acquired to this day a position comparable to that which it actually holds in the courts of the United States. So far, “privacy” remains, in England, a theoretical concept adopted by writers under American influence.<sup>13</sup> This does not mean that there are not decisions, some of them very early, where problems relating to privacy are solved, in substance, very much in the same way as if a distinct action for “invasion of privacy” had existed; it only means that with regard to English law, no history of the birth and conscious elaboration of privacy as an element of positive law can be written.

<sup>9</sup> *Vide* W. L. Prosser in *Calif. L. R.*, vol. 48 (1960), p. 384, note 6.

<sup>10</sup> *Op. cit.*, pp. 385 ff.

<sup>11</sup> *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (1905).

<sup>12</sup> *Prince Albert v. Strange* (1849) 2 De G. & Sm. 652, at p. 689.

<sup>13</sup> For general surveys, *vide* Winfield in *L.Q.R.*, vol. 47 (1931), p. 23; Gutteridge and Walton in *L.Q.R.*, vol. 47 (1931), pp. 203 and 219; Brittan, *op. cit.*; Yang, in *I.C.L.Q.*, vol. 15 (1966), p. 175.

5. The same statement can be made, as a somewhat simplified general judgment, about *French* development. Since the early 19th century, French courts have applied art. 1382 *C.civ.*—which provides, in general terms, that anyone who inflicts an injury upon another is bound to redress the wrong—to sanction acts which involved invasions of privacy, in particular violations of the secrecy of confidential letters,<sup>14</sup> abuse of a person's name,<sup>15</sup> and unwarranted publication of a person's image.<sup>16</sup> However, the very existence of this sweeping provision, which made it possible for the courts to grant redress for most wrongs in the nature of invasions of privacy, was at the same time an obstacle to the elaboration of a coherent theory; for a long time, no such theory was necessary. When, at last, French writers approached the problem of privacy in more general terms, it was under German influence. The first impetus was given in a highly particular field of law, that of *copyright*, where the notion of *droit moral*, emerging in French legal writing in the last decades of the 19th century, had to be fitted into the legal system as a whole. This task was solved by means of the introduction of a concept which was by no means new, but which had earlier led an obscure existence in treatises on legal philosophy: that of *droits de la personnalité*.<sup>17</sup> If a precise date for the adoption of a

<sup>14</sup> *Vide* Trib. civ. de la Seine 8 August 1849 and Cour de Paris 10 December 1850, *D. 1851.2.1*.

<sup>15</sup> *Vide* already Cour de Paris 20 March 1826, *S. 1827.2.155*, *D. 1827.2.55*.

<sup>16</sup> Trib. de la Seine 16 June 1858, *D. 1858.3.62*.

<sup>17</sup> This is not the place for theoretical controversy, but it should be pointed out that when Dean Carbonnier states (*Droit civil*, 1st vol., 1957, No. 73, p. 235) that the notion of *droits de la personnalité* was imported from Germany into France through the intermediary of Swiss legal writing towards 1890 and finally acquired a safe place in Boistel's treatise *Philosophie du droit* (1899), this seems to be an oversimplification. Even if the discussion of similar problems in earlier French 19th century private law writing (concerning art. 1166 *C. civ.*) is not taken into account, there is at least one clear example of the adoption of the concept of *droits de la personnalité* in Bertauld, *Questions pratiques et doctrinales de Code Napoléon* (1st vol. 1867), and the importation of German ideas started, in the field of copyright and industrial property, with the writings of Morillot, early in the 1870's. For a more detailed account of the early French development, *vide* Strömholm, *Le droit moral de l'auteur* (Stockholm 1966 and 1967), vol. I, pp. 159 ff., 302 ff.

more elaborate theory giving a name and a place in the legal system to the protection of person's name, likeness and private sphere or life is of any use, it seems justified to choose the year 1909, when Perreau published an important study on the *droits de la personnalité*.<sup>18</sup> It should be stressed emphatically, however, that this date is picked out for the sake of convenience; the ideas put forward by Perreau had been "in the air" for a long time. In 1902, the *Cour de cassation* had characterized the right of an author to modify or suppress his work as a *faculté . . . inhérente à sa personnalité même*.<sup>19</sup>

As a general statement about the development of the *droits de la personnalité* in France, it may be submitted that for a long time the theoretical discussion of the problem, which did not become very intense until the second World War, and the evolution of case law, essentially based on art. 1382 *C.civ.* and a number of special statutes, pursued their course independently of each other. It is not until fairly recently that the efforts of legal writers seem to have exercised a more obvious influence on the courts.

6. If any European country can claim a position in the history of privacy as a legal concept, which is equal to that of the United States, it is undoubtedly *Germany*—or, more precisely, the German-speaking world, which includes, for present purposes, Austria and German-speaking Switzerland. It should be stressed, however, that it is only as champions of the *theoretical* concept of privacy that German lawyers can compete with their American colleagues; the practical realization of their theories was hardly achieved until the end of the second World War. It should be stated, moreover, that German development in this field, far from presenting the relative simplicity of the American evolution—where privacy was literally born with one law review article—is extremely complex, and that the sketch we are drawing of it here simplifies facts radically.<sup>20</sup>

<sup>18</sup> *R.T.D.C.* 1909, pp. 501 ff.

<sup>19</sup> Cass. civ. 25 June 1902, *D.* 1903.1.51; *S.* 1902.1.305.

<sup>20</sup> For a fuller survey, see Strömholm, *op. cit.*, vol. I, pp. 240 ff., 313 ff. and—for the earlier parts of the development—Leuze, *Die Entwicklung des Persönlichkeitsrechts im 19. Jahrhundert* (Schriften zum deutschen und europäischen Zivil-, Handels- und Prozessrecht, vol. 19, Bielefeld 1962).

Since the early 19th century, German private lawyers have admitted or at least discussed the existence of a category of rights known as *Persönlichkeitsrechte* or *Individualrechte*—a notion derived on the one hand from the 17th and 18th century legal philosophy proclaiming the “law of nature” as supreme source of legal principles, on the other hand from early 19th century German philosophy. Under this name were gathered—according to principles of selection and classification varying from one author to another—certain rights, recognized by positive law or postulated by writers, which had often little more in common than the name. Rights to a person’s honour and name were, however, frequently admitted. The “rights of the personality” fared badly at the hands of 19th century legal positivism, which frowned upon the idea of “natural rights”. Copyright remained a field where the concept managed to hold it own. The drafters of the *Bürgerliches Gesetzbuch* showed little interest in the “rights of personality”. Towards the end of the 19th century, however, several writers launched a vigorous attack in favour of the recognition of these rights—still vaguely defined—as an element of positive law. The first sign of this revival was an article published by Gareis in 1877;<sup>21</sup> he claims, *i.a.*, a right for the individual to organize his life as he likes, a right to a person’s name and to his honour; the other rights mentioned by Gareis belong to the fields of industrial and intellectual property. Another important champion of the “rights of the personality” was Otto von Gierke, who postulated rights to a person’s body and life, liberty, honour, social position, free activity, commercial sphere of activity, name and marks and finally intellectual property. All these separate rights, however, were only “emanations” of a “general right of the personality”, characterized by Gierke as a right to be recognized as a personality.<sup>22</sup> A third pioneer in this field of law was Joseph Kohler, to whose opinions we shall devote some more attention. Between them, Gareis, Gierke and Kohler, whose contributions to the development of the “rights of the personality” date from the period

<sup>21</sup> Gareis, “Das juristische Wesen der Autorrechte, sowie des Firmen- und Markenschutzes”, *Busch’s Archiv* (new series), vol. XXXV, 1877, pp. 185 ff.

<sup>22</sup> Gierke, *Deutsches Privatrecht*, vol. I, 1895 (Systematisches Handbuch der deutschen Rechtswissenschaft, ed. by Binding, part II.3.I), pp. 702 ff.

1877—1914, may claim in the evolution of German law the same position as Warren and Brandeis in U.S. law. Only, the German attack was launched over a far broader area, as would appear from our enumeration of the rights analysed by Gareis and Gierke; it was, moreover, at least intended to advance much deeper, for far from limiting their efforts to characterising a new action in tort, the German writers set out to define in detail the contents, characteristics and sanctions of a new category of complete and far-reaching rights; finally, the number of troops engaged in the attack was considerable, for the three writers mentioned in this study are picked out from a crowd. From the 1890's onwards, there is a considerable output of monographs on a person's right to his likeness, to his letters, to the protection of his sphere of privacy or intimacy against public disclosure, to his honour, to the undisturbed carrying on of business, even to the liberty of action and the liberty to work. From about the same time, the great textbooks on private law contain at least some points of view on the question.<sup>23</sup>

We shall have to return in greater detail to some characteristic features of the German development, which is difficult to understand and to assess properly without a reference to certain technical aspects.

Kohler, whose first contributions to the study of the "rights of personality" go back to about 1880,<sup>24</sup> proclaims, like Gierke, a "general right of the personality", which entitles every individual to claim recognition as such; "expressions" of this general right are various more limited rights, among them a right to a "sphere of intimacy", to the name and to the likeness of a person. In his great work on literary copyright, published in 1907, Kohler defines the "right of secrecy" as a protection against the publication of letters, even such as do not fulfil the conditions of originality required for copyright, but also against the disclosure of private facts in general through the use of living persons as recognizable models for works of fiction; moreover, the right of secrecy comprises a protection of a person's name and likeness. As is the case with most German studies

<sup>23</sup> Vide Strömholm, *op cit.*, pp. 323 ff. with the references.

<sup>24</sup> "Das Autorrecht", in *Iherings Jahrbücher*, XVIII, new series VI, also printed separately in 1880.

on the *Persönlichkeitsrecht* from this period, it is difficult to ascertain to what extent Kohler speaks, or purports to speak, of principles recognized in German positive law or exposes principles *de lege ferenda*. He had little or no statutory provisions or case law from his own country to refer to, but instead he freely used English and French decisions to support his views. Thus by a remarkable coincidence, the case of *Prince Albert v. Strange* (quoted above, at note 12), which played an important part in the Warren and Brandeis article, is referred to by Kohler as the "leading case" in the matter of protection of private documents against unwarranted publication.<sup>25</sup>

7. Although there may certainly have been interesting developments relating to the legal protection of a person's sphere of private life, name and likeness in other countries than those where we have now tried to trace the origins of the modern law of "privacy" or of "rights of the personality", it seems *a priori* unlikely that such developments should have taken place earlier than, or been entirely independent of, the discussion carried on in these important countries.<sup>26</sup> Nor is there any evidence, in available comparative studies on the topic, to the effect that technical approaches radically different from those illustrated by the Anglo-American, French and German discussion have been adopted elsewhere. The brief historical sketch above therefore seems sufficient for present purposes.

It is necessary to add, however, before we go on to give an out-

<sup>25</sup> Kohler, *Urheberrecht an Schriftwerken und Verlagsrecht*, 1907, p. 443.

<sup>26</sup> For a survey of early *Austrian* development in this field, *vide* Adler, "Die Persönlichkeitsrechte im allgemeinen bürgerlichen Gesetzbuch" in *Festschrift zur Jahrhundertfeier des allgemeinen bürgerlichen Gesetzbuches*, vol. 2, Vienna 1911, pp. 163 ff. *Swiss* law is of interest, because Swiss writers took an active part in the German discussion at the beginning of the 20th century (Giesker, *Das Recht des Privaten an der eigenen Geheimsphäre*, Zürich 1905, and Specker, *Die Persönlichkeitsrechte*, Aarau 1910), and particularly because Switzerland would seem to be the first European country to introduce a statutory provision intended to protect the personality in general (v. *Entscheidungen des schweizerischen Bundesgerichtes*, vol. 44, 320). For a general survey, *vide* Mellicher, *Das Verhältnis des Urheberrechts zu den Persönlichkeitsrechten*, Berne 1929, pp. 17 ff. For Scandinavia, *vide* Strömholm, *op. cit.*, vol. I, pp. 491 ff. with the references p. 492, note 44.

line of the further development of the rules concerned, that independently of the birth and evolution of “privacy” or “rights of the personality” as autonomous problems, dealing with the protection of a group of specific interests conceived as a unity or at least as closely related to each other, all those principles of constitutional, private, penal, procedural and administrative law which protect the individual’s freedom, bodily and mental integrity, and property—either directly and consciously, on the basis of the *Rechtsstaat* or Rule of Law ideology, or indirectly, as a consequence of rules pursuing other purposes—developed without interruption in the countries covered by the present study. What was new, in the writing and decisions referred to above, and what entitles us to speak of the “origins” of the law of privacy and its Continental counterparts, was in the first place *the synthesis of interests*—the vision, as it were, of a complete protection granted by essentially uniform rules of law to a set of non-pecuniary interests which had not until then been analysed as a unity—and secondly the recognition of these interests in the field of private law.

8. The further development of the law of privacy in the *United States* needs little comment. It has been described briefly yet exhaustively in a brilliant article by Dean Prosser,<sup>27</sup> from which the following quotation is taken (the notes are omitted):

“For the next thirty years (after 1905; the present author’s remark) there was a continued dispute as to whether the right of privacy existed at all, as the courts elected to follow the *Roberson* (where the right was denied; the present author’s remark) or the *Pavesich* (note 11 *supra*) case. Along in the thirties, with the benediction of the *Restatement of Torts*, the tide set in strongly in favour of recognition, and the rejecting decisions began to be overruled. At the present time the right of privacy, in one form or another, is declared to exist by the overwhelming majority of the American courts. It is recognized in Alabama, Alaska, Arizona, California, Connecticut, the District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, and West Virginia. It will in all probability be recognized in Delaware and Maryland, where a federal and a lower court have accepted it; and also in Arkansas,

<sup>27</sup> “Privacy”, in *Calif. L. R.*, vol. 48 (1960), pp. 383 ff.



Colorado, Massachusetts, Minnesota, and Washington, where the courts at least have refrained from holding that it does not exist, but the decisions have gone off on other grounds. It is recognized in a limited form by the New York statute (from 1903, prohibiting the unauthorized use of a person's name or likeness for the purposes of trade; the present author's remark), and by similar acts adopted in Oklahoma, Utah and Virginia.

At the time of writing the right of privacy stands rejected only by a 1909 decision in Rhode Island, and by more recent ones in Nebraska, Texas, and Wisconsin, which have said that any change in the old common law must be for the legislature, and which have not gone without criticism."<sup>28</sup>

Although this is merely a quantitative description of the American evolution, it seems sufficient in the present context. The contents of the right of privacy varies considerably in those American jurisdictions where it has been recognized; we shall return to the problem of classifying the cases so far decided. In the *Restatement of the Law of Torts* (1939), a general formula has been adopted (sec. 867): "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."

It should be added that if the bulk of American cases on privacy—of which some three or four hundred have been reported—deals with either physical intrusions, disclosure of private facts by means of press, films, radio or television, or with the unwarranted use of a person's name or likeness, the predominant preoccupation in recent years has been with intrusions committed by wire tapping and by means of various electronic and other monitoring devices. The use of such devices not only by business competitors, employers, and gossip journalists but also—and not least—by public servants hunting for evidence has caused considerable solicitude in later years. In some States, the legislature has intervened to prohibit or restrain the use of eavesdropping apparatus.<sup>29</sup>

As compared with the thorny path which the advocates of a right of "privacy" or of "the personality" have had to wander in Europe, at least until recently, the progress of American law in this field

<sup>28</sup> *Op. cit.*, pp. 386 ff.

<sup>29</sup> *Vide* G. L. Davis in *Montana L. R.*, vol. 27 (1966), pp. 173 ff. and *infra*, nos. 70—72.

seems enviable. It should be stressed, however, that—as Dean Prosser put it in 1960—“it is only in recent years, and largely through the legal writers, that there has been any attempt to inquire what interests are we protecting, and against what conduct”.<sup>30</sup> In 1956, an American judge went as far as to state that the law of privacy could be characterized as “a haystack in a hurricane”.<sup>31</sup>

9. It would be unfair to pretend that nothing decisive has happened in the field of privacy in *English* law. But since where there has been no birth, there can be no growth, the English development, so far, can be described as birth pangs. As far as the courts are concerned, it is enough to state that there is no decision where a right of privacy has been acknowledged and an action sustained merely on the ground that the defendant's conduct constituted an invasion of privacy. In *Tolley v. J. S. Fry & Sons, Ltd.*, a libel case from 1930 where a wellknown amateur golf-player had sued a chocolate manufacturer for using his likeness for advertising purposes, Greer, L. J., held that “the defendants in publishing the advertisement in question, without first obtaining Mr. Tolley's consent, acted in a manner inconsistent with the decencies of life, and in doing so they were guilty of an act for which there ought to be a legal remedy. But unless a man's photograph, caricature, or name be published in such a context that the publication can be said to be defamatory within the class of libel, it cannot be the subject-matter of complaint by action of law”.<sup>32</sup> Although the judgment was in fact reversed—on the ground that the publication amounted to libel—and although it has been contended that the opinion of Greer, L. J., was an *obiter dictum*,<sup>33</sup> no later decision has brought the matter any further.<sup>34</sup> It remains to be seen in the course of this study to what extent the recognized actions in tort—particularly actions for defamation, passing

<sup>30</sup> Prosser, *op. cit.*, p. 388.

<sup>31</sup> In *Ettore v. Philco Television Broadcasting Corp.*, 229 F. 2d 481 (at p. 485).

<sup>32</sup> (1930) 1 K.B. 467, at p. 478 (Court of Appeal).

<sup>33</sup> By Winfield in *L.Q.R.* vol. 47 (1931), p. 23.

<sup>34</sup> In *Sim v. Heinz Co. Ltd.* (1959) 1 W.L.R. 313, a case where the facts were similar to those in *Tolley v. Fry*, the court did not refuse to admit the libellous character of the representation, but refused to grant an interlocutory injunction.

off, nuisance and trespass—as well as other legal rules, *e.g.* in the field of contract and copyright, have been used to fill what seems to be felt as a serious gap in the common law. As late as 1948, however, the Committee on the Law of Defamation expressed its disapproval of any extension of the law of defamation so as to cover invasions of privacy.<sup>35</sup>

Those elements of the English evolution which would seem to merit some attention here are, on the one hand, a growing insight—expressed in law review articles and some textbooks<sup>36</sup>—of the desirability of a protection of the sphere of privacy as well as of such elements of personality as name and likeness, on the other hand legislative efforts, to which we shall return below.

10. The development of the protection of privacy and of such elements of personality as a man's name and likeness in *French* law is characterized, at first, by the steady growth of case law very much along the lines already traced in the 19th century, and by increased theoretical interest in questions relating to the “rights of the personality”.

For present purposes, it would seem sufficient to stress three features in the modern French development.

In the first place, the “rights of the personality”, which are the subject of some monographs, the most remarkable one being that of Professor Nerson—*Les Droits extrapatrimoniaux* (Lyon 1939)—eventually find a place in the great treatises on private law.<sup>37</sup> There is, however, little agreement on the delimitation of the concept. On one point, French writers generally agree: they recognize several distinct “rights of the personality”—among which the right to a person's name or likeness, earlier considered as proprietary

<sup>35</sup> *Report of the Committee on the Law of Defamation* (1948), p. 10.

<sup>36</sup> Winfield, *op. cit.*, and in *Torts* (7th ed., 1963), pp. 726 ff.; *The Reform of the Law*, ed. by Glanville Williams (1950), p. 76; Dennis Lloyd in (1952) *Current Legal Problems*, pp. 168 ff.; Salmond on *Torts* (13th ed., 1961), p. 21; Fleming, *Law of Torts* (2nd ed. 1961), p. 563. See also Neil in *M.L.R.*, vol. 25 (1962), pp. 393 ff., and Brittan, *op. cit.*

<sup>37</sup> Nerson in *Travaux de l'Association Henri Capitant*, vol. XIII (1959—1960), pp. 63 f. with the references. We shall return below to some of the textbook definitions.

rights, and a right to the secrecy of confidential letters, earlier interpreted as based upon an implied contract between writer and addressee, are frequently included—but reject the idea of a “general right of the personality”, which could be invoked to meet any attack upon what may be considered as specifically “personal” interests. Such a notion is too vague, according to the prevailing French opinion, to fulfil any useful purpose.<sup>38</sup> Upon the whole, there is considerable distrust, in French legal writing, against “*le verbiage*” easily indulged in when “rights” of the most varying descriptions are proclaimed in general terms.<sup>39</sup>

Secondly, if the notion of “rights of the personality” is used more frequently in modern decision concerning abuse of a person’s name or likeness or in respect of biographies disclosing private facts, the legal basis of liability nevertheless remains art. 1382 *Code civil*, which implies *i.a.*, that some kind of fault and of prejudice—both of which, however, require little proof—are necessary conditions for responsibility.<sup>40</sup>

It should be pointed out, in the third place, that although the French notion of *droits de la personnalité* is large enough to embrace all the problems referred to in Anglo-American legal writing under the heading of “privacy”, the centre of gravity of the French discussion lies on points which are less emphasized, or are not at all considered as elements of the law of privacy, in Anglo-American jurisdictions. Thus the protection of the human body, and questions concerning contracts relating to it, take an important place in French writing. On the other hand, the problem of eavesdropping by means of electronic or other technical devices plays a relatively minor part in France, although by no means unobserved by lawyers. This is a point where differences of sociological patterns between France and the U.S.A. are obvious.

11. The development of the “rights of the personality” in *German* law demands a more detailed examination, not only because it is

<sup>38</sup> Nerson, *op. cit.*, p. 84, and Amiaud in *Travaux de l'Association Henri Capitant*, vol. II (1946—1947), p. 297.

<sup>39</sup> Roubier, *Droits subjectifs et situations juridiques*, Paris 1963, pp. 47 ff.

<sup>40</sup> *Vide*, on this problem, Mr. Sarraute in *Gaz. Pal.* 1966. 1, Doctrine, pp. 11 ff., particularly p. 13.

complex but also because the German approach differs much more radically, in theory if not in results, from the Anglo-American than does any other system. From a comparative point of view, the German method of solving the problems of privacy may be considered as the most interesting alternative to the American solutions.<sup>41</sup>

While Gareis, Gierke, Kohler and their successors elaborated their theories on the "rights of the personality", the German Civil Code (*BGB*) was being prepared.<sup>42</sup> Of all the rights of a specifically personal character proclaimed by legal writers, only one was explicitly recognized in the Code: according to § 12 *BGB*, a person has a proprietary right to his name. But not only did the legislator refuse to adopt the idea of a "general right of the personality" or of distinct rights to certain interests of a personal character. He also deliberately created a system of tortious liability which made impossible the growth of a case law taking such interests into account. Under § 823 *BGB* the wilful or negligent infliction of injury to another person's "life, body, health, liberty, property or other rights" as well as the causing of damage prohibited by statutory provisions intended to protect other people's interests give rise to civil liability. Special provisions (§§ 824—826) enlarge the responsibility for statements of untrue facts which are likely to do harm to another's business or professional activity, for seduction, and for the malicious infliction of injury in an immoral manner.

Under § 253 *BGB*, however, an injury which is not of a pecuniary character cannot be compensated by pecuniary damages unless such recovery is specifically provided for. There are few such provisions;

<sup>41</sup> As far as the present writer knows, little has been done, by English and American as well as by French lawyers, towards a more detailed comparison between the elaborate German system and their own solutions, whereas there is a very complete comparative study in German (*Gutachten des Max-Planck-Instituts für ausländisches und internationales Privatrecht*, first published as Appendix 5 to a Government Bill on the Rights of the personality, *Deutscher Bundestag*, 3. Wahlperiode, Drucksache 1237). The comparative study by Guttridge in *L.Q.R.*, vol. 47 (1931), pp. 203 ff. has lost much of its interest; for an American comparative survey, *vide* Krause, "The Right to Privacy in Germany—Pointers for American Legislation", *Duke L. J.* 1965, p. 481.

<sup>42</sup> For a more detailed study of this development, *vide* Strömholm, *op. cit.*, vol. I, pp. 313—327, 465—475.

the only important one, for present purposes, is § 847, subsec. 1, which allows the judge to grant equitable damages for injuries to a person's bodily integrity, health and liberty.

In order to arrive, if not at an explicit recognition of the "rights of the personality", at least at an adequate protection under § 823 *BGB*, of such personal interests as *e.g.* the right to prevent the unauthorized disclosure of private facts, the German lawyers who were in favour of such protection had to establish, in the first place, that there was not merely a legitimate interest, but also a "right" which was entitled to protection. In the second place, it was necessary to overcome the obstacles created by § 253 *BGB* to the granting of compensation for invasions of privacy. On one point, several decisions of the *Reichsgericht* opened, at an early date, the possibility of at least some protection; it was recognized that an action for an *injunction* ordering the defendant to refrain from an attack upon a legitimate interest (*Unterlassungsklage*) could be instituted and sustained even if that interest was not the object of an explicitly recognized right.<sup>43</sup>

The Artistic Copyright Act, 1907, brought decisive progress in a limited field: a person's right to his likeness was recognized and defined in detail; we shall return below to the relevant provisions. The case law of the *Reichsgericht* further acknowledged, as "rights" in the technical sense, the interest in carrying on an established business without interference and in a person's honour. On other points, the courts refused to follow the writers; in particular, the *Reichsgericht* explicitly rejected the idea of an exclusive right to the publication of letters not protected by copyright, and in several decisions went out of its way to state that German positive law knew of no such thing as a "general right of the personality" from which such protection could be derived.<sup>44</sup>

Before 1945, one single decision by a court of appeal may be interpreted—not without straining the words of the court—as an adhesion to the idea of a "general right of the personality"; the

<sup>43</sup> *Vide* Smoschewer in *UFITA*, vol. 3 (1930), pp. 169 ff.

<sup>44</sup> The leading case, which concerned the letters of Friedrich Nietzsche, dates from 1908 (*RGZ* vol. 69, p. 401). The principles are reaffirmed in *RGZ* vol. 79, p. 397, and vol. 113, p. 413.

Court of Kiel, in a case concerning a play which represented, with names and details, a recently committed murder, gave an injunction in favour of the victim's children. *Obiter*, the Court stressed the necessity of an enlargement of protection for personal interests, but § 826 BGB, which is applicable even where the injured interest is not a "right", would seem to have provided a sufficient ground for the decision.<sup>45</sup> In spite of the resistance of the Supreme Court, legal writers continued, during the first half of the 20th century, to elaborate the notion of "a general right of the personality". It was particularly in the field of copyright—where the courts admitted, on the ground of certain laconic provisions in the applicable statutes of 1901 and 1907, a *droit moral* intended to protect the personal interests of authors—that these studies were undertaken. As an important example may be mentioned an article by Smoschewer published in 1930.<sup>46</sup>

The adoption of a new Constitution for Western Germany in 1949, which includes a comprehensive list of fundamental rights, e.g. "the free development of the personality" (art. 2, No. 1) brought a decisive change in the attitude of courts. It was generally claimed by legal writers—among which particular mention should be made of Professor Nipperdey and of Professor Hubmann, author of the leading work *Das Persönlichkeitsrecht* (1953)—that irrespective of the intentions and language of the drafters of the BGB, the recognition of a "general right of the personality" in public and private law was an inevitable consequence of the new Constitution.

In 1954, the *Bundesgerichtshof* makes the first step. In a case which concerned the publication, in mutilated form, of a letter from a banker's attorney to a newspaper where the banker had been attacked, the Court states that the "general right of the personality", as recognized by the Constitution, is an "absolute right" in the sense of § 823 BGB.<sup>47</sup> Several decisions follow, in which the provisions on the right to a person's name and likeness are completed, and a

<sup>45</sup> *Oberlandesgericht Kiel* 9 July 1929, *UFITA*, vol. 2 (1929), p. 559.

<sup>46</sup> Smoschewer, "Das Persönlichkeitsrecht im allgemeinen und im Urheberrecht", *UFITA*, vol. 3 (1930), pp. 119 ff., 229 ff., 349 ff.

<sup>47</sup> *Bundesgerichtshof* 25 May 1954, *BGHZ* vol. 13, 334; *GRUR* 1955, p. 197; *NJW* 1954, p. 1404; *UFITA*, vol. 18 (1954), p. 370, *Vide* no. 136 below.

right of privacy in a wide sense—protecting *inter alia* against the disclosure of private facts and the unauthorized recording of private conversations—is recognized.

In 1958, the *Bundesgerichtshof* takes the next decisive step. In an action introduced by a respectable businessman, who had been photographed on horseback and who subsequently found his likeness used in the advertising of a manufacturer of doubtful pharmaceuticals, the Court awarded substantial damages (DM 10,000). The conduct of the defendants was held to be an attack upon the plaintiff's liberty of decision; thus § 847 *BGB* could be invoked, at least by analogy.<sup>48</sup> This somewhat strained ratio was later abandoned, and the Court—followed by most lower courts and the vast majority of legal writers—openly adopted the principle that damages can be awarded at least for serious encroachments upon the “general right of the personality” (*vide* no. 102 *infra*).

It should be stressed that the most notable particularity of the prevailing German theory, according to which each individual has an exclusive right, the object of which is his own personality—that concept taken in a very broad sense—is due, historically, to the technical necessities created by § 823 *BGB*, where the domain of civil liability is limited to attacks upon distinct *rights*. As will appear below, this technical construction and the frequent affirmation of the “absolute” character of the “general right of the personality” do not imply that the protection granted to that right is unlimited and independent of opposing interests.

12. It is impossible to attempt here a description of the origins and development in other countries of legal rules or legal theories intended to protect, or at least capable of protecting, the specifically personal interests which are the object of the Anglo-American “right of privacy” and the French and German “rights of the personality”. It is sufficient to state that such rules have been developed from various origins in many countries. In addition to the examples given here, we shall mention a number of constitutional and statutory provisions in nos. 34—50 below.

<sup>48</sup> *Bundesgerichtshof* 14 February 1958, *BGHZ* 26, 349; *NJW* 1958, p. 827 with note by Professor Larenz; *GRUR* 1958, p. 408 with note by Professor Bussmann; *UFITA*, vol. 25 (1958), p. 452.



In *Roman-Dutch* law, e.g., the Roman *actio iniuriarum*, which was frequently invoked in German legal writing before the adoption of the BGB, has served that purpose.<sup>49</sup> In those countries where the influence of French law and legal theory has traditionally prevailed and where civil codes have been introduced or revised in the course of the last decades, special provisions deal with at least some aspects of privacy; the usual technique in these codes is to recognize certain "rights of the personality"; that notion frequently embraces also questions outside our actual sphere of interest.<sup>50</sup> However, the term is not used in the *Italian* Civil Code, where rights to a person's name (art. 6, 7 and 8), to pseudonyms (art. 9) and to a person's likeness (art. 10) are explicitly recognized.

Particular mention should be made of *Swiss* law. As already pointed out (note 26 *supra*), Swiss lawyers contributed to the German discussion on the "rights of the personality" at the beginning of the present century. More successful than their German colleagues, the advocates of the recognition of a "general right of the personality" managed to convince the legislator of the utility of a provision affirming that right. §§ 26—30 of the Civil Code of 1907 deal with the "protection of the personality"; § 28 contains the provision:

"Wer in seinen persönlichen Verhältnissen unbefugterweise verletzt wird, kann auf Beseitigung der Störung klagen."

As in the *BGB*, damages can be granted only in the cases specifically provided for. A proprietary right to a person's name is recognized in § 29. These rules, although cautiously applied by the courts, have given rise to case law protecting certain interests of the kind which are studied, in Anglo-American law, under the heading of "privacy".<sup>51</sup>

<sup>49</sup> Vide Professor Stoll in *Verhandlungen des 45. deutschen Juristentages 1964*, vol. I: 1, p. 55 with references.

<sup>50</sup> Vide the report of Professor De Castro in *Travaux de l'Association Henri Capitant*, vol. XIII (1959—1960), pp. 50 f.

<sup>51</sup> Vide Professor Grossen in *Schweizerischer Juristenverein, Referate und Mitteilungen*, fasc. 1, 1960, pp. 3 a ff., and Professor Jäggi, *ibid.*, fasc. 2, pp. 138 a ff., 174 a ff. Cf. also the German Government Bill of 1959 (note 41 *supra*), pp. 70 ff.

The *Greek Civil Code* of 1946 affirms, in similar terms, a “general right of the personality”:

“Celui qui, d’une manière illicite, est atteint dans sa personnalité, a le droit d’exiger la suppression de l’atteinte et, en outre, l’abstention de toute atteinte à l’avenir.” (Art. 57)

Violations of this right also give rise to a claim for damages under the provisions applicable to torts in general and under a special provision on *préjudice moral* (art. 59). There is a further enactment (art. 58) on a person’s right to his name.

In *Scandinavia*, where the notion of “rights of the personality” never gained much ground, the protection of privacy outside the spheres of constitutional, administrative, penal and procedural law did not attract much attention until recently. It seems justifiable to state that the first writer to put the question in a comprehensive way was the Norwegian Professor Knoph who, in a famous treatise on intellectual property, published in 1936, argued for an enlarged protection of certain personal interests, particularly of a person’s name and likeness.<sup>52</sup> It was also in Norway that a court first decided (in 1952) a typical privacy case in this sense: a man who had participated in the commission of a murder, served his sentence, and thereafter led a blameless life, obtained an injunction from the Norwegian Supreme Court against the showing of a film on his crime.<sup>53</sup> The case gave rise to lengthy debates. Finally, Norway adopted certain provisions in her Criminal Code which are intended to protect privacy.<sup>54</sup> In 1966, at a meeting of Scandinavian lawyers, the problem of privacy and mass-media was extensively discussed, and these questions have also attracted the attention of the Nordic Council. Generally speaking, however, neither courts nor writers have so far given much attention to questions of privacy.

Certain rights falling within the Anglo-American concept of privacy are expressly guaranteed in the civil and, more frequently, the constitutional and penal legislation of the *Communist States*.

<sup>52</sup> Knoph, *Andsretten*, 1936, pp. 576 ff.

<sup>53</sup> *Norsk Rettstidende* 1952, p. 1217. *Vide* no. 141 *infra*.

<sup>54</sup> *Vide* nos. 68, 70, 72, 77 *infra*.

Mention should be made, here, of the Civil Code of *Hungary* (1959), where the protection of a person's name and honour is provided for in art. 82, as an element of the "rights pertaining to persons in their capacity as such", and where violation of the secrecy of correspondence and the privacy of the home as well as abuses of a person's likeness and recorded voice are also considered as encroachments upon these rights. The *Polish* Civil Code of 1964, likewise, refers to the notion of *biens inhérents à la personnalité humaine*; among which are counted name and pseudonym, likeness, secrecy of correspondence and inviolability of domicile (art. 23). We shall return somewhat more fully to the Communist States below (nos. 43—50); we are unable to attempt any *historical* analysis of the growth of privacy in these countries.

13. The rapid sketch given above of the origin, growth and present state of those legal principles which deal with the protection of the right to be "let alone" and to prevent the public use of such elements of individuality as a person's name or likeness would seem to offer a sufficient basis for a more detailed discussion of the legal problems involved.

It seems clear, on the one hand, that there is a considerable difference between the approach which consists in analysing and protecting privacy in a strict sense and that which purports to provide a protection for human personality in general and which envisages the right to be "let alone" as one element of the far wider concept of "rights of the personality". This difference is more important than the technical differences between a protection analysed in terms of "absolute rights" and a system based on actions in tort.

On the other hand, although the notion of "rights of the personality" is not only much wider but also more vague than the concept of "privacy", the actual conflicts covered by the two terms coincide very largely, at least as far as private law is concerned. In both cases it is justifiable to state that the two notions are used—have indeed been invented—to meet a number of specific demands for protection. Both constitute, as it were, modernized and enlarged translations into the language of private (and to some extent penal) law of principles already familiar to that of public law. A comparison

between German case law in the field of “rights of the personality” and American decisions reported under the heading of “privacy” reveals astonishing coincidences, both with regard to the questions and in respect of the answers.

It may be concluded that the problems of “privacy” and of “rights of the personality” have a common core which is sufficient to make a more detailed comparative survey possible and meaningful.

## B. ATTEMPTS TO DEFINE THE NOTION OF PRIVACY AND TO CLASSIFY ITS DIFFERENT ELEMENTS

### 1. Common Law Countries

14. The facts which prompted Warren and Brandeis to write their famous article on the right of privacy were the prying and gossip of the “yellow press”, and the purpose of the article was to find remedies against such conduct. To achieve this, the two authors had, in the first place, to find a synthetic formula, under which could be gathered a number of seemingly disparate decisions and principles. It was not, and could not be, their business to analyse the different elements of the tort they tried to establish. And, in spite of several subsequent attempts by legal writers to define the concept of privacy, and to classify its elements,<sup>55</sup> the growth of American law in this field went on unhampered by theoretical definitions and classifications. Where courts felt the need to invoke statutory provisions in support of decisions in the field of privacy, they frequently fell back upon the vague and general terms of Constitutions (cf. no. 43 below). As an example, mention can be made of the leading case of *Melvin v. Reid*,<sup>56</sup> to which we shall return frequently below. Here, the right of “pursuing and obtaining happiness”, recognized by the Californian constitution, served as the ground, or at least an element of the ground, of the decision.

Nor did Warren and Brandeis and the American courts adopting the notion of privacy define the nature of the interest protected by the new action. Mr. Bloustein, in a recent article, argues that pre-occupations of human dignity were foremost in their minds.<sup>57</sup> Although the learned writer produces convincing arguments in sup-

<sup>55</sup> *Vide* Yang in *I.C.L.Q.*, vol. 15 (1966), p. 177, note 9, and Bloustein in *N.Y. Univ. L.R.*, vol. 39 (1964), p. 262, note 4.

<sup>56</sup> 297 Pac. 91, 1931.

<sup>57</sup> *Vide* note 55 *supra*.

port of his opinion, it must be granted that the very generality of the notion of human dignity makes it little helpful for practical purposes.

15. The most successful attempt to analyse the American concept of privacy is certainly that of Dean Prosser,<sup>58</sup> whose analysis already seems to have been widely adopted by courts and writers.<sup>59</sup> According to Dean Prosser the law of privacy really embraces “four different kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common” apart from the fact that they interfere with the right to be “let alone”.<sup>60</sup> These four different torts are:

- “1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.”

The learned Dean sets out to range the mass of American privacy cases within these four categories and to analyse on the one hand the relations between the four branches of privacy and the earlier common law actions in tort, on the other hand the principles particular to each of the four branches. Thus the intrusion cases, which afford protection only for the private sphere and only against “prying or intrusion”, are characterized as instruments for filling “the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights”. The protected interest, according to Dean Prosser, is primarily a mental one.<sup>61</sup> The “public disclosure” branch,

<sup>58</sup> *Calif. L.R.*, vol. 48 (1960), pp. 383 ff.

<sup>59</sup> *Vide* Bloustein, *op. cit.*, pp. 963 f. with the references, notes 9—11, and Yang, *op. cit.*, p. 177.

<sup>60</sup> Prosser, *op. cit.*, p. 389.

<sup>61</sup> *Op. cit.*, p. 392.

it is held, protects the plaintiff's reputation, and constitutes an extension of the established torts of libel and slander.<sup>62</sup> The conditions which must be fulfilled for a successful action under this branch of privacy are the private character of the facts disclosed, the publicity of the revelation, and the offensiveness—from the reasonable and not over-sensitive man's point of view—of the disclosure.

The "false light" cases, involving abuse of a man's name or likeness, also protect reputation, and come close to the old defamation torts. They differ from the disclosure cases in that what is made public is false.<sup>63</sup> "Appropriation", finally, implies the use of a person's identity—generally symbolized by his name or likeness—for the defendant's personal or pecuniary advantage. The protected interest is chiefly a proprietary one, and the right has, whether it is classified as "property" or not, a value, since the plaintiff can sell licences.<sup>64</sup>

16. We shall not attempt here to give a critical analysis of Dean Prosser's definition of privacy and its different elements. In American legal writing, the splitting up of the tort introduced by Warren and Brandeis has been criticized particularly by Mr. Bloustein (*op. cit.*), who tries to demonstrate the fundamental unity of privacy, chiefly by stressing that the safeguarding of human dignity is at the root of all four branches and by pointing out the presence of this idea in the decisions used by Dean Prosser to illustrate his theses.

Without choosing sides in this discussion, the present writer submits that the real issue is less one of definition and classification than one of policy, and that the two writers referred to are largely operating on *different levels of abstraction*. As an analysis of American law as it actually stands, Dean Prosser's reasoning seems indeed convincing, although the learned writer may omit to discuss such elements of judicial reasoning as, in an analysis realised on a higher level of abstraction, emphasize the unity of the four branches of privacy. From the policy point of view, the obvious risk created by definitions—and particularly by definitions made by eminent and

<sup>62</sup> *Op. cit.*, p. 398.

<sup>63</sup> *Op. cit.*, p. 400.

<sup>64</sup> *Op. cit.*, p. 406.

influential writers—is that they close, as it were, the field of privacy to new and unforeseeable developments, which might be more easily admitted if the more general “human dignity” formula is stressed as the common element of privacy.

It is natural and, it is submitted, necessary that at a given point of a growth as rapid and as luxuriant as that of the American law of privacy, some analytical gardening is resorted to. The question is, however, whether the gardener shall confine himself to survey or use his knife. Shall privacy continue to grow, in the shelter of a general formula, or shall a more incisive analysis of its details lead to a stop, at least temporarily, so that lawyers have time to consider its implications, classify it and “give to airy nothing, a local habitation and a name”?

The dilemma illustrated by the American discussion now referred to is strikingly similar to that facing German lawyers in the field of the “general right of the personality”. It is submitted that this is one of the most fundamental problems to be considered by any lawyer trying to reach the best solution in this branch of law: is it better to lay down principles wide enough to meet any future need, or shall one put trust enough in one’s imagination—and in the possibility of future reforms, if need be—to formulate rules more detailed and, consequently, more consistent with legal security?

17. It follows from what has been said above about the *English* development that there is small room for such analysis as Dean Prosser’s, since there is little to analyse. *De lege lata*, the task is, rather, to adopt any rational definition of the notion of privacy, or of the interest or interests worthy of protection, and subsequently to examine to what extent, and in what cases, the well-established common law actions in tort provide such protection. It is natural that the American experience is used for the definition. The course of action thus described seems in fact to have been adopted by recent writers on the subject.<sup>65</sup> Textbooks—where privacy does not take a large place, for obvious reasons—usually do without more precise definitions. In the 7th edition of Winfield on *Tort*,<sup>66</sup> a distinction

<sup>65</sup> Mr. Brittan, *op. cit.*, particularly pp. 256 ff.; Mr. Yang, *op. cit.*, pp. 177 ff.

<sup>66</sup> 1963, pp. 726 ff.



is made between "privacy of property" and "personal privacy"; in Salmond,<sup>67</sup> Dean Prosser's classification is used. It is also possible to analyse English case law (in the fields of defamation, passing off, copyright, trespass, breach of contract and nuisance and in the light of the principles relating to contempt of court) in terms of German theories and experience, although the technical difficulties opposed to such a comparison are obviously greater. A remarkable study of this kind is found in the German Government Bill of 1959 (see note 41 above).

The solutions proposed in England *de lege ferenda* will be discussed below (no. 112).

## 2. France

18. Lack of material is not the primary difficulty in studying the definitions and classifications of the "rights of the personality" in French legal writing. What makes the task difficult is rather the lack of uniformity in theoretical definitions. Moreover, theoretical analysis has more often than not been but loosely connected with judicial experience. As already pointed out, the ever-ready art. 1382 *Code civil* has usually been sufficient for the courts and, where judicial dicta occasionally seem to be influenced by academic writing, it is very difficult to assess with any precision the real impact of theoretical considerations. Finally, it is characteristic of most French theories in this field that the notion of *droits de la personnalité* is far wider than that of privacy, and that the civil rights guaranteed by constitutional and other public are often involved and sometimes not clearly distinguished from the rights of the personality as elements of private law.

In the light of these facts, it seems justifiable to pick out a few representative definitions and classifications from important French textbooks and articles.

Perreau's famous article of 1909 contains a fairly comprehensive definition of the *droits de la personnalité*.<sup>68</sup> These are, in the first

<sup>67</sup> *The Law of Torts*, 14th ed., 1965, § 5 (1), pp. 22 ff.

<sup>68</sup> *R.T.D.C.* 1909, pp. 501—536.

place, rights of the person as such, comprising the right to be recognized as a distinct individual—expressed, in positive law, by a person's exclusive right to his name and the actions pertaining thereto, the right to one's own likeness and the rights to honour and liberty, *i.a.* the liberty to organize one's private life. Secondly, there are rights inherent in the person as member of a family: rights concerning legitimacy, marital status, etc., and rights to the family name. Finally, there are rights attached to the status of citizen: nationality, right to vote, etc. Perreau also discusses in detail the legal nature of all these rights; we shall refrain, however, from analysing these problems in the present context.

19. By far the most consistent, the most realistic, and the most thorough study of the French concept of the "rights of the personality" is that of Professor Nerson, who is still a leading expert in this field.<sup>69</sup>

The notion of *droits extrapatrimoniaux*—rights not falling within the *patrimoine*, the sum of pecuniary assets belonging to a person—differs slightly from that of "rights of the personality" but, for present purposes, we may consider them as essentially identical.<sup>70</sup> Professor Nerson excludes from his analysis public rights, although these are also *extrapatrimoniaux* in the sense stated above. The objective of his study being, *i.a.*, to ascertain in what cases it is justifiable to use the term "right" for a given *situation juridique*, he sets out to study a great number of such "situations" with a view to finding adequate tests for the adoption of that term. Adopting the basic classification of Perreau, Professor Nerson ranges the interests relating to a person's name, domicile, status, legal capacity and profession under the category of "interests in the notion of individuality"; another interest is that in bodily integrity; a third group, *intérêts relatifs à l'élément moral de la personnalité*, comprises the right to a person's likeness, to secrecy and honour, the moral right of authors, rights to personal or family *souvenirs*, family tombs and the rights of family law in general. However, Professor Nerson con-

<sup>69</sup> Nerson, *Les droits extrapatrimoniaux*, Lyon 1939.

<sup>70</sup> In the same sense, Professor Carbonnier, in *Droit civil*, 1st vol., 1957, no. 73, p. 235.

cludes that only few of the protected interests referred to deserve the name of “rights” in a technical sense. Only the right of reply—which is a remedy granted in the French press legislation (*vide* no. 106 below)—the right of self-defence, the right to a person’s name, perhaps the moral right of authors, “perhaps one day” the right to a person’s likeness, belong to this group. The “right” of secrecy is characterized as too vague.<sup>71</sup> That “right”, which is of particular importance here, is analysed by Professor Nerson as composed of the rules on professional secrets, where there is no room for a “right” in favour of private persons,<sup>72</sup> and the rules on confidential letters, where the term “right” is equally out of place.<sup>73</sup> The author rejects the idea of a general “right of secrecy”.

The remaining personal interests, concludes Professor Nerson, which cannot be considered as “rights” in a technical sense, are protected by the general law of torts. In his concluding remarks, the learned writer argues on the one hand that the list of “personal rights” should be left open, so that the courts can create new ones to meet new needs, on the other hand that in some cases legislative intervention is desirable to delimit more precisely the outlines of certain rights.

Professor Nerson’s study reveals both the problems and the relative lack of importance of a clear definition of “rights” approximately corresponding to the right of privacy in French law. The rise of a certain interest, e.g. that in not having one’s likeness published, from the status of *situation juridique* to that of *droit subjectif* obviously implies greater security, provided the “right” in question is defined with sufficient clarity, and it may also imply certain other advantages, such as the applicability of specific remedies or procedural principles—thus the plaintiff may not have to prove that the defendant has acted negligently or that a real prejudice has been caused—but on the other hand, the almost inexhaustible possibilities of art. 1382 *Code civil* would be lost. Against the background of these possibilities, and the way they have been used by French courts in respect of all kinds of *préjudice moral*, it is inevitable that the dis-

<sup>71</sup> Nerson, *op. cit.*, p. 386.

<sup>72</sup> *Op. cit.*, pp. 160 f., 384 f.

<sup>73</sup> *Op. cit.*, pp. 172, 385.

cussion about the "recognition" of this or that "right of the personality" amounts to little more than the creation of analytical instruments for a rational classification of distinct groups of actions. To proclaim a "right", in this context, may often seem a display of eloquence and high-flown principles rather than an attempt to influence the development of the living law.

This explains the scepticism of French lawyers confronted with the notion of "rights of the personality" and particularly a "general right of the personality".<sup>74</sup> The relative lack of practical importance of any classification also seems to explain the diversity of principles in the textbooks.

20. Three good examples may be chosen from among many.

Messrs. H., L. and J. Mazeaud<sup>75</sup> establish a first distinction between the *droits de la personnalité*, belonging to the field of private law, and the *droits de l'homme*, guaranteed by public law. The former embrace rights to bodily integrity, the right to work, and a right of moral integrity, including the right to one's own likeness, the freedom to contract marriage, the right to defend one's honour, the right to claim respect for one's affections, and finally a right of secrecy (right to claim the observance of professional duties of secrecy and right to keep one's correspondence secret).

Professor Carbonnier, in his *Droit civil*<sup>76</sup>, also distinguishes the civil rights protected by public law from the *attributs de la personne physique*, which are, according to the writer, *droits primordiaux*, *libertés civiles* and *égalité civile*. The term *droits primordiaux*, which corresponds to *droits extrapatrimoniaux* or *de la personnalité*, is said to apply to such rights as are sufficiently precise, with regard to their object, to deserve the name of *droits subjectifs*: rights to live and to have one's bodily integrity respected, the right to a person's

<sup>74</sup> For recent examples of that scepticism, *vide* Roubier, *Droits subjectifs et situations juridiques* (1963), pp. 364 ff.; Professor Nerson in *R.T.D.C.* 1966, pp. 65 f. and in *Travaux de l'Association Henri Capitant*, vol. XIII (1959—1960), pp. 83 ff.; Professor Amiaud in *Travaux de l'Association Henri Capitant*, vol. II (1946), pp. 82 ff. A classical example is found in Gény, *Science et technique en droit privé positif*, vol. III (1921), No. 225 (pp. 230—232).

<sup>75</sup> H., L. and J. Mazeaud, *Leçons de droit civil*, vol. I, pp. 626 ff.

<sup>76</sup> Carbonnier, *Droit civil*, vol. I (1957), nos. 70 ff., pp. 227 ff.

name and likeness, the right to defend one's honour. However, in the classification of Professor Carbonnier, certain elements of the American notion of privacy are found under the heading of "civil liberties"; thus, the protection of a person's home against intrusions is considered as an expression of the *liberté de s'enfermer chez soi*, and the right to react against the disclosure of private facts is called *la liberté de la sphère d'intimité*.

A particularly careful study of the notion of *droit de la personnalité* is found in the textbook on civil law of Messrs. Marty and Raynaud.<sup>77</sup> These authors adopt three distinct methods for the classification of private rights—their pecuniary or personal character, their objects and their subjects—and thus arrive at a distinction between *droits patrimoniaux* and *extrapatrimoniaux* on the one hand and between *droits de la personnalité*, having the beneficiary's own person as their object, *droits réels*, *droits de créance* and *droits intellectuels* on the other hand. However, the authors stress both the vagueness of the "rights of the personality" and their closeness to the non-pecuniary rights, to which they mostly belong.<sup>78</sup> Starting with a definition by the Belgian writer Dabin, Messrs. Marty and Raynaud characterize the "rights of the personality" as *ceux qui ont pour objet les éléments constitutifs de la personnalité*. It should be stressed that this definition comes near to those which have been adopted for a long time in German legal writing. At the same time, the French authors stress the impossibility of making an exhaustive list of the rights concerned; they only pretend to deal with the principal ones, divided into three groups: rights to the constitutive elements of the person, comprising bodily integrity and honour and reputation; rights to the means of identification or expression, including the rights to a person's name and likeness, the right of secrecy (professional secrecy and secrecy of correspondence) and the moral right of authors; finally, the freedom of movement and of work.<sup>79</sup>

<sup>77</sup> Marty and Raynaud, *Droit civil*, vol. I (1956).

<sup>78</sup> *Op. cit.*, pp. 248 ff.

<sup>79</sup> *Op. cit.*, pp. 331 ff., 480 ff.

21. If we leave the problems of classification on a higher level, the result of this survey of the French theory of *droits de la personnalité* would seem to be that for practical purposes, there is a relative unanimity on certain points, particularly the inclusion among these rights of rights to a person's name, likeness and honour and of maintaining the secrecy of private life. In spite of the wideness and vagueness of the French notion of "rights of the personality", it seems justifiable, therefore, to consider this branch of the law as corresponding to the Anglo-American law of privacy.

### 3. Germany

22. Although there is no other country where the notion of "rights of the personality" has been studied so extensively, and for such a long time, as in Germany, it is possible to limit our survey of prevailing methods of definition and classification to an analysis of two writers. For unlike their French colleagues, the vast majority of German lawyers have adopted fairly uniform theories in this field of law. This unanimity—which, obviously, does not exclude disagreement and variety of opinions on almost every point of detail—would seem to be due to a number of facts worthy of mention. In the first place, the German Civil Code differs radically from the French through its wealth of highly developed technical rules which, quite often, open only one way to the desired solution; this is the case, as we have already pointed out, in respect of civil liability. Thus the notion of "rights of the personality" is, in German law, a technical necessity if certain ends are to be achieved. Secondly, German writers and German courts speak the same language, and have to do so, precisely because the technical and scientific character of legislation imposes the language of science upon the judges and, what is more, make them listen very attentively to professorial opinions. It also follows, however, that questions of classification and definition cannot be considered—as the case would often seem to be in France—as matters indifferent to, or at least different from, the "living law": an influential author who proposes a new theory can expect to find his reasoning translated into a judicial decision.

These points should be made before we expose the theories of German writers; for comparative purposes, it is necessary to bear in mind the specific climate of German legal thinking and the heavy impact of technical considerations upon the solutions of conflicts. At the same time, these facts undoubtedly develop the skill of reasoning, and impose discipline upon the inventors of new theories. They also reduce, to some extent, the possibility of exporting German solutions and ideas into countries with a different legal system.

23. Writing at the beginning of the 1950's, when the German Supreme Court had not yet made the decisive steps towards the full recognition of the "general right of the personality" in the field of private law, Professor Hubmann starts his inquiry with an analysis of the notion of personality and with a criticism of those earlier writers who had objected to the idea of a "subjective right" to one's own personality. We have to refrain from an analysis of this part of the German writer's work, which ends with two important conclusions: There is a "general right of the personality", which is not identical with the sum of specific rights recognized by statutes or decisions and which cannot be defined any more than the notion of "personality" itself;<sup>80</sup> that right belongs to the categories of rights protected under § 823 *BGB*.<sup>81</sup>

Although Professor Hubmann argues that no definite determination of the *allgemeines Persönlichkeitsrecht* is possible, he sets out to analyse its principal elements, divided into three groups: the right to develop one's personality, the right to defend one's personality as such, and the right to defend one's individuality.

The first group comprises numerous rights largely protected by public law rules: the general freedom of action, the freedom of work, the right of pursuing a professional, commercial or cultural activity, the freedoms of association, expression, religious and moral activities and education. The second group, on the contrary, embraces rights in the domain of private law: the protection of a person's life, body and health, the protection of intellectual property, the

<sup>80</sup> Hubmann, *Das Persönlichkeitsrecht* (Beiträge zum Handels-, Wirtschafts- und Steuerrecht, fasc. 4, 1953), pp. 123 ff.

<sup>81</sup> *Op. cit.*, pp. 127 ff.

protection of the free will, of a person's feelings and personal relations.

The "right of individuality" (*Recht auf Individualität*) is analysed as the protection of three distinct "spheres": the sphere of individuality, which comprises a person's name, trade name and honour; the "private sphere" and the "sphere of intimacy". By virtue of the right to defend his "private sphere", a person may prohibit the publication not only of his likeness, but also of "the portrait of his life" (*Lebensbild*), *i.e.* a description or representation of his life, acts, words and thought, and of his "character portrait" (*Charakterbild*), as it can be read out of words, acts, handwriting and other elements capable of interpretation by scientific methods. The right to the "sphere of intimacy" goes further: it protects not only against publication, but also against any act by which a third party can obtain knowledge about such things as confidential notes and letters.

It is superfluous to stress the wideness and vagueness of this definition. However, many of the terms which, at first glance, seem highly esoteric recur in the language of courts and are applied and developed in respect of actual conflicts.

24. In 1960, Professor Nipperdey gave a survey of the "general right of the personality" in German law in which the recent progress made by the *Bundesgerichtshof* was taken into account.<sup>82</sup> In accordance with the vast majority of writers, the author states that after the coming into force of the German Constitution of 1949, with its catalogue of fundamental rights, which do not merely concern the relations between State and individual but also those between private subjects, this general right belongs to those protected under § 823 *BGB*. It fills out the gaps between such provisions of a more specialized kind as protect similar interests. In spite of its universal scope, the general right of the personality is not unlimited; the limits are set by the rights of other persons, by such well-recognized defences as *e.g.* consent, and by the application of the principle that such invasions as are "socially adequate", *i.e.*

<sup>82</sup> "Das allgemeine Persönlichkeitsrecht", *UFITA*, vol. 30 (1960), pp. 1—29.



recognized as reasonable and inevitable within the community concerned, do not give rise to any liability.<sup>83</sup>

Like Mr. Hubmann, Professor Nipperdey emphasizes that no definite list can be made of the elements of the *allgemeines Persönlichkeitsrecht*; it is, by nature, inexhaustible. However, certain specific rights are derived from it. Among these is the right to a person's name, already granted by the *BGB*. There is also a right to a person's likeness, which is wider than that granted by the Artistic Copyright Act, 1907, but is subject to the same exceptions. Another right of the personality has the spoken word as its object: any recording or transmission of a person's voice is unlawful, subject to certain exceptions. The right to a person's honour and reputation belongs to the "personality rights", like the right to have one's descent established (*Recht der blutmässigen Abstammung*). Professor Nipperdey also adopts the distinction between the right to claim a "sphere of intimacy" (*Geheimsphäre*), i.e. a protection against any person trying to have access to letters, diaries, personal notes or, more generally, any facts which a person has a reasonable interest in keeping secret, and a "sphere of privacy" (*Privatsphäre*), protected against any prying into, surveillance of and disclosure of private facts, independently of their character. The right to a sphere of privacy comprises a protection against the publication of the portrait of a person's life or character. Invasions are justified only in a few cases. Further "rights of the personality" protect a person's feelings and emotional life and the accused's freedom of speech in criminal proceedings. Finally, the moral right of authors is a personality right.<sup>84</sup>

25. The opinion of Professor Nipperdey, himself a senior judge, may be considered as authoritative, as far as the "general right of the personality" as an element of private law is concerned. Most of his theses are covered by judicial dicta; in particular, the *Bundesgerichtshof* has explicitly adopted the view that this "general right" cannot be defined exhaustively.<sup>85</sup> The dangers of this attitude

<sup>83</sup> *Op. cit.*, pp. 3—8.

<sup>84</sup> *Op. cit.*, pp. 8—20.

<sup>85</sup> *Vide Juristen-Zeitung* 1957, p. 473.

have not been overlooked,<sup>86</sup> but so far the matter has not been brought to a head.

For the purposes of the present comparison, it seems important to make three points with regard to the German concept of "rights of the personality".

If ideological aspects are set aside, the energetic affirmations of the inexhaustible character of the "general right of the personality" mean little more than that the list of cases which may be decided in favour of a plaintiff claiming a violation of such a right is kept open. However, an analysis of the present body of case law shows that the actions so far brought before the courts all fall within one or several of the specific personality rights mentioned by Professor Nipperdey.

The width of the range of rights considered to belong to the constitutionally guaranteed *Persönlichkeitsrecht* does not necessarily imply that those which correspond to the cases covered by the notion of "privacy" differ in actual practice from the corresponding Anglo-American actions. There are, in fact, striking coincidences.

However, as a third point, it must be stressed that although the rise of a number of legitimate personal interests into "absolute rights" in German law does not mean that there are no defences for violations or that the courts refrain from balancing the opposing interests in each case—this is true particularly in respect of the rights which have not a clearly defined object—the term "right" is not an empty word. Whereas "privacy" in American law, whether it be considered as a group of loosely connected interests or as a unity, is protected by actions in tort and subject to the substantive and procedural provisions on torts in general, the "rights of the personality" are absolute in the sense that any violation is sanctioned unless a good defence is produced. The development of German case law from the early 1950's onwards may be described as a process of stabilization, in the course of which the outlines of these "absolute rights" emerge more clearly.

<sup>86</sup> See e.g. Professor Neumann-Duesberg in *N.J.W.* 1957, pp. 1341 ff.

#### 4. Other Countries

26. It would produce confusion, were we to add more definitions to those already presented in this survey. It seems likely that where deeper analyses of "privacy" or of "rights of the personality" have been made outside the legal systems now discussed, they follow the one or the other of the patterns found in these systems. It would have appeared from the survey of the history of privacy (no. 12 *supra*)—and it will be shown more fully below (nos. 47—50)—that outside the common law area, definitions similar to those adopted in French and German law are frequently used. In most countries, *e.g.* in the Scandinavian countries—with the exception of Norway, where recovery has been granted in civil actions in respect of the unwarranted disclosure of private facts of an embarrassing character, where there are judicial *dicta* to the effect that the law offers a general protection to the personality (cf. no. 141 *infra*), and where there are several criminal provisions in point<sup>87</sup>—the problems concerned have not been sufficiently discussed, and there is not enough practical experience for general definitions to have emerged. However, one statement would seem safe in respect of Scandinavian law: the idea of a "general right of the personality" seems incompatible with the pragmatic traditions and habits of thought of Scandinavian lawyers.<sup>88</sup>

#### 5. Conclusions

27. The next task to be faced in the present study is the finding of common denominators, if not of a common language. Against the background of systematic and terminological diversity as well as of substantive differences between the legal systems covered, it seems obvious that the safest solution is to use an analysis of *facts*, *i.e.* of interests and conflicts, as the basis of classification for the purposes

<sup>87</sup> See Professor Andenaes in *UFITA*, vol. 30 (1960), pp. 30—69.

<sup>88</sup> *Vide* Professor Grönfors in Coing—Lawson—Grönfors, *Das subjektive Recht und der Rechtsschutz der Persönlichkeit* (1959), and more recently in "Personlighetskydd och massmedia" (Offprint from *Förhandlingarna vid det 24:e nordiska juristmötet*, 1966), p. 5.

of the study, rather than to adopt, or invent, definitions and classifications of *legal rules* or *theoretical concepts*.

28. There would appear to be three kinds of actions which fall within the American notion of "invasion of privacy" and which also constitute violations of "rights of the personality" according to the prevailing German view and to some French writers at least. Taken in their logical—or rather chronological—order these acts are<sup>89</sup>:

- (i) intrusions, whether committed by means of physical violence or otherwise, into an area, whether in a local or a figurative sense, which a person has an interest in keeping for himself;
- (ii) collecting material, in the broadest possible sense, about a person, either by intrusion or by other methods felt to be unfair;
- (iii) using material about a person, whether lawfully or unlawfully obtained, for publication or for some specific purpose, *e.g.* as evidence against that person.

Usually, an act falling within the definitions of "invasion of privacy" or "violation of a right of the personality" will belong to two of these categories or to all three of them. Thus the collecting of material about a person is not unlawful under any of the legal systems considered, unless realized by intrusion or by such systematic prying into somebody else's private affairs as amounts to an invasion of the private sphere. Certain kinds of intrusion, on the other hand, become unlawful only if committed with a view to collecting material about a person. The third category presents certain particular features. Where publication is concerned, the way in which the published material has been obtained is usually of little importance. In other cases, *e.g.* where material concerning a person's private affairs, such as confidential letters, is used as evidence, the lawfulness of the manner of acquiring it may be decisive from the legal point of view.

For practical purposes, the acts falling within the two first categories may be described as follows:

- (a) unauthorized entry on and search of premises or other property;
- (b) unauthorized search of the person;

<sup>89</sup> Cf. Prosser, *op. cit.*, p. 408, note 199.

- (c) medical examination, blood test, etc.;
- (d) intrusions upon a person's solitude, seclusion or privacy committed without entry on or trespass to property or persons (following a person, spying, misuse of the telephone, prying into private facts);
- (e) importuning by the press or by agents of other mass media;
- (f) unauthorized tape recording, photographing, or filming;
- (g) interception of correspondence (this case would seem to fall under (a) above but should be considered separately on account of its particular importance);
- (h) telephone tapping (this case, which may involve trespass to property or belong to the cases under (d) *supra*, also merits special attention);
- (i) use of electronic surveillance or other "bugging" devices (the same remark applies here).

The principal cases falling under the third category are the following:

- (j) disclosure of information given to professional advisers or to public authorities bound to observe secrecy;
- (k) unwarranted public disclosure of private facts;
- (l) unauthorized use of a person's name, identity or likeness;
- (m) misuse of words or other communications from a person;
- (n) unwarranted attacks upon a person's honour or reputation.

It should be emphasized that this is an attempt to cover the cases of practical importance rather than to achieve a perfectly logical classification. Thus, the defamation cases, which do not really belong to the field of privacy, are included because of the close historical and practical connection between them, and because both the defences and the remedies developed in the field of defamation have served, to some extent, as models in the development of the law of privacy. Conversely, we have not included, as a distinct group, the use of evidence about a person's private affairs which has been unlawfully obtained; it has been thought more practical to discuss the problems raised by such evidence in connection with the remedies for invasions of privacy.

It should further be stressed that, as will appear in the course of our study of judicial decisions (part II *infra*), the cases belonging

to category (iii) are closely interwoven. Thus the use of a person's name may often be unlawful only because it takes place in connection with the disclosure of private facts: similarly, such disclosure, *e.g.* in a work of fiction, becomes unlawful only where a name or other means of identification are used. Again, if words or other communications from a person are published with important alterations, so as to convey a meaning different from that of the original communication, this may amount, according to the circumstances, to defamation or to the abuse of the person's name. It will appear, moreover, that certain groups of acts put together in the list above must be split, upon closer analysis, into two or more distinct invasions; thus the unauthorized use of a person's name embraces both "false light" and "appropriation" cases, according to Dean Prosser's classification. If we have chosen to put these two wrongs into the same category, it is because Continental case law frequently makes—or at least made—use of the *droit au nom* (*Namensrecht*) as the legal basis for decisions in both cases.

The question of a final classification with some claim to logic and rationality can be envisaged from two different angles: *de lege ferenda* and *de lege lata*. The first approach is obviously freer; where it is adopted, an analysis of facts and interests worthy of protection can serve as the basis of classification. The second implies at least some dependence upon the definitions and classifications expressed in existing legal rules; in the light of the diversity and sometimes irrational character of these, it seems difficult to arrive at a system which is at once universally valid and satisfactory from a logical point of view. Whether the one or the other approach be chosen, however, it is obvious that the final classification cannot be attempted until we have studies at least a selection of leading cases. An analysis *in abstracto* of the facts and interests involved would be of little value.

29. The order adopted in the present study is based on the following considerations:

It would have appeared from the foregoing survey on the one hand that the law of privacy—that term being used throughout this study to denote such legal principles as are specifically intended to

protect a person against the acts enumerated under (a)—(n) above—is incomplete in many countries, *e.g.* England and Scandinavia, and on the other hand that where that branch of the law is more fully developed, it appears very much as a set of principles which either completes such already existing rules as offered some protection to the specific interests involved or fills out the gaps between such rules. The ultimate purpose of the present study being to ascertain whether and to what extent special rules on privacy are needed, it seems logical to start with a survey of statutory provisions or well-established case law granting protection in the cases enumerated above and with a general analysis of justifications and remedies and of recent legislative initiatives in the field of privacy. On the strength of that survey, which will necessarily be incomplete, the principal *lacunae* will have emerged, and the field where the law of privacy may have a useful function will be defined, at least in outline.

We then set out to study more closely the solutions given by courts and legislatures to privacy problems in the domain of *private law*. The reason for this limitation will be discussed more fully below (no. 117).

In the course of the examination of case law, the results of our enquiry will be summed up; the solutions obtained in those countries where the law of privacy has been more fully developed will be criticized, and some recommendations for the solution of the principal problems will be given.

Before setting out to examine the rules applicable to the cases referred to under (a)—(n) above, it seems useful to discuss briefly the notions of “private” and “public”, which will recur frequently and which are obviously of fundamental importance.

30. The limited purpose of this study makes it necessary to exclude a number of questions, the analysis of which, although important in itself, does not seem to contribute to the solution of the general problems as to whether an extensive law of privacy is needed and on what points it is desirable.

Thus, the *legal nature* of the rights of action concerned—*e.g.* their assignability and similar questions—will not be discussed. Here,

the technical differences between the “tort approach” and the “absolute right approach” assume real importance.

Nor shall we examine the problem whether a right of privacy can be extended to *deceased persons* or their surviving relatives.

Finally, the question whether the protection of privacy should be extended to *corporations* and other juristic persons must be left out.<sup>90</sup>

<sup>90</sup> On these general questions, *vide* Prosser, *op. cit.*, pp. 408 f.; Yang, *op. cit.*, pp. 187 f.; Marty and Raynaud, *op. cit.*, nos. 333 f., pp. 483 f.; Nipperdey, *op. cit.* pp. 20 ff., 29.



## C. THE DISTINCTION BETWEEN "PRIVATE" AND "PUBLIC"

### 1. General Remarks

31. The distinction between what is "private" and what is "public" is of relevance in various fields of private and public law. As a general proposition, it seems safe to state that the definition of the two terms varies, and must vary, considerably from one branch to another. "Publicity" as an element of certain criminal offences, as a concept in the law of copyright, as a term used in administrative or fiscal law, is not the same thing. Nor is it possible to expect that "publicity" in German law is identical with the concept denoted by that term in French or American law.<sup>91</sup> It therefore seems justifiable to conclude that a study of these two notions as adopted in better established branches of law than that of privacy is unlikely to offer much assistance, except in certain cases (thus, the "publicity" of a statement putting a person in a false light in the public eye should, in all probability, be subject to the same tests as a defamatory statement).

In the field of privacy, the distinction is of importance in two entirely distinct cases. In intrusion and disclosure cases, it is essential to determine whether the sphere intruded upon or the facts disclosed are of a "private" character. The disclosure cases, as well as the unauthorized use of somebody's name or likeness, may give rise to the question whether the incriminated acts amounted to "publication". It is likely that different principles are used to find the answer to these two questions; the interests involved are obviously different. In this context, we shall only discuss the first question, which is of

<sup>91</sup> In a yet unpublished study on copyright, we have been able to ascertain that the meaning of the notion of publicity varies considerably not only between the different Scandinavian countries, France, and Germany, but also that "publication", as a term of copyright law, is an ambiguous term even within national legal systems. The fact was pointed out in the preparatory works of the Swedish Copyright Act, 1960.

general importance. The second one will be discussed in connection with those invasions where publicity is essential.

32. Again, it seems necessary to warn against generalizations and the mechanical application within one branch of privacy of tests invented for another branch. It is obviously no intrusion to inspect court records accessible to the public, but the public disclosure of facts contained therein may amount to an invasion of privacy.<sup>92</sup> Similarly, words uttered in a public place, or by a person holding public office, can nevertheless be "private" for present purposes.

For the sake of convenience, it may be useful to consider in turn the meaning of the terms "private" and "public" in respect of documents, persons, premises and activities. A few examples illustrating the problems raised by the distinction in these cases may help us to reach certain conclusions.

## 2. "Public" and "Private" Documents

33. It is clear, as pointed out by Dean Prosser,<sup>93</sup> that no invasion of privacy is committed when public records which are, by law or by custom, kept open to the public are inspected. It is equally clear that certain documents, such as confidential letters, private journals or diaries, are of a "private" character. Between these two extremes, however, it may be doubtful whether a document, and in particular a document drafted in the carrying out of a business or a profession, belongs to the one or the other group.

In some cases, there are enactments to the effect that information contained in certain documents given to public authorities must not be communicated to others than those concerned. In the U.S.A. there are detailed provisions of this kind, both in federal and state law, in respect of information given for the purpose of the census or tax collection; there are also more general enactments in favour of

<sup>92</sup> Prosser, *op. cit.*, p. 396.

<sup>93</sup> *Op. cit.*, pp. 391 and 395 f.

business information delivered to public authorities.<sup>94</sup> There are similar enactments in other countries.<sup>95</sup>

It would be of little use, however, to analyse in detail these provisions, for they do not in the least contribute to a final answer to our question. There is nothing to say that the introduction of criminal or civil liability for the disclosure of the contents of certain documents renders these documents "private" in the sense of pertaining to an individual's sphere of privacy.

As will appear more clearly below, where we discuss the admissibility as evidence of certain documents and where a more detailed analysis of decisions will be given, the "private" or "public" character of a document is relative in more than one sense. A French jurist has stated, in respect of a rule of French defamation law, according to which the truth of a statement is not a good defence when it concerns "la vie privée":

"D'abord il est à peu près impossible de distinguer, comme le veut la loi, ce qui touche à la vie publique, et ce qui concerne seulement la vie privée. Nul n'est en mesure de donner à cet égard un critérium valable. La vie publique et la vie privée sont étroitement unies l'une à l'autre et pratiquement inséparables . . ."<sup>96</sup>

It is submitted that there are in fact certain criteria which may be used—French courts, among others, have had to use them<sup>97</sup>—but that the question "private" or "public" is, at least in respect

<sup>94</sup> *Vide* Bloustein, *op. cit.*, pp. 997 f.

<sup>95</sup> See, for Germany, Jeschek, "La protection pénale des droits de la personnalité en Allemagne", in *Revue de science criminelle et de droit pénal comparé*, 1966, p. 551. In France, there are several statutes: of October 19, 1946 (*Statut général des fonctionnaires*), Art. 13; of April 28, 1952, on the officers of local government authorities. In Sweden, where all documents drafted by or delivered to public authorities are open to inspection under the Freedom of the Press Act, 1949, which is part of the Constitution of the Realm and only restates, on this point, the law as it has stood with short interruptions since the end of the 18th century, a special statute, the "Secrecy Act" of 1937, enumerates in detail what documents may be, by decision of the responsible authority, withdrawn from public inspection.

<sup>96</sup> President Patin, quoted from Lindon, *La presse et la vie privée*, *J.C.P.* 1965. I. 1887.

<sup>97</sup> *Vide* Mr. Sarraute in *Gaz. Pal.* 1966, 1, Doctrine, p. 13 with the references.

of documents, misleading. It may be a superfluous remark that the contents of the document is the first feature to take into account. But we must go further. Apart from the marginal cases referred to above, there is no such thing as an absolute publicity or an absolute privacy of documents. In respect of a letter, for instance, the question should be: does this particular use of the letter amount to an invasion of privacy? The letter may in fact be of such a character that showing it to a colleague is a serious infringement; in other cases, disclosure of its contents is an invasion only if made to the writer's business competitors, or to the general public. Similarly, the defences which may be invoked by the defendant in an invasion suit vary according to the character of the document.

This reasoning leads us to the conclusion that the "privacy" or "publicity" of a document is not a quality inherent in the document or its contents as such. There are clear cases, such as diaries or information protected by statutory provisions against inspection by third parties, but outside that limited area the decisive question is what use is made of the information and in what interests it is used. Sometimes, *e.g.* where a document is produced as evidence, the way in which it was obtained may also assume importance. Among the methods of using information concerning other persons, two are of particular interest for present purposes: communication through the public press and the use as evidence before a court. Generally speaking, the publication of the contents of documents through mass media, being the safest way to a maximum of publicity, is most likely to amount to an invasion of privacy, for documents not intended for that use often contain at least some information about non-public persons and non-public activities. Conversely, producing a document as evidence in court is often likely to be lawful, since it is seldom done without some reasonable interest; here, the focus of attention is shifted towards the way in which such information was obtained.

### 3. "Public" and "Private" Persons

33. In respect of persons, the distinction between "public" and "private" has a sense entirely different from that which can be

given to these terms with regard to documents. Whereas the privacy or publicity of documents must be relative, in the first place because “document” is a neutral word and the contents of the document is decisive for its character, and secondly because it is only in the light of the use made of such contents that it is possible to state whether a person’s sphere of privacy has been encroached upon, the notion of “public” person, although a highly controversial point in the law of privacy, can nevertheless be defined in absolute terms.

Although there are many shades in the definitions given by courts and writers in the jurisdictions covered by the present study, there is agreement on one point: there exists a category of persons who have lost, to some extent, their claim to be “let alone”. Dean Prosser speaks about “a person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a ‘public personage’ ”,<sup>98</sup> but also adds to these groups of voluntary actors on the stage of the world those who become, more or less temporarily, “public” because voluntarily or involuntarily connected with that which the public at large considers to be “news” or which serves, in the press or other mass media, to entertain the public.<sup>99</sup>

34. It would seem, upon the whole, that the European definitions of “public persons” are somewhat more narrow. The “news” test here is generally replaced by considerations where the *legitimate* interests of the public are opposed to the mere interest in sensation or gossip. Thus an eminent *French* jurist, Mr. Lindon, enumerates: public persons in the strict sense, such as the holders of high office, and politicians on different levels, criminals—but here the French lawyer, although admitting that the facts are otherwise, claims that publicity be strictly limited to facts immediately connected with the crime—the *grande*es of the world of entertainment.<sup>1</sup> In respect of the last-mentioned category, Mr. Lindon seems to hold that, having once abandoned, in the interest of popularity, all claims to a

<sup>98</sup> Prosser, *op. cit.*, p. 410.

<sup>99</sup> *Op. cit.*, pp. 412 ff.

<sup>1</sup> M. Lindon in *J.C.P.* 1965. I, 1887,

sphere of secrecy, they cannot suddenly turn into hermits. It should be added that, as will appear from some recent cases, the idea of a general and irrevokable consent has not found favour with the courts.

35. In *German* decisions and legal writing, the notion of "public figures" has been extensively discussed. An interesting attempt to systematize the principles applicable in this matter has been made by Professor Neumann-Duesberg,<sup>2</sup> whose views have been adopted in a recent decision of the Supreme Court.<sup>3</sup> Since his definitions and classifications seem in fact to harmonize with the leading cases, they may be used here to illustrate the German approach. The statutory basis of the German analysis is found in § 23, subsec. 1, no. 1, Artistic Copyright Act, 1907. According to this provision, which has been applied by analogy far outside its original field of application, portraits belonging to "contemporary history" may be published without the consent of the person portrayed. Professor Neumann-Duesberg makes a distinction between "absolute" and "relative" persons of contemporary history. The first category is composed of crowned heads, leading statesmen and, generally, persons who are likely to retain the interest of historians even after they have left the stage. Their claim to privacy must be considerably reduced, although there ought to remain a sphere of *intimacy* wholly unconnected with their public activities. The limits of publicity in these cases, are set by the legitimate need for informing the general public. Persons who belong to contemporary history only in the "relative" sense are those who, voluntarily or involuntarily, attract legitimate public interest through some specific event in which they are involved or some activity of public concern in which they participate. Their privacy is sacrificed only in connection with the facts which entitle them to the position of persons of contemporary history and only as long as they are associated with these facts.

The German writer also tries to apply these principles to the *family* of persons belonging to contemporary history. This is a point where the difference between American and German attitudes be-

<sup>2</sup> In *Juristen-Jahrbuch*, vol. 7, 1966—1967, pp. 150 ff.

<sup>3</sup> *Bundesgerichtshof* September 16, 1966, *N.J.W.* 1966, p. 2353.

comes particularly obvious. Whereas Dean Prosser<sup>4</sup> states, in respect of *all* public figures, that the privilege of the press “extends even to identification and some reasonable depiction of the individuals’ family, although there must certainly be limits as to their own private lives into which the publisher cannot go”—the principle being, as the American writer subsequently admits, that there must be “some logical connection between the plaintiff and the matter of public interest”—Professor Neumann-Duesberg argues that the family of persons of contemporary history in the “absolute sense” becomes, by virtue of their connection with such public figures, members of the “relatively” public category. On the other hand, the family of “relative” persons of contemporary history remains completely outside the public scene unless connected, in one way or another, with the events giving rise to publicity. It is, however doubtful whether this last restriction upon the privileges of the press is consistently observed by the courts.<sup>5</sup>

There are numerous judicial decisions on the problem, to which we shall return in due course below.

#### 4. “Public” and “Private” Premises

36. The question of “public” or “private” premises is of more limited interest for present purposes than that of determining what persons belong to the category of “public figures”. There are, basically, two groups of cases where it assumes real importance, and in both no mechanical application of fixed tests would seem possible.

In the first place, it is of relevance in intrusion cases, but, as in respect of documents, the private or public character of premises can be determined only in a relative sense: in relation to whom, and for what purposes, is a place considered *av* private? A good illustration is furnished by a Danish decision where a criminal action (for violating a person’s domicile) was sustained against a private detective who, acting on the order of a husband and using a key delivered by him, entered a flat by night to ascertain whether

<sup>4</sup> Cp. Prosser, *op. cit.*, p. 414.

<sup>5</sup> It would seem to be adopted *e.g.* by the Court of Appeal of Frankfurt in

his client's wife was committing adultery.<sup>6</sup> Another example is a German case where the plaintiff's business premises—obviously open to the public—were held “private” for the purpose of photographing.<sup>7</sup> A similar principle was adopted, at least *obiter*, with regard to monitoring, in the American decision *Lanza v. New York*.<sup>8</sup>

Secondly, the private or public character of a place may be of importance in cases concerning the disclosure of private facts or the use of a person's likeness. In all the legal systems covered by this study, there is agreement on certain broad principles according to which descriptions or pictures of public scenes, which can be observed by anyone, may be freely published. The application of these principles hits upon considerable difficulties, however, and it is submitted that, here again, no mechanical application of a “publicity test” is possible,<sup>9</sup> although there seems to be at least a tendency towards such strict enforcement of the test in American case law.<sup>10</sup> As will appear from the study of judicial decisions below, the “publicity” of a place does not imply that courts overlook the balancing of opposing interests involved.

## 5. “Private” and “Public” Activities

37. The problem which has to be faced under this very general heading cannot be simply added to those already discussed. Obviously, an activity, even an uninteresting one, carried on by a “public figure” is often “public” for the purposes of the law of privacy, whereas the same pursuits carried on by an obscure citizen clearly belong to the sphere of private life. Similarly, certain goings-on, which would be manifestly private if confined to a garden, may become part of “contemporary history”—in the most liberal sense—if located in a street. The question we purport to discuss now

*GRUR*, 1958, p. 508. *Contra*, *Kammergericht* (Berlin) in Schulze, *Rechtsprechung zum Urheberrecht*, KGZ, nos. 14 and 15.

<sup>6</sup> *Juristen* 1957, p. 85.

<sup>7</sup> *Bundesgerichtshof* in *GRUR* 1957, p. 494.

<sup>8</sup> 370 U.S. 139 (1962).

<sup>9</sup> *Vide* Grönfors, “Personlighetsskyddet och massmedia”, pp. 9 f., and Lindon, *op. cit.*

<sup>10</sup> *Vide* Prosser, *op. cit.*, pp. 395 f.



is whether certain activities are, by virtue of their intrinsic character or their effects, such as to give the general public, represented by the press and other mass media, a legitimate interest in being informed about them. In this broad sense, the question amounts to asking what is "news" in a given community, and whether the opinions of courts and writers coincide with the views of press and public on this point. This problem, which we have already touched upon when discussing "public figures"—being by definition those who transform trivial facts into news because connected with them, and those who become news-worthy because connected with non-trivial facts—cannot be analysed in general terms.<sup>11</sup> In its picturesque diversity, it defies definition. What we can attempt to discuss is whether there are specific groups of activities which, by their importance or implications, fall clearly outside the sphere of privacy. The result of labelling an activity as "public" in this sense is obviously that documents,<sup>12</sup> persons—at least leading persons—and premises<sup>13</sup> concerned also assume a "public character" in so far as publishing (as opposed to intrusion) is involved.

Now, since it seems beyond doubt that international, national and local politics, trade union and similar activities<sup>14</sup>—at least within the groups concerned<sup>15</sup>—religious movements, scientific activities of some importance, and the world of entertainment belong to the public sphere in this sense, our problem is practically reduced to the question whether business and professional activities in general, as opposed to other sectors of life (family life, holiday

<sup>11</sup> Cf. the enumeration in Prosser, *op. cit.*, p. 412.

<sup>12</sup> Cf. a German decision, where a business letter concerning the private arms trade—explicitly characterized as a matter of public concern—was admitted although it was alleged, and *prima facie* probable, that it had been obtained unlawfully. *Bundesgerichtshof* Oct. 24, 1961, *GRUR* 1962, p. 108.

<sup>13</sup> *Bundesgerichtshof* June 21, 1960, *UFITA*, vol. 32, 1960, p. 369, where the mentioning of a house involved in a notorious murder case was held lawful, and *Bundesgerichtshof* Sept. 19, 1966, *NJW* 1966, p. 2353, where the publication of pictures of a person's house in connection with a criticism of the owner's conduct in the war was held an invasion of privacy.

<sup>14</sup> *Bundesgerichtshof* Dec. 12, 1959, *GRUR* 1960, p. 449.

<sup>15</sup> *Vide* the examples quoted by Mr. Lindon, *op. cit.*

and leisure activities), are “public” for the purposes of the law of privacy.

Although there is evidence in favour of a negative reply,<sup>16</sup> there is some uncertainty about this question. It is probable that as soon as business activities are important enough to be matters of serious public concern, they belong to the domain of “contemporary history” (*vide Bundesgerichtshof* in the decision quoted in note 12 *supra*). This, however, does not mean that the life, property and correspondence of those involved become wholly unprotected. Again, the application of a uniform test to the variety of possible conflicts and interests seems clearly insufficient. Each group of invasions, and each kind of protected interests, must be studied separately.

## 6. Conclusions

38. The foregoing attempt to analyse systematically different objects of protection leads to the conclusion that a universally valid, uniform principle for determining what is “public” and what is “private” cannot be found. There are, within each group, certain clear cases which need no further discussion, but for the vast majority of possible conflicts a clear distinction between private and public persons, documents, premises and activities cannot be made. It is only regard to “public figures” that principles of some generality may be found. If, however, the restrictions imposed by courts upon the privilege of publishing verbal or pictorial information about such persons are taken into account, these principles suffer exceptions of such importance that their apparent clarity vanishes.

39. Insight into the difficulty of proceeding, as we have tried to do, by a systematic analysis of different objects of protection, but also into the need for general principles, would seem to be at the root

<sup>16</sup> *Vide* G. L. Davis in *Montana L.R.*, vol. 27 (1966), p. 183; Lindon, *op. cit.* Cf. however, Mr. Martin in *R.T.D.C.* 1959, p. 230, and *Tribunal de grande instance de la Seine* March 18, 1966, *J.C.P.* 1966. IV. 131. The “privacy” of business premises is recognized by the *Bundesgerichtshof* in *GRUR* 1957, p. 404. Cf. however, *Landgericht Düsseldorf* in *NJW* 1965, p. 696.

of the attempts, made by German writers and to some extent by courts, to establish different "spheres" according to the degree of privacy which may be claimed for the facts belonging to each of them. Several classifications of this kind have been proposed, some of which have already been mentioned; the discussion between the advocates of different schools of thought has not always been fertile.<sup>17</sup> Classifications of this kind can obviously be no more than analytical instruments; they should not be treated as fixed rules. The most commonly adopted system would seem to be that of Professor Hubmann, who establishes two "spheres" of protection: the sphere of privacy and that of secrecy or intimacy.<sup>18</sup> The German Supreme Court and many writers have adopted this classification.<sup>19</sup>

The "sphere of secrecy" comprises all those facts, whether they be letters, other documents, acts, thoughts or words, which a person has an interest in keeping strictly for himself and for the person or persons immediately concerned.

The "sphere of privacy" is that which is shared with a person's family, colleagues and collaborators, neighbours and, generally speaking, those members of the community among whom the person concerned leads his daily family, business or professional life.

The doctrine of "spheres" is undoubtedly useful as a complement to the more mechanical study of different objects of protection, and as a rough classification of the nature of interests involved. It must obviously be completed, in its turn, by the distinction between "private" and "public" persons. At the same time, it seems helpful for the purpose of determining to what extent such persons have lost their claim to privacy.

<sup>17</sup> Cf. J. Werhahn in *UFITA*, vol. 33 (1961), pp. 207 ff.

<sup>18</sup> *Bundesgerichtshof*, May 20, 1958, in *GRUR* 1958, p. 615.

<sup>19</sup> *Vide* Nipperdey, *op. cit.*, pp. 17 ff.; Werhahn, *loc. cit.*; in Switzerland Jäggi, *op. cit.*, pp. 226 a f.

## D. LEGAL RULES PROTECTING PRIVACY

### 1. General Considerations

40. It has already been pointed out that since the law of privacy, where it has been developed with some consistency, comes in to complete certain existing legal rules and to fill the gaps between them, the logical approach to our subject demands a preliminary survey of such protection as is offered by better established legal principles.

In this study, we adopt what may be called the hierarchic order of legal provisions, beginning with such international conventions as oblige the signatory States to give some protection to privacy and continuing with constitutional provisions and ordinary statutory or judge-made principles.

For obvious reasons, conventions and constitutions cannot be expected to contain more than general principles in this field. As we have already stated, the notion of "rights of the personality" is frequently resorted to in such documents, where it is natural to make use of the time-honoured public law notion of human rights.

On the lower steps of the hierarchy of legal provisions, rules protecting the spheres of privacy and of secrecy are found in most branches of the law. Statutory rules in the field of private law are so far exceptional; both in the U.S.A. and in Germany, the protection granted in this domain is largely judge-made. Rules on intrusion, in a physical sense, are usually found in penal law; justifications may be defined, in so far as public authorities are concerned, in procedural and administrative law. Administrative legislation of various kinds also frequently comprises such provisions as exist on the protection of tele-communications and correspondence. Press laws deal with defamation and often provide for special remedies. Our task is to arrive, through this patchwork of legal provisions, at a synthesis allowing us to find the most important *lacunae* to be eventually filled by special rules on privacy.

A question which arises already in this context, but which must be postponed till we have examined more closely the principal branches of privacy, is whether it is appropriate to introduce statutory provisions on privacy which cover the whole of the field, and thus incorporate at least part of the special rules found in different branches of public and private law, or whether it is sufficient, or indeed preferable, to recommend the adoption of enactments intended merely to fill the most important gaps. This question cannot be answered uniformly for all the countries concerned.

## 2. International Conventions

41. *The Universal Declaration of Human Rights*, adopted by the General Assembly of the United Nations, contains several provisions dealing with the protection of privacy as defined in the countries covered by the present survey. There is one provision which is of direct relevance, article 12:

“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.”

This rule defines, in fact, most of the interests protected by the law of privacy in those countries where it has been recognized most extensively. To what extent the Declaration of Human Rights—being, according to its tenor, “a common standard of achievement”—imposes real obligations upon the members of the U.N. in respect of private law rules will not be discussed.

*The Covenant on Civil and Political Rights*, adopted by the U.N. General Assembly on December 19, 1966, contains a provision in like terms (article 17). While the Covenant provides for a limited form of implementation machinery, it is not yet in force; the requisite number of ratifications have not yet been deposited.

42. *The European Convention on Human Rights and Fundamental Freedoms*, of November 4, 1950, both contains more detailed

provisions and provides for their enforcement.<sup>20</sup> Moreover, apart from the greater efficiency following from the possibility of bringing individual claims before the European Commission on Human Rights and the Court competent to hear such cases, the Convention is an element of national law both in those States (*inter alia* France and Western Germany) which have adopted the principle of the direct applicability of conventions as municipal law and those which have enacted special statutes incorporating the principles of the Convention into their legal system. The European Convention was in fact frequently invoked in German decisions in privacy cases, particularly before municipal case law had been firmly established.

Several provisions of the European Convention are of interest for present purposes: article 5, which proclaims the right of personal freedom and security and lays down in detail the cases where these interests may lawfully be set aside by public authorities; article 11, where the right of association is defined. The *sedes materiae*, however, is article 8. This provision proclaims the right to respect for private and family life, domicile and correspondence. The second paragraph of the article is of particular interest; it enumerates in detail the justifications for invasions of privacy committed by public authorities. Such invasions are justified only if they are committed in accordance with legal rules and if they are necessary in a democratic State for national or public security, for the economic well-being of the country, for the prevention of crime or disorder, for the protection of health or morals, or for the protection of other persons' rights and freedoms. This classification will be used for the purposes of our analysis of justifications for invasions of privacy (nos. 93 ff. *infra*).

The actions so far brought before the European Commission of Human Rights under article 8 of the Convention would not seem to be of particular interest for the present study.<sup>21</sup>

<sup>20</sup> *Vide* A. M. May-Cadoux, *Les conditions de recevabilité des requêtes individuelles devant la commission européenne des droits de l'homme* (Bibliothèque européenne publiée sous les auspices de l'Institut universitaire d'études européennes de Turin, tome VII, Turin 1966).

<sup>21</sup> For a brief survey, *vide* May-Cadoux, *op. cit.*, pp. 28 ff. and C. C. Morrison, Jr., *The Developing European Law of Human Rights*, Leyden 1967, pp. 133 ff.

### 3. Constitutional Rules

43. It is necessary to limit this survey to a few recent examples of constitutional provisions on the right of privacy. It is also necessary to refrain from discussing the problems of efficiency raised by such rules. Are they considered, in the legal system concerned, as directly applicable by courts of justice or are they binding only upon the legislature? In the latter case, are the courts entitled to examine the compatibility of statutes, and of administrative orders or acts, with the Constitution? Finally, even if directly applicable to the acts of public authorities, may constitutional provisions be invoked in private litigation? These issues of constitutional law, which are solved differently in all those jurisdictions which are studied more closely in the present survey, are obviously decisive for the real impact of such constitutional provisions as deal with privacy.

The only test which may be applied to ascertain the importance of constitutional rules is whether they are actually invoked in privacy actions. It is only in two of the jurisdictions referred to above that such rules are quoted in the *ratio* of decisions. In Germany, it is done almost regularly. In the USA, constitutional rules or principles of a general scope seem to have been used occasionally in the formative period of the law of privacy; later, references to the Federal Constitution occur when the action concerns some specific right or freedom granted by it. We are not in a position to make any statement of a general scope on the use of American State Constitutions.

One further problem of importance for a correct assessment of constitutional rules on privacy must equally be left aside: the methods of construction used in different jurisdictions. Some recent Constitutions contain fairly detailed provisions on this point, others use general formulae. Although the former approach is at least an indication of legislative interest in the questions of privacy, whereas the latter admits no such inferences, no definite conclusion is possible in the absence of information about the methods of construction adopted in the countries concerned. Thus the German courts have created a body of highly developed case law on the basis of a few constitutional provisions framed in very general terms.

In short, in the following discussion of a few selected constitutional laws, existing provisions must be taken at their face value, as expressions of legislative attitudes chiefly with regard to conflicts between the individual claiming a sphere of privacy on the one hand and public authorities on the other. Few conclusions can be drawn from this material.

44. In the *U.S.A.*, four groups of constitutional principles would seem to be in point.

First, as already pointed out above, courts looking, during the early phases of the development of privacy law, for some statutory support for what was really a new action in tort, resorted to such general provisions in Federal or State Constitutions as proclaim the individual's right to pursue happiness.<sup>22</sup>

Another broad constitutional principle occasionally invoked is that of due process. It was quoted by the Supreme Court of Georgia in *Pavesich v. New England Life Insurance Company*,<sup>23</sup> the leading case on the appropriation of a person's likeness for advertising purposes, where the court relied upon those provisions in the U.S. and Georgia Constitutions which declare "that no person shall be deprived of liberty except by due process of law". The due process clause was considered the basis of privacy in a dissenting opinion in a well-known recent case, *Silverman v. United States*.<sup>24</sup> It should be pointed out, in this context, that there is a striking similarity between the reasoning of the Georgia Court in the *Pavesich* case, where the publication of a person's likeness was held a violation of personal liberty, and the "Herrenreiter" decision of the German *Bundesgerichtshof*,<sup>25</sup> where that court resorted to the same strained analogy in order to arrive at the application of § 847 *BGB*, which provides for damages in case of attacks upon a person's liberty.

The fifth amendment of the U.S. Constitution—which protects a person against compulsion to be a witness against himself—has at least been considered in some American privacy cases dealing

<sup>22</sup> Cf. *Melvin v. Reid*, 297 Pac. 91 (1931).

<sup>23</sup> 50 S. E. 68 (1905).

<sup>24</sup> 365 U.S. 505 (1961).

<sup>25</sup> *GRUR* 1958, p. 408 (*vide* no. 11 above).



with the use of overheard conversations as evidence, but does not seem to have served as the ground of decisions.<sup>26</sup>

The constitutional guarantee of the freedom of speech has also been quoted in some eaves-dropping cases.<sup>27</sup>

The constitutional rule most frequently applied in privacy cases concerning intrusion and, lately, telephone tapping and eavesdropping by means of electronic monitoring devices is the prohibition against unreasonable search and seizure in the fourth amendment. The application of this provision was rejected in a famous decision on wire-tapping (*Olmstead v. United States*; *vide supra*), where it was held that it required an act of trespass and the seizure of a tangible object. It was further held, at least *obiter*, that evidence obtained in violation of the fourth amendment was not absolutely inadmissible. In a series of recent cases concerning eavesdropping by concealed microphones, the U.S. Supreme Court seems to have abandoned this narrow construction, but there is still considerable uncertainty as to the precise implications of the fourth amendment.<sup>28</sup>

45. In *English* and *French* law, constitutional principles do not seem to have been discussed in connection with privacy, although it would appear from what has been said above about the French classification of *droits de la personnalité* and the close association between these rights and the civil rights guaranteed by public law in some of the systems proposed by writers that principles of public law, as expressed in the *Déclaration des droits de l'homme et du citoyen* of 1789—still recognized as an element of the French Constitution (*vide Préambule* of the Constitution of October 4, 1958)—have at least had an indirect influence upon the theoretical concepts of “rights of the personality”. It may be recalled that the Declaration of 1789 guarantees *inter alia* liberty, property and security in general terms (arts. 2, 4, 5, 7, 10, 11).

<sup>26</sup> *Vide* Brandeis, J., and Taft, C. J., in *Olmstead v. U.S.*, 277 U.S. 438 (1928).

<sup>27</sup> *Vide, e.g.*, the dissenting opinion of Brennan, J., in *Lopez v. U.S.*, 373 U.S. 427 (1963).

<sup>28</sup> *Vide* G. L. Davis in *Montana L.R.*, vol. 27 (1966), pp. 182 ff.

46. As stated above, the Constitution adopted by the *German Federal Republic* in 1949 has served as the basis of a rapid and important development in the field of privacy. It must be emphatically stressed, however, that the solemn proclamation of fundamental rights in the German Constitution would certainly not have produced these consequences, had not legal writers elaborated, over more than fifty years, a system of "rights of the personality". That system was essentially ready for use in 1949, and the Constitution merely served, if the expression may be used, as the decisive spark which put the machinery to work. For although the catalogue of fundamental rights in the German Constitution is somewhat more explicit than *e.g.* the French Declaration of 1789, it does not amount to precise legislation on personal rights. The articles most frequently quoted in privacy cases are art. 1, where the inviolability of human dignity is proclaimed, and article 2, which affirms the right to free development of the personality, subject to the rights of others, the constitutional order, and the laws of morality. Among other fundamental rights guaranteed by the Constitution may be mentioned the right to life, bodily integrity and liberty (art. 2, para. 2); the freedoms of faith and conscience (art. 4); the freedom of expression, limited only by general legal provisions, laws for the protection of youth, and the right to honour and reputation (art. 5)—this provision is often referred to in privacy actions concerning the press—; the rights of assembly (art. 8) and of association (art. 9); the secrecy of letters, other postal communications, telegraph and telephone communications (art. 10); the freedom of movement (art. 11); the inviolability of the domicile, subject to fairly well-defined exceptions (art. 13). Finally, among the provisions of the Constitution of 1919 taken over under art. 140, mention should be made of the freedom not to reveal one's religious belief (art. 136 of the older Constitution).

What has made these constitutional provisions an essential part of the "living law" of Western Germany, and not hollow eloquence, is the adoption of the principle that the constitutional rights should be put into effect not only where the relations of the state and the individual are concerned, but also in the field of private law. Although there is much discussion and considerable disagreement on

the questions of detail concerning this direct enforcement of constitutional provisions, the broad principle of their applicability was adopted at an early date and has been upheld by the courts.<sup>29</sup>

47. A survey of constitutions in *Western Europe* shows that whereas the oldest of them—the Swedish “Form of Government” from 1809—contains only a general declaration (§ 16) about the spirit in which the King shall exercise his powers, the vast majority of constitutions guarantee two rights falling within our present sphere of interest: the inviolability of a person’s home, and the secrecy of correspondence, in many cases also of cable and telephone communications.<sup>30</sup>

The most systematic treatment of the right of privacy is found in the Turkish Constitution of 1961, where the “secret sphere of private life”, “the inviolability of the domicile” and “the freedom of communication” (art. 15—17) are guaranteed under the heading “Protection of Privacy”.

48. Also in *Eastern Europe*, the inviolability of domestic privacy and the secrecy of correspondence or of communications in general are generally guaranteed by constitutional provisions;<sup>31</sup> these are

<sup>29</sup> Vide e.g. Hamann, *Das Grundgesetz*, 2nd ed. 1961, pp. 73 ff.; Maunz, *Deutsches Staatsrecht*, 12th ed. 1963, pp. 84 ff.; *Bundesverfassungsgericht* in *GRUR* 1958, p. 254; *Bundesgerichtshof*, same review 1958, p. 408.

<sup>30</sup> Art. 10 and 22 of the Belgian Constitution of 1831; § 72 of the Danish Constitution of 1953; § 11 of the Finnish Constitution of 1919; Art. 12 and 20 of the Greek Constitution of 1952; art. 40 (5) of the Irish Constitution of 1937 (only protection of the domicile); art. 66 of the Icelandic Constitution of 1944; art. 14 and 15 of the Italian Constitution of 1948; art. 15 of the Constitution of Luxembourg of 1868; § 102 of the Norwegian Constitution of 1814 (only protection of the domicile); art. 9 and 10 of the Austrian Act on civic liberties, 1867, which is still in force under art. 149 of the Constitution of 1920; art. 8, no. 6 of the Portuguese Constitution of 1933; art. 15 of the “Charter of the Spaniards”, 1945.

<sup>31</sup> Art. 85 and 86 of the Bulgarian Constitution of 1948; art. 57 of the Hungarian Constitution of 1949; art. 74, no. 2 of the Polish Constitution of 1952; art. 32 and 33 of the Rumanian Constitution of 1965; art. 52 and 53 of the Yugoslavian Constitution of 1963; art. 128 of the Soviet Constitution of 1936.

held to be of a declaratory character and concern the relations between state and individual.<sup>32</sup> In Yugoslavia (Constitution of 1963), there is a general provision (art. 47) to the effect that “*l’inviolabilité de la vie intime et des autres droits de la personne est garantie*”; this declaration of principles is completed by detailed rules on searches of private premises and on the secrecy of correspondence (art. 52 and 53).

<sup>32</sup> *Vide* A. Denisov and M. Kirichenko, *Soviet State Law*, Moscow 1960, pp. 332 f.

#### 4. Statutory and other rules applicable to invasions of privacy

##### (a) *General Provisions*

49. In the following survey we shall use the classification proposed above. For obvious reasons, only the legal systems of those countries from which we possess sufficient material—England, the U.S.A., Germany, France, and Scandinavia (or, on some points, the one or the other Scandinavian country)—will be studied more systematically. It seems to be of interest, however, to mention those jurisdictions where civil and penal legislation contain more general provisions on the protection of privacy. Since we shall not return below to these legal systems, it seems justified to deal also with the remedies provided by them for invasions of privacy.

We have already mentioned art. 28 of the Swiss Civil Code of 1907; Switzerland would seem to be the first country to introduce a general protection of the personality in the field of *private* law. Mention has also been made of the Italian Civil Code of 1941.

The most clear example of statutes where the rights of the personality are treated as a unity are the civil and penal laws—all relatively recent—of the Communist States.

50. Whereas the civil legislation of *Soviet Russia* contains rules only on defamation, which is sanctioned—unless the defendant can invoke the defence of truth—by a refutation, obtained from the court, or the retraction of the defamatory statement, if made in the press (art. 7 of the Principles of civil legislation of the Soviet Union, 1962), Russian criminal law punishes violations of the secrecy of correspondence, “illegal search, illegal eviction or any other illegal act violating the inviolability of the living quarters of a citizen” (art. 135 and 136 of the Criminal Code of the R.S.F.S.R., 1961) as “crimes against the political and labour rights of citizens”.<sup>33</sup>

In other Communist States, there are also private law rules on

<sup>33</sup> *Loc. cit.*

the protection of privacy. Thus in *Hungary*, art. 263—265 of the Penal Code punish the disclosure of private secrets given to a person in his professional or other such capacity, the opening, reading or delivery to a third party of letters, other closed communications or telegrams, the interception of telephone communications or messages sent by other telecommunications (it is held an aggravating circumstance if the contents of intercepted messages are disclosed). In addition to the penal rules, however, there are comprehensive provisions—manifestly based upon the notion of “rights of the personality”—in the Civil Code of 1959. The rules concerned are found in title IV of the Code (“Private Law Protection of Persons”); the chapter containing them (Ch. VII) has the title “Rights pertaining to Persons in their Capacity as such”.

The Hungarian Civil Code provisions seem to be interesting enough to be quoted in full as examples of the legal technique used in Eastern Europe in the field of “rights of the personality”:

#### *Article 81*

- (1) The rights pertaining to persons in their capacity as such are under the protection of the law.
- (2) Shall be deemed to be violations of the rights pertaining to the person of the citizens, in particular: all prejudicial discrimination of any kind because of sex, nationality or denomination, violation of the liberty of conscience of the citizens, restriction of personal freedom, and bodily injury to or defamation of, the citizens.

#### *Article 82*

- (1) Within the scope of rights pertaining to persons in their capacity as such, the right of citizens and juristic persons to use of name shall be under the protection of the law: should anybody unlawfully use the name of another person, then such conduct shall especially be deemed to constitute a violation of the said right.
- (2) The protection of rights pertaining to persons in their capacity as such includes in like manner the protection of good reputation.

#### *Article 83*

- (1) Shall be deemed in like manner to amount to a violation of the rights pertaining to persons in their capacity as such: the action of any person violating the secrecy of correspondence or the exclusivity of the right

attaching to the privacy of the home and to the premises used for the purposes of juristic persons. A similar violation of correspondence shall equally be committed by any person misusing papers of a confidential character, other than correspondence, to the detriment of the lawful interest of another person.

- (2) The misuse of the likeness or the recorded voice of another person, particularly the unauthorized utilization, reproduction, publication and alteration of such image or record shall constitute a violation of the rights pertaining to persons in their capacity as such.

#### *Article 85*

- (1) A person who has been offended in any of the rights pertaining to his person in his capacity as such may, according to the special circumstances of the case, raise the following claims under the civil law:
  - (a) he may ask the Court to state and declare the commission of the wrong;
  - (b) he may require the wrong to be discontinued and the tortfeasor to be enjoined from doing further wrong;
  - (c) he may claim that the tortfeasor give satisfaction either by declaration or in some other appropriate manner, and that due publicity be given, if need be, by the tortfeasor, or at his expense, to the satisfaction given by the tortfeasor to him;
  - (d) he may claim that the injurious situation be brought to an end, that the state prior to the commission of the wrong be restored by the tortfeasor, or at his expense, further that the thing produced by the wrong be destroyed or deprived of its wrongful character.
- (2) Should the violation of any right pertaining to persons in their capacity as such have resulted in damage to property, then compensation for damages shall be due too according to the rules of responsibility under the civil law.

The Polish Civil Code of 1964 contains similar provisions, equally based on the notion of "rights inherent in human personality as such" (art. 23 and 24). In *Yugoslavia* detailed provisions of penal law (art. 154—157) deal with violations of the domicile, unlawful searches, violations of the privacy of correspondence and other consignments, disclosure of secrets obtained by such violations, and offences against the professional secrecy of lawyers, doctors and other persons in a similar position.

Ignorance about the way in which the rules now referred to are administered makes any judgment impossible. It should be point-

ed out, however, that the Hungarian provisions quoted above undoubtedly create, if applied extensively, a very complete protection of most interests attached to privacy. Thus even eavesdropping committed by means of electronic devices would seem to fall under art. 83. para. 1. If "secrecy of correspondence", in the same enactment, be held to cover all those invasions which are treated as equal to interceptions of correspondence in the Penal Code, telephone tapping also comes under the prohibition. Only unauthorized recording or photographing (when not made in violation of the "exclusivity of the right attaching to the privacy of the home and to the premises used for the purpose of juristic persons") seem to fall clearly outside the scope of art. 83, but the abuse of pictures and records is sanctioned. Finally, the disclosure of private facts lawfully obtained would not seem to be covered by the Hungarian provisions.

(b) *Unauthorized Entry on and Search of Premises  
and other Property*

51. Most legal systems contain both penal and private law provisions protecting a person's domicile and other property against intrusions. The question, now, is whether and to what extent such provisions grant an efficient protection for such interests as are not merely attached to the undisturbed possession of property.

Under *English* private law, unauthorized entry on premises and unauthorized dealing with other people's property fall under the action of trespass to property (land or chattels). The protection offered by the law of trespass would seem to be fairly efficient as far as actual intrusions by means of physical violence are concerned.<sup>34</sup> The problem is to what extent such additional elements of an act of trespass as searching are taken into account otherwise than in the assessment of damages. We shall return later to the questions concerning the surreptitious installation of telephone tapping or "bugging" devices. Apart from these problems, the principle according to which even a person who has a right of entry for a specific pur-

<sup>34</sup> Winfield on *Tort*, 7th ed., p. 727.



pose but enters or remains on another person's land for another purpose,<sup>35</sup> may possibly apply where a person duly admitted to premises undertakes an unauthorized search. To give a more precise analysis of the field of application of the action of trespass would require a study of case law which cannot be undertaken here.

It must be stressed, however, that the action of trespass being, by definition, an action for the protection of possession in a technical sense, it is manifestly insufficient to safeguard privacy—being essentially a non-proprietary interest—in cases where an intrusion is committed against a person who has the mere use, without possession, of premises.<sup>36</sup> For instance a mere lodger or a guest at an inn, as opposed to a subtenant, cannot bring an action in trespass.<sup>37</sup> This implies, *inter alia*, that the right of self-defence open to possessors against trespassers cannot be exercised, although the licensee may have an action for breach of contract against the licensor (owner) at least in some cases.<sup>38</sup>

The action of trespass to chattels has played an important part, historically, for the protection of letters and confidential documents against publication, but it seems difficult to make any definite statement about its applicability in cases of searching etc., *i.a.* because it is doubtful whether trespass is actionable *per se* or specific damage must be proved.<sup>39</sup> The mere inspection of another person's goods, without any physical interference such as moving them from one room to another,<sup>40</sup> would hardly seem actionable. On the other hand, searching of goods on the plaintiff's premises by a person admitted for some other purpose is likely to make the person undertaking such search a trespasser (cf. *supra*).

It is impossible to enumerate here the defences to an action for trespass and, in particular, the numerous rights of entry recognized under common law and, to a far greater extent, by modern statu-

<sup>35</sup> Cf. Salmond on *The Law of Torts*, 14th ed., p. 69.

<sup>36</sup> *Vide* Salmond, *op. cit.*, p. 77; Clerk and Lindsell on *Torts*, 12th ed., nos. 1143 ff.

<sup>37</sup> Cf. *Appah v. Parncliffe Investment, Ltd.* [1964] 1 W.L.R. 1064 (C.A.).

<sup>38</sup> *Vide* Salmond, *op. cit.*, pp. 114 ff.

<sup>39</sup> *Vide* Winfield, *op. cit.*, pp. 507 f.

<sup>40</sup> Cf. *Kirk v. Gregory* (1876) 1 Ex. Div. 55.

tory provisions. It is enough to state that the conditions for a right of entry as for searching premises and goods are well-defined and leave very little margin for arbitrary intrusions by public officers in the discharge of their duties.<sup>41</sup>

English *criminal* law would seem to be of slight interest for present purposes; the offence of forcible entry, defined chiefly by old decisions, does not seem frequent enough to deserve any comment here.<sup>42</sup>

Although this short survey embraces only the law of England, it seems superfluous to consider the same questions in respect of *American* law; although there may certainly be differences on certain points, and although there are important statutory modifications of the common law in many American jurisdictions, the general principles would seem to be the same as in England (at least with regard to the private law aspects of the problem).

52. In *French* law, the protection of a person's home against intrusions may be considered, essentially, as a matter of criminal law.<sup>42a</sup> Under art. 184 *Code pénal* (as amended in 1956) any public servant or officer of justice who enters a person's domicile, against the will of that person, by virtue of his official capacity but in a case not provided for by law or in violation of the formalities there prescribed, commits a punishable abuse of authority. Moreover, any individual, whatever his capacity, who enters a person's domicile by threat or violence is subject to punishment.

Leaving aside the problems relating to public servants, to which we shall return, it should be remarked, in the first place, that the notion of a person's domicile has been defined by the French courts in a very large sense: what is decisive is not any technical or legal test, such as the right of property or possession of the person concerned—although, of course, an intruder without any show of title cannot claim that the premises where he has intruded are his domicile—but rather the test that the person in question *a le droit de se*

<sup>41</sup> *Vide* e.g. Clerk and Lindsell, *op. cit.*, nos. 1803—1893.

<sup>42</sup> *Vide* Russell on *Crime*, 11th ed., pp. 309 ff.

<sup>42a</sup> For a recent decision where the administrative law aspects are discussed, *vide* *J.C.P.*, 1967. II. 15135.

*dire chez elle*.<sup>43</sup> Thus a hotel room, or a room occupied by a paying lodger in a private flat, may be the domicile of the person living there, and inviolable even as against the landlord.<sup>44</sup>

Secondly, the condition of violence is interpreted very liberally by the courts; climbing a porch,<sup>45</sup> opening the door, in the lodger's absence, with the help of a blacksmith<sup>46</sup> or simply with an extra key left with the landlord,<sup>47</sup> all these acts have been held to fall within the field of application of art. 184 *Code pénal*.

In French *private* law, the notion of trespass is unknown, and the problem of the protection of the domicile against intruders would seem to have been studied essentially in connection with two special questions: is there a right of self-defence against persons entering private premises without authorization, and are court officials (*huissiers*) entitled to a right of entry in order to obtain evidence—usually about adultery—in the interest of private parties?<sup>48</sup> As for the first question, no clear answer has been found, although there are decisions—from a period when the protection of property was probably looked upon as a matter more sacred than it is today—to the effect that injuries inflicted even by dangerous devices, or by an angry dog, upon persons entering private land without reasonable excuse did not give rise to a responsibility in tort.<sup>49</sup> The second question has produced a vast amount of litigation and of legal writing,<sup>50</sup> but seems to have found at least a partial answer in a decision of the *Chambre criminelle* of the French *Cour de Cassation* in 1955:<sup>51</sup> provided there is an authorization by a competent judge specifying the object of the intrusion, and provided it takes place in the daytime, this kind of private search is held to be lawful.

A third exception to the inviolability of domicile seems to be admitted by the courts: if strictly necessary, *e.g.* in a case of burst water-

<sup>43</sup> *Vide* Cass. crim. in *D.* 1963. Somm. 68.

<sup>44</sup> Cass. crim. in *D.* 1918. 1. 76; *D.* 1954. 781; *D.* 1956. 26.

<sup>45</sup> Cass. crim. in *D.H.* 1938. 440.

<sup>46</sup> Cass. crim. in *D.* 1890. 1. 334.

<sup>47</sup> Cass. crim. in *D.* 1954. 784.

<sup>48</sup> *Vide* Carbonnier, *op. cit.*, 1st vol., pp. 238 ff.

<sup>49</sup> Cass. req. in *S.* 1903. 1. 5 and *S.* 1904. 1. 320.

<sup>50</sup> Carbonnier, *loc. cit.*

<sup>51</sup> *D.* 1956. 133.

pipes<sup>52</sup> or if a landlord is obliged to visit leased premises, an unauthorized entry may be effected in the presence of two witnesses.<sup>53</sup>

It seems sufficient to state that the rights of search and of entry of public officers in the discharge of their duties are defined in detail by statutory provisions, particularly in the Code of Penal Procedure and the very considerable mass of minor legislation attached thereto. The guarantees for the protection of the domicile in French law seem to be approximately the same as in the law of England.

The conclusion of this survey would seem to be that apart from the special rules now quoted, a person's right to be left in peace in his home is protected essentially by the general provision in art. 1382 of the *Code civil*. In the second part of our study, we shall return briefly to this question.

53. In *German*, as in French law, it seems natural to consider in the first place the penal provisions guaranteeing the inviolability of domicile.

Paragraph 123 of the German Penal Code is very wide in scope. Under this provision, it is punishable to enter unlawfully the living quarters, business premises or enclosed land of another person or closed premises used for the public service or public communications, or to remain on such premises if ordered to leave them by a competent person. The normal punishment is a fine or imprisonment for a term not exceeding three months, but in the presence of aggravating circumstances (the carrying of arms, or violations committed by several persons in common: § 123, 2, §124) the punishment is more severe.

German writers consider the offence of violation of domicile (*Hausfriedensbruch*) chiefly as an attack upon an interest closely similar to personal liberty, and the notion of domicile is, accordingly, interpreted widely, without regard to legal technicality; thus a hotel room is protected, since it constitutes temporarily the private sphere of a person, even against the proprietor or innkeeper.<sup>54</sup> Rail-

<sup>52</sup> *D.* 1873. 1. 279.

<sup>53</sup> Court of Paris in *D.* 1920. 2. 135.

<sup>54</sup> Schöнке—Schröder, *Strafgesetzbuch*, 11th ed. 1963, p. 616.

way waiting rooms, coaches and buses are included.<sup>55</sup> Unlawful entry does not presuppose violence or fraud; it is any act by which a person comes into the protected area. Justifications—except for those based on provisions of criminal procedure or administrative law—may be found *e.g.* in a father's authority to inspect the lodgings of his minor child, etc.<sup>56</sup>

Generally speaking, the limits on the authority of public servants to enter upon premises without the owner's or tenant's consent are subject, in German as in English and French law, to precise and detailed provisions in various statutes.<sup>57</sup> Although these may, of course, raise problems of construction, they do not seem to deserve particular attention here.<sup>58</sup>

Nor does it seem necessary to examine the applicable German *private* law provisions, which have attracted less attention than the corresponding penal rules. Any act which implies a violation of the right of possession gives rise to an action under § 985 *BGB*; if the disturbance does not affect actual possession, § 1004 *BGB* is applicable. Moreover, the right of self-defence is recognized both in criminal (§ 53 *Strafgesetzbuch*) and private law (§ 227 *BGB*), although it is held that the means for self-defence must be in some proportion to the value of the violated interest.<sup>59</sup>

54. A few words should be said about the penal protection of the domicile in *Swedish* law which, on this point, comes near the German system and thus offers a very far-reaching protection.

In the new Swedish Penal Code of 1962, the offence now under consideration was divided into two branches: "violation of the domicile" and "unlawful entry" (chap. 4, § 6). Both are committed by entering or remaining without authorization on premises, but the

<sup>55</sup> *Op. cit.*, p. 617.

<sup>56</sup> Maurach, *Deutsches Strafrecht. Besonderer Teil*, 2nd ed. 1956, p. 161.

<sup>57</sup> *Vide* Maurach, *op. cit.*, p. 161 and, more generally, Peters in *Verhandlungen des 46. deutschen Juristentages*, 1966, vol. I 3 a, pp. 140 ff.

<sup>58</sup> It should be pointed out that the notion of "right of the domicile" (*Hausrecht*) has been developed particularly in Austria, where it was recognized and subjected to detailed provisions. *Vide* Ermacora, *Handbuch der Grundfreiheiten und der Menschenrechte*, Vienna 1963, pp. 236 ff.

<sup>59</sup> Maurach, *op. cit.*, pp. 354 ff.

first branch refers to a person's living quarters whether it be a room, a house, an enclosed area or a vehicle; the other branch covers offices, factories, storeyards and similar places, and ships. Hotel rooms and servant's lodgings are protected. Violence is not required.<sup>60</sup> An unlawful search, which is undertaken without any show of authority (in which case special provisions apply), may amount to an independent offence (under chap. 8, § 8, Swedish Penal Code), if property is disturbed or removed from its place.<sup>61</sup>

The rules of the other Scandinavian countries would seem to be of less interest in this context.

55. By way of conclusion, it may be stated that the civil and penal protection of the domicile or of other premises against actual intrusions is reasonably efficient in all the countries covered by this survey. There is, however, a marked difference between those systems where the penal rules are envisaged chiefly as intended to protect the peace—as is the case with the offence of unlawful entry in English criminal law—and where they are framed as a protection of individual interests. Moreover, both private and criminal law are concerned with the facts attending the manner of entering (or remaining) as such rather than with the purpose of an unlawful entry. It is difficult to answer in general terms the question whether or to what extent a violation of the domicile (the commission of trespass) would be considered by the courts of the jurisdictions concerned as particularly serious if undertaken with a view to searching or prying. If no violence to persons or property is committed, if the search or prying does not involve any serious interference with possession and, finally, in the incriminated act cannot be considered as a preparatory element of any other offence (such as *e.g.* larceny, obtaining information about business secrets or violation of the secrecy of correspondence), it seems doubtful, in the present state of the law in these countries, whether an unlawful entry committed for the specific purpose of searching or prying could be considered as a wrong different or independent from the normal cases, where the entry or remaining as such is the constitutive element.

<sup>60</sup> Beckman—Holmberg—Hult—Strahl, *Brottsbalken*, vol. I, 1964, pp. 148 ff.

<sup>61</sup> *Op. cit.*, pp. 287 f.

(c) *Unauthorized Search of the Person*

56. It seems possible to deal very briefly with this point. Three distinct cases can be envisaged. The first is where a search of the person is made under a show of authority of some kind. The question, here, is whether the person undertaking such search acts within the limits of this competence. The second concerns searches of the person carried out without any alleged or actual authority, against the will of the person searched. This invariably implies some kind of violence. Finally, a search may be undertaken unlawfully, although the person concerned submits to the act, with or without protest, in order to avoid scandal or because he believes that the person performing the search may claim some right to do so.

The first case can be left aside here. In all the countries concerned, the rights of police and other public officers to make searches of the person are defined and limited by case law or statute—primarily in the branches of criminal procedure and administrative law—and, although the applicable rules are undoubtedly of great interest from the point of view of privacy and their construction may raise difficult questions, it is submitted that for present purposes it is sufficient to state here, as in the case of entry on premises, that the rule of law prevails and that the study of the problems of privacy does not seem to demand a new approach to this particular aspect of human liberty.

The second case is also of minor interest, for it is beyond any doubt that both the civil and the criminal law of the countries studied here possess remedies against such attacks upon bodily integrity and liberty. The fact that such violations must be judged differently according to the purpose of the act—thus a search effected by violence but without the intention to deprive the victim of his belongings is not likely to amount to robbery, and the search of a person reasonably suspected of stealing may under certain circumstances be an act of legitimate self-defence, at least in some countries—does not seem to justify any further remarks in this context.

The third group of cases is more problematic. It is a well-established principle in all the legal systems concerned that *consent* to an otherwise unlawful act is a good defence within certain limits.

If a person submits to an order, given without any threats of violence and any show of authority, to empty his pockets or even to undress, is there any remedy against the conduct of the person giving such order? It should be pointed out, in the first place, that submission to the order does not amount to consent to its being given. Thus, although no unlawful act is committed in order to enforce the execution of the command, the act of commanding may be unlawful as such, and is not covered by any consent. In practice, this case would seem to occur in a number of particular situations (often accompanied by some such trespass to the person as false imprisonment,<sup>62</sup> viz. where an employee or a customer in a department store or self-service shop is suspected of larceny. In the case of employees, where the employer or his servants may claim a more or less general right to give orders, the question often arises whether an order of the kind referred to implies an abuse of that right. In shops and stores, the circumstances of a search may amount to defamation. Our question, however, is whether a search of the person, which is neither accompanied by any facts actionable under any other heading nor clearly justified under any legal principle concerning self-defence, may be punished or may give rise to civil liability.

There is an American case in point, and here the fact that the right of privacy was resorted to would seem to indicate that at common law no other action was available.<sup>63</sup> On the other hand, it may be argued that an action for trespass to chattels might have been sustained, since the defendants searched the plaintiff's shopping bag.<sup>64</sup> A French decision from 1904 points in the same direction.<sup>65</sup> Here, an employer who suspected his female employees of stealing, ordered them to undress in order to be searched. The court held that the employer's conduct was a violation of human dignity and the inviolability of the person and applied art. 1382 *Code civil*. A similar case was decided by a German labour court in 1953. It was held that although a contract between employer and employees concerning the search of employees leaving the workshop was

<sup>62</sup> Cf. the English case *John Lewis & Co. v. Tims*, (1952) A.C. 676.

<sup>63</sup> *Sutherland v. Krager*, 110 S.E. 2d 716.

<sup>64</sup> Cf. Prosser, *op. cit.*, pp. 389 f.

<sup>65</sup> Cour de Nancy, in *D.* 1904. 5. 596.



neither immoral nor repugnant to the Constitution of 1949, an arbitrary search of a female worker implied a grave defamation which entitled the employee to leave her employment without notice.<sup>66</sup>

These are the only “pure” cases we have been able to find. Although this is scanty material for a conclusion, it would seem justifiable to state, on the one hand, that the protection against such invasions of privacy as searches of the person is but incompletely assured by extant rules, on the other hand that the scarcity of conflicts not involving either other violations of personal liberty or bodily integrity or abuse of authority by public servants seems to indicate that the problem is hardly an important one.

d) *Compulsory Medical Examination, Tests, etc.*

57. Various aspects of medical law in a wide sense are frequently discussed in connection with the notions of “privacy” or of “rights of the personality”. It is necessary to state the problems with some precision in order to limit the scope of the following remarks, intended merely to ascertain what is the actual state of the law in the countries concerned and whether there are gaps which might be filled by the introduction of the concepts of “privacy or of “rights of the personality”.

Medical and similar expert examinations may be envisaged from two different points of view. They may be considered as means of obtaining such information about a person as he will not, or cannot, give himself by a statement. When serving this purpose, an examination may constitute an attack upon two interests of an essentially personal character: it may, like a search of the person, violate liberty; it may also be considered a means of obtaining surreptitiously information which it is felt that a person should be free to give or to withhold. In this latter sense, the expert violates moral integrity very much in the same way as the eavesdropper or the crime investigator who obtains a confession against the will of the accused

<sup>66</sup> *Landesarbeitsgericht Mainz*, Jan. 1st, 1953, in *NJW-Fundhefte zum Arbeitsrecht*, vol. IV (1957), No. 139, and V (1958), No. 219.

by means of torture. Secondly, some but not all examinations and tests imply actual violations of physical integrity. Although this aspect is a matter of direct interest in all those legal systems which recognize "rights of the personality"—the right to physical integrity being, as would have appeared from the examples of classifications above, an essential object of protection embraced by such rights—it is not of greater relevance for the narrower concept of "privacy" than any other act of violence to the person. However, in the course of legal discussion, the two aspects have not usually been distinguished.

Next, it seems appropriate to ask in what situations the question arises whether a medical or other expert examination is lawful. That question being easily answered at least in principle—the consent of the person concerned is a good defence—we have to restate it more precisely: when is it lawful to prescribe that an examination shall be effected and what action may lawfully be taken if a person refuses to submit? Basically, three different situations must be faced, the first two relating to court or similar proceedings. The first concerns the securing of evidence by public agencies in criminal actions or in cases concerning the taking into custody of insane persons, alcoholics, etc. The second situation is where it is in the interest of a party to civil litigation to obtain evidence by medical examination; the most frequent case is the blood test in paternity suits. Finally, a private subject, usually an employer, may have an interest in testing scientifically the talents and abilities of employees or applicants for employment. There is obviously a difference, within the last category, between those cases where an applicant submits to a test and those where the employer, using his position of command, orders his servants to undergo a test with a view to placing ultimately "the right man in the right place".

A last distinction already touched upon above may be of some use. Whatever the actual position of modern psychology, the lawyer has to accept the time-honoured idea that there are such things as body and soul. Some kinds of examinations relate to the "body"; in fact they may often be the only means of obtaining information about it, for there are many important physiological facts which are only, and can only be, expressed in terms of "values", these

being nothing but a description in figures or other symbols of the reaction of the technical device used for examination. Other tests or examinations relate to the "spirit". In many cases such examinations would seem to constitute a "short cut" to something which the examined person could reveal by a verbal statement if he wished to do so, for most things of the spirit, unlike physiological facts, are supposed to be capable of at least some description in words. In other cases, *e.g.* where psychological tests (Rohrschach, etc.) are applied, the same information could presumably be obtained—although, perhaps, with less precision, and certainly with a smaller expanse of learned terminology—by continuous observation for a long time of the person concerned in various situations and activities, including some at which he would never let a stranger be present.

In criminal actions and similar proceedings before public authorities, the question of medical examination arises in two forms. First: shall an examination be ordered? Secondly: shall evidence obtained by an examination be admitted? In civil actions, a further question must be faced: shall a person's refusal to submit to an examination be considered as evidence, and in what sense? This problem might possibly arise in criminal actions where the findings of the examination are necessary to establish an element of a punishable act, but, apart from the practical unlikelihood of that question, it seems *prima facie* improbable that any court would treat the refusal to be examined as conclusive evidence of a punishable act.

The preliminary distinctions made above also allow us to put more precisely the problem of medical examinations and tests out of court. Some groups of cases may be eliminated. The general principle is that such examinations carried out without the consent of the person examined are just as unlawful as a search or any violation of a person's liberty. If performed with consent or under other justifying circumstances—the much-discussed problem of the unconscious patient can be left out here—with a view to diagnosing and ultimately curing an illness, an examination is also lawful. There remain, in practice, two groups of questions. Are certain kinds of examination unlawful *per se*, precisely because they are held to violate vital interests? If this question is answered in the affirmative, the principle thus established must obviously be respected by the

courts also, unless there are specific provisions to the contrary. Secondly: is it unlawful to make an examination a condition for employment or promotion, to order one's servants to undergo an examination and to treat a refusal as a breach of contract? In other words: is the employer's order an excess of authority which the employee may disregard without violating the duty of obedience following from his position?

It should be pointed out that medical examinations and tests involve another problem: that of professional secrecy. The purpose of such examination being to inform the person or the authority who orders it of its results, it may be asked on the one hand to what extent such information may be given about certain facts, and on the other one what use may be made of it by the person ordering the test.

58. It seems practical to start with a short survey of the position in *French* law, where some solutions of the problems belonging to the first two categories defined above are at least reasonably well established. As for the third group of cases—examinations and tests out of court—they do not seem to have been discussed in French legal writing.

Conversely, the use of medical examinations in *civil litigation* has been extensively discussed.<sup>67</sup> In paternity suits, the alleged father of an illegitimate child may invoke a blood test to prove that the child cannot be his offspring (art. 340 *Code civil* as amended in 1955). Some courts have concluded that this provision authorises the court to order a blood test to be taken<sup>68</sup> and the *Cour de Cassation* has also adopted this principle.<sup>69</sup> There seems to be agreement among writers, however, that a person cannot be forced to undergo the test but that his refusal creates a presumption against

<sup>67</sup> *Vide e.g.* Carbonnier, *op. cit.*, no. 53, pp. 172 ff.; Houin in *Revue internationale de droit comparé* 1953, pp. 69 ff.; Nerson in *Travaux de l'Association Henri Capitant*, vol. XIII (1959—1960), pp. 70 ff.; Grossen, *op. cit.*, pp. 61 a f.

<sup>68</sup> Cour de Montpellier in *D.* 1956. 186; Cour de Paris in *D.* 1957. 436.

<sup>69</sup> *J.C.P.* 1965. II. 14422.

him.<sup>70</sup> The question to what extent a blood test may be ordered outside the cases covered by the new art. 340 *Code civil* seems to be doubtful. In a recent decision, a court refused to order a test intended to prove the adultery of a married woman on grounds which, however, did not imply considerations of *droits de la personnalité*.<sup>71</sup>

In *criminal* actions, there is at least one enactment which explicitly provides for blood tests or other tests to be taken. Under art. L. 88 of the *Code des débits de boissons et des mesures contre l'alcoolisme* (1959), the police has a duty to have such tests taken in order to ascertain the presence of alcohol in a person's body when there are grounds to suppose that the person has committed a crime or been involved in a traffic accident; whenever it seems useful, the *victim* of such crime or accident shall also be submitted to a test. It is clear, on the other hand, that a person cannot be forced by physical violence to undergo the test; by art. L. 89 of the statute, refusal to submit is punished severely. As for other analytical methods, it seems justifiable to state that, although there is at least one decision where the use of a narcodiagnostic method has been admitted,<sup>72</sup> legal writers are extremely critical of such practices, as of lie-detectors and similar devices.<sup>73</sup>

59. In the *German* Code of Penal Procedure, there is a general provision (§ 81a) on the examination of an accused person. Such examination, which may be ordered only by the judge or, where its success depends upon immediate action, by the prosecutor or his assistants, can be made to ascertain any fact of importance for the result of the action. Physical force may be used to perform blood tests or other tests involving a violation of the accused's bodily integrity, provided they are carried out by a medical practitioner acting according to the rules of his profession and no injury to the ac-

<sup>70</sup> *Vide* Grossen, *op. cit.*, pp. 62 a with the references and Cour de Lyon in *D.* 1957, *Somm.* 22.

<sup>71</sup> Tribunal civil de Privas, in *D.* 1958. 492.

<sup>72</sup> Tribunal correctionnel de la Seine, in *J.C.P.* 1949. II. 4786.

<sup>73</sup> Stefani and Levasseur, *Droit pénal général et procédure pénale*, vol. II, 1964, p. 23, Cf., however, Professor Levasseur in *Travaux de l'Association Henri Capitant*, vol. XIII (1959—1960), p. 193.

cused's health can be expected. In practice, this very far-reaching authorization to perform medical examinations is subject to the principle of "proportionality": there must be a reasonable proportion between the examination and the consequences which may follow from the findings. Finger-prints, photographs, measurements, etc. can be taken by force under an explicit enactment (§81b), and persons who may appear as witness in criminal proceedings can be examined, but not subjected to tests involving physical injury; if they have a right to refuse to give evidence, they cannot be forced to undergo an examination; in certain specified cases, force may be used against persons who cannot refuse to act as witnesses.

§ 136a of the German Code of Criminal Procedure prohibits methods of inquiry which affect the accused's free will, such as the use of drugs or hypnotic methods. Narcoanalysis was rejected in an early decision,<sup>74</sup> and the prohibition has been held applicable to various "truth-drugs."<sup>75</sup> The use of lie-detectors has been held inadmissible by the same court.<sup>76</sup> After some hesitation, psychological tests were recently held compatible with the Constitution of 1949.<sup>77</sup>

In *civil* actions, the general principle is that nobody can be forced to undergo an examination,<sup>78</sup> but there is one exception: in actions concerning affiliation, medical or biological examinations of any person involved may be ordered by the court; in case of repeated unjustified refusal to submit to the test, physical violence may be used (§ 372a *Zivilprozessordnung*). There has been doubt about the constitutionality of this rule, but the Supreme Constitutional Court has accepted it.<sup>79</sup>

The problem of *tests* has been discussed particularly with regard to tests imposed upon applicants for driving licences. So far, there is some disagreement between different courts on the constitutionality of such tests,<sup>80</sup> but it would seem that at least certain methods,

<sup>74</sup> *Oberlandesgericht Hamm*, in *Deutsche Richterzeitung* 1950, p. 212.

<sup>75</sup> *Vide e.g. BGHSt* vol. 11, p. 211.

<sup>76</sup> *BGHSt* vol. 5, p. 332.

<sup>77</sup> *Bundesverwaltungsgericht*, in *NJW* 1964, p. 607.

<sup>78</sup> Blomeyer, *Zivilprozessrecht, Erkenntnisverfahren*, 1963, p. 382.

<sup>79</sup> *Entscheidungen des Bundesverfassungsgerichts*, vol. 5, p. 13.

<sup>80</sup> *Vide Oberverwaltungsgericht Bremen* in *UFITA*, vol. 43 (1964), pp. 372 ff.

intended to explore the subconscious, are held unconstitutional when applied by administrative authorities. It is hardly likely, on the other hand, that tests in general, when applied by private subjects, should be considered as prohibited.

60. A corresponding survey of *English* and *American* law and of the law of other countries would seem superfluous in this context. Such a survey would demand an analysis of technicalities without adducing new aspects of the problem considered. The patterns of French and German law are more or less universally valid. It should only be pointed out, on the one hand, that in the U.S.A. an unlawful blood test has been held actionable, in at least one decision of 1940, precisely as an invasion of privacy,<sup>81</sup> and that the very widespread use of tests of various kinds particularly in the federal services, has given rise to much discussion, and even to inquiries by Congress. The critics of such tests stress both the violations of liberty in general and the risks for invasions of privacy which are likely to follow from the use of tests.

Generally speaking, it seems justifiable to maintain the distinctions made above between tests and examinations necessary for the finding of legally relevant physiological facts—to which should be added inevitable psychiatric examinations— and those procedures which aim at finding out such things as a person, usually the accused in a criminal action, refuses to reveal and is entitled to keep to himself. The question of the admissibility of the former kind of examination seems to have found an answer in principle, or is at least solved by the courts in a way which justifies leaving the problem aside in this context. As for the second category, there are also grounds to believe that as far as court proceedings are concerned, these cases are at least under control.

(e) *Intrusion upon a Person's Solitude, Seclusion or Privacy*

61. The variegated cases to be discussed under this heading—following a person, spying on a person, disturbing someone by misuse of the telephone, prying into private facts—have at least two things

<sup>81</sup> *Bednarik v. Bednarik*, 16 A. 2d 80.

in common: the difficulty of stating with precision both where the limit should be drawn between the unlawful and the merely unpleasant, disturbing, and indiscreet, and the difficulty of finding uniform legal principles applicable to them. It should be remembered here that our present task is to find whether there are any legal rules, and to what extent they cover the field. It is a matter for further consideration, in the second part of the present study, whether the introduction of privacy, or of "rights of the personality", has resulted, or is likely to result, in a more adequate protection against those acts of the kind referred to against which the law should reasonably react.

It seems preferable, given the extreme variety of cases and the impossibility of furnishing more than examples—the imagination of gossips and snoops being by far more creative than that of lawyers—to examine this category case by case rather than to follow the order of national legal systems.

The following groups of cases will be examined: following or spying on a person; peeping into or spying on a person's house; misuse of the telephone or otherwise disturbing a person without actually intruding; spying into facts of a private character without committing an intrusion.

Generally speaking, it is likely that the possibly applicable legal rules will be found either in the law of torts—particularly in those countries where provisions relating to civil liability are expressed in very general terms—or in what may be called the back garden of criminal law: those general provisions which deal with minor offences against public order. To a large extent, the actions in the cases referred to are often likely to fail under the principle *de minimis non curat curia*; where it is felt that a remedy is needed, judges have to take it where it can be found.

62. The last assumptions are verified, in German law, by a recent decision: the fact of following an unknown woman in the street by night was punished as *grober Unfug*, an offence defined—or rather left without any other definition than that indicated by the term *Unfug*: offensive conduct—in § 360, no. 11 of the Penal Code.<sup>82</sup>

<sup>82</sup> *Oberlandesgericht Hamm*, in *NJW* 1966, p. 2420.



It is stressed in the decision, which is not the first of its kind (*vide* references in the report), that the offence concerned is directed against the *public*, and that consequently the following of a person with whom the accused is acquainted would not fall within the definition of *grober Unfug*. In common law jurisdictions, the mere fact of following a person about,<sup>83</sup> or even of addressing an unknown person,<sup>84</sup> would not seem to be actionable, unless accompanied by such particular circumstances as make them actionable as slander,<sup>85</sup> assault, intentional infliction of emotional distress, conduct likely to cause a breach of the peace, or make some local criminal bye-law applicable. In the Swedish Penal Code, there is an offence called “annoying” (*ofredande*, chap. 4, § 7), which covers certain cases of this kind, such as following a woman with some obstinacy; in the case of men, a somewhat more active conduct, although falling short of actual battery, seems to be required.<sup>86</sup>

63. The act of peeping into, or spying on, a person’s house has been defined in some American so-called “Peeping Tom Statutes”.<sup>87</sup> A definition of “Peeping Toms” is given, *inter alia*, in sec. 26-2002 of the Georgia Code Annotated:

“The term ‘Peeping Tom’, as used in this chapter, means one who peeps through windows or doors, or other like places, on or about the premises of another, for the purpose of spying upon or invading the privacy of the persons spied upon, and the doing of any acts of a similar nature, tending to invade the privacy of such persons.”

Eavesdropping or being a “Peeping Tom” on or about the premises of another, or going about or upon the premises of another for the purpose of eavesdropping or peeping is punishable as a misdemeanour under sec. 26-2004 of the Code; there is a general exception for police officers shadowing or otherwise watching a sus-

<sup>83</sup> *Vide* Prosser, *op. cit.*, p. 391.

<sup>84</sup> *Vide* Winfield, *op. cit.*, p. 730.

<sup>85</sup> *Schultz v. Frankfurt Marine, Accident & Plate Glass Ins. Co.*, 139 N.W. 386 (1913).

<sup>86</sup> Beckman *et al.*, *op. cit.*, pp. 152 ff.

<sup>87</sup> *Vide* Bloustein, *op. cit.*, p. 983, note 119.

pected offender. Similar provisions exist, *e.g.*, in the Codes of Laws of South Carolina (§§ 16-554 and 16-555) and South Dakota (§ 13.1425), but most American statutes refer only to wiretapping or eavesdropping by means of electronic devices.

In English common law, no action in tort would seem to lie against eavesdroppers and "Peeping Toms", unless there is some element in their conduct which makes it actionable as trespass<sup>88</sup> or nuisance.<sup>89</sup> There is some authority for the continuous watching of a house being considered a nuisance. On the other hand, there are criminal provisions under which eavesdroppers and "Peeping Toms" can be bound over to be of good behaviour, and these have been applied in modern times.<sup>90</sup>

In French and German law, it seems difficult to find any provisions applicable to these acts if not committed in public or in an outrageous manner. In modern Swedish criminal law, eavesdroppers and "Peeping Toms" may probably be punished if their conduct is public or if it amounts to "annoying" the persons spied on.

Generally speaking, there hardly seems to be effective legal protection against eavesdropping and peeping in the private law of the countries examined, and the protection offered by criminal law is not complete. This statement must be subject to reservations, however, for these topics are not among those upon which writers and editors of reports bestow much interest, and it is difficult to obtain accurate information about the "living law" on such points.

64. The same statement applies to another kind of invasion: the sending of anonymous letters and misuse of the telephone. In *German* criminal law, the offence of *grober Unfug* demands some publicity; thus repeated nightly telephone calls to a person are not punishable under § 360 Penal Code;<sup>91</sup> the sending of anonymous letters not containing threats, immoral statements, or defamatory matter, is punishable as *grober Unfug* only if addressed to several persons.<sup>92</sup>

<sup>88</sup> Cf. Salmond, *op. cit.*, p. 70.

<sup>89</sup> Winfield, *op. cit.*, pp. 727 f.

<sup>90</sup> *Vide* Russell on *Crime*, vol. II, pp. 1600 ff.

<sup>91</sup> *Vide Landgericht Hamburg* in *MDR* 1954, p. 630; cf. Maurach, *op. cit.*, p. 160.

<sup>92</sup> Schönke—Schröder, *op. cit.*, p. 1391.

Under *Swedish* criminal law, useless and disturbing telephone calls are undoubtedly punishable as "annoying",<sup>93</sup> but it seems most doubtful whether the mere sending of anonymous letters falls within the definition as such. The *Danish* Penal Code has a provision under which harrasing a person with letters and other communications becomes punishable if continued in spite of a warning by the police (§ 264, Penal Code, 1933). The position of *French* law would seem to be the same: the mere sending of anonymous letters is not a criminal offence, nor is there any clear provision prohibiting "telephone terror".<sup>94</sup> On the other hand, civil liability has been imposed for the sending of anonymous letters<sup>95</sup> and, more generally, for sending publications with immoral contents.<sup>96</sup> It seems likely that art. 1382 *Code civil* would be applied also in respect of misuse of the telephone.

In England, it has been suggested that malicious use of the telephone in order to disturb a person would amount to nuisance,<sup>97</sup> and there is an Australian decision to this effect.<sup>98</sup> Anonymous letters may be actionable under such heads as defamation or intentional infliction of distress but, as far as the author has been able to find, there is no authority on the point whether such letters are unlawful *per se*.

65. If the invasions referred to above are difficult to define with precision, the problem of drawing limits is even more delicate in respect of the last group of cases to be discussed here: *prying into a person's affairs without committing an actual intrusion*. We can only make a few remarks to state the problem.

In principle, it is lawful, for good reasons, to make inquiries or to collect facts about a person. There are two points where such activities meet with reasonably firm legal barriers. First, the collect-

<sup>93</sup> Beckman *et al.*, *loc. cit.*

<sup>94</sup> *Vide* Sicot, "Anonymographes et anonymophones", *La Vie Judiciaire*, 3—9 April 1967, pp. 1, 5 f.

<sup>95</sup> Cour de Paris, in *Gaz. Pal.* 1931. 2. 133.

<sup>96</sup> Tribunal civil de la Seine, in *D.* 1899. 2. 52.

<sup>97</sup> Winfield, *op. cit.*, p. 728.

<sup>98</sup> *Vide* Clerk and Lindsell, *op. cit.*, p. 644.

ing of facts must be done *by means lawful in themselves*. Here, such rules as protect business secrets or establish professional duties of secrecy may interfere. We shall return to the latter rules below, whereas the former will be considered in this context. There are also special provisions or legal principles protecting the secrecy of letters and other communications; these will be considered in due course. Obviously, the rules protecting the domicile against intrusion, eavesdropping or peeping—where such rules exist—serve the same purpose.

In the second place, there are legal principles concerning *the use made of such material as has been collected*, and these rules—*e.g.* the law of defamation, rules on breach of confidence or professional secrecy and possibly rules concerning the disclosure of certain facts, not to speak of criminal law provisions on blackmailing—would seem to reduce considerably the scope of our problem: the collecting of material about a person for the sole purpose of keeping the information for oneself seems rather an unusual pursuit. Knowledge, we are told, is power; but this does not apply to knowledge about Mr. Smith's private affairs, unless these happen to involve such elements as may be used *e.g.* for business or technical purposes.

These points made, it seems justifiable to restate the question: what additional elements would be required to make the gathering of information about a person, performed by lawful means and not amounting to preparations for some unlawful act (although such an act may, of course, be ultimately contemplated), a wrong actionable in private or criminal law? Malice or the utter absence of a reasonable purpose would certainly not be enough, for many acts are performed out of malice or without a reasonable purpose and yet remain lawful. The systematic character of enquiries about a person might possibly be considered as the requisite element, but unlike the case of the man who systematically spies on a house, even very far-reaching enquiries do not produce such a concentrated effect, and is likely to be less intensely felt by the person concerned. There may, of course, be cases where regular research into a person's affairs, committed by a variety of means—questions, photographing, inspection of records—amounting to real harrassing, but

there hardly seems to be any remedy where a right of privacy, or of defending one's "private sphere", is not recognised.

Our conclusion, on this point, is that apart from those cases where information is obtained by unlawful means—the most important being no doubt bribing or other acts committed with a view to getting hold of protected business secrets—prying into somebody's affairs cannot be prevented without recourse to the notion of privacy. We shall return below to the solutions of courts adopting that notion and to the questions emerging *de lege ferenda*.

Since these questions are very largely of a technical nature—owing to the difficulty of formulating with precision both the object of protection and the acts which might be deemed unlawful—it seems justifiable to give here a very short outline of the principles of German law relating to *trade secrets*. The reason for choosing German provisions as an example is that, to the author's knowledge, this branch of the law has been elaborated with particular care in Germany.

The principal provision is § 17 of the German Unfair Competition Act, 1909. Under this enactment, in the first place the communication by any employee of an enterprise, during his term of employment, of any business secrets confided or made available to him in the course of his employment, is punishable, provided such communication is made for purposes of competition, for gain or to inflict injury. It is also made punishable for any person to make use of, or to communicate, any business secret obtained through an act of the kind defined above, or through any other unlawful or immoral act committed by the person himself, provided such secret be used or communicated for purposes of competition or for gain.

The term "secret" is interpreted widely—any fact, technical device or process which is not known to the general public or to any professional man is considered as a secret. The concept of "unlawful or immoral act" is also construed widely: thus, an employee who systematically acquires knowledge about *e.g.* constructions, models, or designs which he does not need for his work acts immorally for the purpose of the Act.<sup>99</sup>

<sup>99</sup> *Vide* Baumbach—Hefermehl, *Wettbewerbs- und Warenzeichenrecht*, vol. I, 9th ed. 1964, pp. 806 ff.

(f) *Importuning by the Press or by Agents of other Mass Media*

66. We can deal very shortly with this particular kind of invasion. There seems to be no doubt that the mere importuning of a person, which neither amounts to assault, to nuisance—cf. the discussion of “Peeping Toms”, eavesdroppers, misuse of the telephone, anonymous letters and systematic prying above—or to a violation of by-laws or such rules as may be applicable in special places, such as courts of justice or hospitals, can hardly be actionable either as a tort or as a criminal offence. There is, in the typical cases of importuning, a feature which would seem to make even the remedies available in the cases referred to above inapplicable: the intensity of the invasion which, in the case of the “Peeping Tom” or telephone maniac is due to the continuous, or repeated, acts of one person, is here due to the presence of many, each of whom cannot be accused for the conduct of the others.

What gives importuning by the press a particular position is, on the one hand, the fact that such material as may result from these invasions is likely to be published and that reporters may thus, as it were, create the scene they are going to describe, including such elements as the angry, intimidated, or otherwise inadequate reaction of their victim, and, on the other hand, that the press puts forward a claim of authority, as deputies of the public, which the ordinary eavesdropper will not advance.

For these reasons, the problem of importuning by the press cannot be discussed finally without some observations—which will be made below—on the rules relating to defamation, the publishing of private facts, or a person’s likeness, and to unauthorized tape-recording, photographing and filming.

Finally, the absence of legal rules does not necessarily mean that there are no remedies; ethical standards may also be upheld, and to some extent enforced, by private organizations.

(g) *Unauthorised Tape Recording, Photographing or Filming*

67. As opposed to eavesdropping, the activities referred to in the heading of this paragraph are in themselves “neutral”: there is

nothing inherent in the act of photographing or recording which is in itself unlawful or immoral. If put to illegal use, however, these acts are obviously more dangerous in some ways than peeping or overhearing private conversations, since there are tangible results, making the things seen or heard permanent and capable of publication. Like the problem of invasions by the press, that of unauthorized recording and photographing cannot be analysed finally without some reference to the use ultimately made of the results.

The question to be studied here is whether there are explicit legal rules protecting a person against recording or photographing as such, without recourse to the notion of "privacy" or of "rights of the personality".

It should be stated, in the first place, that the acts with which we are now concerned are methods for the securing of information. Thus all the more general principles stated under (a)—(f) above are applicable to the *methods* by which such information is secured. In particular, the protection of the domicile, and that of business secrets, will draw some limits to the liberty of recording or photographing. Similarly, filming or recording performed in the course of acts amounting to prohibited "peeping" or eavesdropping is likely to fall under the prohibition.

Our problem, then, may be reduced to the question whether and to what extent recording, photographing and filming may be unlawful unaccompanied by such additional facts as give rise to criminal or civil liability. If there are rules against it, they are likely to be due either to the *place*, the *occasion*, the *subject-matter* or the *methods* used.

68. It seems safe to state that photographing or recording is lawful in *places* open to the general public, unless there are special bye-laws to the contrary, as may be the case in churches, museums or houses open to the public under certain conditions.<sup>1</sup> Such bye-laws may, of course, exist also in respect of public places; thus the *préfet de police* of Paris has prohibited, by administrative decree, the

<sup>1</sup> *Vide* Professor Nerson in *R.T.D.C.* 1966, p. 62 (*contra* Professor Desbois in *J.C.P.* 1963. II. 13364); Mr. Stoufflet in *J.C.P.* 1957. I. 1374, no. 9; Salmond, *op. cit.*, p. 22; Winfield, *op. cit.*, p. 726.

photographing of persons in the street, if they give their consent (*arrêté* August 11, 1960). Such administrative acts have been challenged before the *Conseil d'Etat*, which seems to have considered the matter exclusively from the point of view of the necessities of free traffic in the streets.<sup>2</sup>

There is at least one *occasion*, namely court proceedings, in respect of which there are certain rules limiting the liberty to record, to photograph, or both. In France, a general prohibition against sound recordings, filming for the purpose of the television or the cinema and, subject to certain exceptions, photographing in a court-room where proceedings are going on, was enacted in 1954 (art. 39 of the Press Act, 1881; cf. also art. 308 and 403 of the Code of Criminal Procedure). Similar principles in respect of photographing exist elsewhere, *e.g.* in Denmark and Sweden.<sup>3</sup>

In German law, the question of photographing and tape recording in court has been discussed in connection with the "right of the personality". We shall return to this debate later. The general principle is that the presiding judge decides whether the maintenance of order in the court-room requires that no recording or filming takes place. If he has made such a decision, but a person has nevertheless recorded the proceedings, the judge cannot interfere, *e.g.* by having the record seized.<sup>4</sup> The question whether a recording intended to be broadcast should be prohibited, because of the risk of witnesses being influenced, has been raised but answered in the negative.<sup>5</sup>

As for prohibitions of the recording, photographing or filming of certain *subject-matters*, we have to refer to what has been said above about private and public documents: there are many legal provisions under which certain facts are kept secret; these provisions obviously apply not only to the inspection of the documents concerned but also, *a fortiori*, to any reproduction, by sound or picture.

<sup>2</sup> *Conseil d'Etat*, June 22, 1951, *J.C.P.* 1951. II. 6515.

<sup>3</sup> For a discussion of principles in Scandinavian law, *vide* Mr. Hjort in *Norsk Sakførerblad* 1955.

<sup>4</sup> *Vide GRUR* 1951. p. 474.

<sup>5</sup> *Bundesgerichtshof in UFITA*, vol. 24 (1957), p. 245.



Finally, there may be provisions in national legislation on telecommunications which prohibit the recording of telephone messages. Such a rule exists in *Sweden* where the recording of telephone calls is subject to authorization by the competent authority, and where the existence of a recording device is usually (but not compulsorily) indicated against the number concerned in the official telephone books.

As far as the present writer knows, general statutory provisions prohibiting certain *methods* of tape recording exist only in *Norway*, where § 145a of the Penal Code as amended in 1958 contains prohibitions against *secret* recording, by means of any technical device, of conversations between other persons, deliberations either at a closed meeting to which the accused has no access or at such meeting to which he has obtained access by fraud. The prohibition also covers the installation of devices for the purpose of an unlawful recording.

#### (h) *Interception of Correspondence*

69. Among the various methods for obtaining information about a person against his will, the interception of his correspondence is certainly, for good historical reasons, the one which has attracted the greatest legislative attention. As we have seen above, the right to secrecy of correspondence is recognized in many Constitutions and international conventions. All the countries covered by this study have more or less far-reaching civil and criminal provisions on the matter.

We can refrain, therefore, from any detailed discussion on this point. What is important is to state the extent of the protection: what kinds of communication are included, and what acts are prohibited? It should be noted that we are not dealing here with the *publication* of letters, and it should further be remarked that the general principle applicable to the unauthorized inspection of letters and other communications (for present purposes, the suppression of letters is of less interest, although it is usually treated together with unlawful opening and reading) may be subject to exceptions

in certain cases, particularly when intercepted communications are produced as evidence before a court.

In *French* law, art. 187 of the *Code pénal* punishes the suppression or opening of correspondence of any kind; a statute of 1850 extended the protection to telegrams. Civil liability (art. 1382 *Code civil*) is also incurred by anyone who tampers with letters or telegrams intended for another person. § 299 of the German Penal Code contains similar provisions, applicable to all "closed documents". The secrecy of cables and telephone communications is covered by § 354 which is, however, applicable only to the employees of the public telecommunications services. The corresponding *Swedish* provision (chap. 4, § 8, Penal Code of 1962) is couched in very broad terms: any person who unlawfully seizes or inspects a message, whether contained in a letter, cable or other telecommunication, which is being forwarded by a public agency, is punished for violation of the secrecy of post or telecommunications. The provision is completed—like the French and German rules—by administrative regulations for the services concerned. There is further an even more general provision (chap. 4, § 9) prohibiting any opening of a letter, cable or any object kept under seal or lock. There are similar rules in Danish and Norwegian law. *English* statutory law contains provisions against the opening, delaying or suppression of postal packets (secs. 56—58, Larceny Act, 1916) and there are similar rules protecting telegrams (sec. 20, Telegraph Act, 1868, and sec 11, Post Office (Protection) Act, 1884). Telephone communications have been held messages in the sense of the Telegraph Act.<sup>6</sup>

In the U.S.A., where the rules relating to letters are similar to those prevailing in the European jurisdictions referred to above, there exists a large body of Federal and State legislation on the interception of telegrams. Although it is difficult to state in a few words the leading principles of these statutes,<sup>7</sup> it may be said that

<sup>6</sup> *Attorney-General v. Edison Telephone Co.* (1881) 6 Q.B.D. 244.

<sup>7</sup> *Vide Laws Relating to Wiretapping and Eavesdropping*, submitted by the Subcommittee on Administrative practice and procedure to the Committee on The Judiciary of the United States Senate (Wash., D.C., 1966).

they create a protection approximately equivalent to that offered by the corresponding European laws.

(i) *Telephone Tapping*

70. The unauthorized overhearing of telephone conversations, which has a long history in the United States,<sup>8</sup> seems to be so far little known in Europe, except as a measure of criminal investigation. As such it is admitted, under a court order, in some of the countries covered by this study (*e.g.* Sweden, Germany). In France there are two decisions denying the right of the police to overhear telephone calls, but these cases are rather particular.<sup>9</sup> In England, the right to authorize telephone tapping lies with the Home Secretary.

The question which must be discussed here is whether the existing provisions against interception of telecommunications or any other rules in point are applicable also to telephone tapping. One point would seem to be clear: if such tapping implies any damage to wires, posts or other property, there are obviously civil and penal rules to repress it. It is now technically possible, however, to tap messages without any physical contact with the wires. That immixtion into, or disclosure of, telephone conversations is unlawful if committed by the servants of the public service or private company running the telephone network seems certain in all the countries concerned. As for telephone tapping committed by other persons, the situation is different. In those countries where offences against the secrecy of telecommunications are defined not by reference to any technical proceeding or any specified kind of message, but in general terms, such tapping would seem to fall under the prohibition. This is the case *e.g.* in *Sweden*. In a *Danish* decision of 1940,<sup>10</sup> the Court of Appeal of Copenhagen applied, by analogy, a provision in the Danish Penal Code on the opening of letters or interception of messages; the use of a tapping device was held punish-

<sup>8</sup> *Vide* Mr. Davis in *Montana L. R.*, vol. 27 (1966), p. 174, note 9.

<sup>9</sup> *Vide* *S.* 1954. 1. 69 and *D.* 1955. 573.

<sup>10</sup> *Vide Ugeskrift for Retsvaesen* 1940, p. 156.

able under this enactment (§ 263, Penal Code). In *Norway*, finally, an explicit provision against telephone tapping was introduced in 1958 (§ 145a, Penal Code).<sup>11</sup> As for the position in *France* and *Germany*, the present writer has not been able to find a clear answer; if tapping devices are such as to fall within the general provisions requiring an authorization by the competent authority for operating broadcasting devices (*vide e.g.* the French *Code des postes et des télécommunications*, art. L. 39), there may be some possibility of repressing such activities. As for *Germany*, however, it is certain, as will appear below, that this is one of the points where the “general right of the personality” is invoked. In *England*, where telephone tapping has aroused much public and parliamentary interest,<sup>12</sup> there does not seem to exist any rule capable of covering such practices in general.<sup>13</sup>

A point on which it is impossible to state any general principle is whether the use of an extension telephone or the overhearing of a conversation caused by a technical fault falls within the scope of existing prohibitions. In the latter case, the absence of malicious intention is usually decisive; as for the former case, it seems unlikely that it would be, in general, considered as unlawful tapping.<sup>14</sup>

71. This interpretation was adopted by the U.S. Supreme Court in respect of sec. 605, Federal Communications Act, which prohibits telephone tapping irrespective of the means used.<sup>15</sup> In addition to this enactment, there exists an important body of State legislation which contains more or less far-reaching provisions

<sup>11</sup> There is an interesting and detailed discussion of these problems in the Norwegian Government Bill (*Ot. prp. Nr. 5*, 1958). *Vide* also Professor Andenaes in *UFITA*, vol. 30 (1960), pp. 54 ff.

<sup>12</sup> *Vide* the *Report of the Committee of Privy Councillors appointed to Inquire into the Interception of Communications*, 1957, cmd. 283, and more recently *Hansard's Parliamentary Debates*, H.C., Nov. 17th 1966 (col. 635 ff.).

<sup>13</sup> Salmond, *op. cit.*, p. 22.

<sup>14</sup> *Vide* the Norwegian Bill (note 11 *supra*), p. 38, and *Oberlandesgericht Bremen*, April 29, 1959 (in *Betriebsberater* 1959, p. 828). Cf. Mr. Werhahn in *UFITA*, vol. 33 (1961), pp. 210 ff.

<sup>15</sup> *Rathbun v. U.S.*, 355 U.S. 107 (1957).

against wire-tapping.<sup>16</sup> To pass a laconic judgment upon a matter which has been discussed most extensively and considered by the courts in a great number of actions,<sup>17</sup> American law prohibits any form of telephone tapping—a fact which does not seem to prevent such practices from being very common.<sup>18</sup>

(j) *Use of Bugging Devices*

72. Electronic surveillance seems to have become a real plague in the United States. So far it plays a very minor part in Europe. In principle, there are three angles from which “bugging” may be fought—by restrictions upon the manufacture and sale of such devices; by prohibition against their use; by provisions prohibiting the use of information obtained by unauthorized electronic eavesdropping.

As far as the material available to the present writer goes, all these methods have been tried. In the United States, the two last-mentioned methods seem to be most frequently resorted to; in England, licensing of radio-microphones rests with the Home Secretary;<sup>19</sup> the only European country where there is a general provision on the topic would seem to be Norway. In Sweden, a recently appointed Royal Commission is considering necessary measures.

On some points, most European legislation seems to offer at least some protection against “bugging”: where there is a radio monopoly vested in the State or in some public authority, the use of surveillance devices transmitting sounds by means of radio waves is subject to licensing (cf. Jeschek, *op. cit.*, pp. 551; the French pro-

<sup>16</sup> *Vide* the texts published in the Congress document referred to in note 7 *supra*.

<sup>17</sup> For a survey of the position, *vide* Mr. Davis in *Montana L.R.*, vol. 27 (1966), pp. 179 ff. An exhaustive list of decisions, books and articles is given in the above-mentioned Congress document (note 7 above).

<sup>18</sup> Mention should be made of the interesting study of Mr. Dobry, “Wire-tapping and Eavesdropping”, in the *Journal of the International Commission of Jurists*, 1958, where the questions discussed here and in the following paragraph are dealt with in greater detail.

<sup>19</sup> *Vide Hansard's Parliamentary Debates*, H.C., December 8, 1965, col. 97.

vision quoted above; Swedish Act of 1966 on broadcasting, etc.). There remain, however, eavesdropping devices operating by wire. Another category of rules which grants some protection are the provisions, where they exist in a general form, on business secrets. There can be no doubt that under the German Unfair Competition Act, quoted above (no. 65), the obtaining of information through "bugging" devices will be held immoral.

Under § 145a of the Norwegian Penal Code, as amended in 1958, it is punishable to overhear, by means of a secret eavesdropping device, not only telephone conversations but any conversations between other persons and any deliberations at a closed meeting to which the accused has not access. It is also punishable to put eavesdropping devices into place. Unlike the provisions on telephone tapping, not even police officers acting under a court order can transgress these rules.

The position in *American* law<sup>20</sup> would seem to be the following. Sec 605 of the Federal Communications Act does not immediately concern such eavesdropping as is not performed by wire-tapping. However, a recent federal administrative ruling (31 *Fed. Reg.* 3397, 1966) prohibits the use of any radio devices for eavesdropping purposes. Thus, as in Europe, the cases of eavesdropping by technical devices not covered by legal rules are those where wire is being used.<sup>21</sup> The question of the lawfulness of electronic eavesdropping has usually been considered in criminal actions where overheard statements were used by the prosecution as evidence. We shall return to these problems later.

On this point, there exist a number of enactments in State law, but far fewer than in respect of wire-tapping. "On the whole", says an American lawyer, "state legislation cannot cope with the methods now in use".<sup>22</sup>

Generally speaking, the *legal* situation in America would seem to be very much the same as in Europe. What makes the problem worse on the other side of the Atlantic is the widespread use of electronic surveillance devices not only by duly authorized crime in-

<sup>20</sup> *Vide* the Congress paper referred to in note 7 above.

<sup>21</sup> *Vide* Davis, *op. cit.*, pp. 184 ff.

<sup>22</sup> *Op. cit.*, p. 186.

vestigation officers, but also by private persons and—what is more remarkable from a European point of view—by administrative agencies in the course of their business.<sup>23</sup>

(k) *Disclosure of Information given to Public Authorities  
or Professional Advisers*

73. In all the legal systems covered by the present study there exist more or less detailed rules of criminal law prohibiting the disclosure of information given to public authorities—unless, of course, such information is of a public character—and to professional advisers, such as confessors, lawyers, doctors and certain other groups. As will be discussed below, these rules are usually completed, on the one hand, by procedural provisions on the right of certain persons to refuse to appear as witnesses and on the other hand by internal byelaws or ethical standards adopted and enforced by private or semi-official professional organizations.

74. Under *French* criminal law (art. 378 *Code pénal*), doctors and other officers of the health service, apothecaries, midwives and generally all persons who have received secrets by virtue of their permanent or temporary office or function are bound not to disclose such secrets in other cases than those explicitly provided for by statute. These rules, which have been held applicable *inter alia* to priests and to police officers, and are applied with considerable severity—thus a description, in a medical treatise, of a clinical case which could be identified, has been held a violation of a doctor's duty of secrecy<sup>24</sup>—are completed by an important body of special legislation (cf. *supra*, on private documents). There are numerous

<sup>23</sup> *Vide, e.g.,* *Invasions of Privacy (Government Agencies), Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate*, Part 4, Washington, D.C., 1966.

<sup>24</sup> Cour de Bordeaux, in *D.* 1894. 2. 177.

decisions, which define, in particular, the effects of the consent of the person concerned.<sup>25</sup>

*German* legislation is based essentially on the same principles, although it should be pointed out that the prohibition is less absolute than in French law: the disclosure of a secret is punishable only if "unjustified" (§ 300 of Penal Code), which means that superior interests may be invoked to make a disclosure lawful. The rules on the duty of secrecy of public servants (§ 353b, c, Penal Code and § 412 Fiscal Code) are more severe than those applicable to professional advisers, but are also subject to the exception of superior interests.<sup>26</sup>

*Scandinavian* law would seem to come near the German system; there is no reason to examine it in detail here. It should be noted, however, that Norwegian and Swedish law contain no general rule; only public servants are subject to a general duty of secrecy under the Penal Codes.<sup>27</sup> There are, however, special provisions applicable to most liberal professions concerned.<sup>28</sup> Moreover, Danish and Norwegian law contains a general prohibition against the disclosure of private facts to which we shall return below.

The position of *English* law differs from that of the continental States now referred to. There is no general rule even for public servants,<sup>29</sup> and the rules applicable to medical practitioners seem to be doubtful.<sup>30</sup> In the *U.S.A.*, finally, there exists a fairly important body of Federal and State legislation, including general provisions on the duty of public servants not to disclose information concerning business.<sup>31</sup>

<sup>25</sup> *Vide* Professor Nerson in *Travaux de l'Association Henri Capitant*, Vol. XIII, 1959—1960, pp. 79 f. with the references. *Adde* an important recent decision by the Cour de Cassation, *J.C.P.* 1967. II. 15126.

<sup>26</sup> *Vide* Schönke-Schröder, *op. cit.*, pp. 1229 ff. (§ 300 Penal Code). A general survey in Jescheck, *op. cit.*, p. 551.

<sup>27</sup> *Vide*, for Sweden, Beckman *et al.*, *op. cit.*, vol. 2, pp. 357 ff.; for Norway, Skeie, *Den norske Strafferett*, vol. 2, 2nd ed., 1946, pp. 129 ff.; for Denmark, Krabbe, *Borgerlig Straffelov*, 4th ed., 1947, pp. 404 ff.

<sup>28</sup> *Vide*, on doctors in Swedish law, Welamson, *Läkarsekretessen*, Stockholm 1962.

<sup>29</sup> Russell on *Crime*, 11th ed. 1958, vol. 1, pp. 235 ff.

<sup>30</sup> Cf. *N.J.W.* 1965, p. 389 with the references.

<sup>31</sup> *Vide* Bloustein, *op. cit.*, pp. 997 f.



(1) *Unwarranted Public Disclosure of Private Facts*

75. Having considered those various means of obtaining information about a person and his private affairs, the use of which may imply violations of his interest in being "let alone", we now come to the problems raised by *the use of such information*.

It seems appropriate to recall, before we set out to examine these questions, that the distinction between "private" and "public" is relative in the sense that there are degrees of privacy and publicity both with regard to facts about which information can be collected and with regard to the communication of facts to others. There is no universal test which admits the final classification of facts, or of acts of communication, within either of the two categories referred to.

This statement is particularly important in matters regarding the "disclosure of private facts". What, in the first place, amounts to a "disclosure"? Faced with the wide range of possible interpretations, it seems preferable to refrain from any definition or, rather, to start with a definition of the utmost simplicity: any communication, made to any person, of facts known to the one who makes such communication but not to the addressee, may be called a disclosure. But this broad formula gives little satisfaction. It would seem, *a priori*, that if the term disclosure is used for defining a legal concept of any interest, some qualification must be added which takes into account the *purpose* of the communication or, in other words, the *interests* opposed to that of complete secrecy or privacy. Another method for limiting the field to be covered is to classify the degrees of publicity obtained by a communication, but such a classification must also rely, to some extent, on the notions of purpose and interest, for even if we set aside such extreme cases as publication in the press on the one hand, and communicating information to a colleague having an immediate interest in it on the other, there remains a large intermediary group where the most appropriate test seems to be the question whether the persons receiving the communication have any kind of legitimate interest in it (cf. no. 32 *supra*).

76. Is there any legislation, or are there any established legal rules, on the disclosure of private facts in the legal systems discussed here, apart from such principles as may have been adopted as a consequence of the recognition of a right of “privacy” or of the “personality” and apart from the rules concerning professional secrets, unauthorized use of a person’s name or likeness, and defamation?

One point may be safely made: where there is a prohibition against *acquiring* information about something or in a certain way, the subsequent disclosure—the sense of that term varying according to the circumstances (in provisions on the secrecy of correspondence or of telecommunications, disclosure to any third party is usually prohibited; in case of business secrets, the prohibition may apply only to revealing such secrets to competitors)—is normally also prohibited, although there may be exceptions to this principle, *e.g.* with regard to producing material unlawfully obtained as evidence.

Where knowledge about private facts has been obtained lawfully—*i.e.* for practical purposes where it cannot be proved that the methods of acquiring it were unlawful<sup>32</sup>—it seems equally safe to state that the question raised above must be answered in the negative for most of the legal systems concerned. There may be provisions of a limited scope which we cannot examine here, such as procedural rules on the secrecy of criminal investigation; indirectly, such rules protect the perpetrator and the victim of a crime against publicity although—as all jurists know—in a highly imperfect manner. As an example may be quoted arts. 38—40 of the French Press Act, 1881, as amended. There are, among the provisions contained in these articles, some which are obviously based upon what may be called “privacy considerations”, *e.g.* the prohibitions, in art. 39 *bis*, against any publication in a book or newspaper, or by broadcast, film, television or otherwise, of texts or pictures on the identity or *personnalité* of minors who have not yet attained 18 years and who have left their guardians and, in art. 39 *ter*, of the publication of information about the origin of an adopted person.

Apart from such special rules, however, it must be stated that the

<sup>32</sup> Cf. *Metter v. Los Angeles Examiner*, 95 P. 2d 491 (1939).

disclosure of private facts is precisely one of the gaps which the right of privacy, where recognized, has filled out and, consequently, where the non-recognition of that right is felt as a serious lacuna. The attempts made to solve this problem by means of other legal rules, as well as the application of the right of privacy to such cases, will be dealt with more fully in the second part of this study.

77. As far as the present writer knows, there are only two countries, among those more particularly considered in this survey, which have general legal rules on the disclosure of private facts.

According to § 390 of the *Norwegian* Penal Code, 1902, it is a punishable act to "violate privacy by communicating in public facts concerning personal or domestic affairs". The notion "in public" is defined in § 7, no. 2 of the Code: an act is public when performed either by means of publishing a printed matter, or in the presence of a large number of persons or under such circumstances that it could easily be observed from a public place and is in fact observed by some person who is present at, or in the vicinity of, the place where the act was committed.

A writer of some authority has stated that information about such facts as the engagement of two persons, the pregnancy of a woman, the quarrels of two spouses, but also about a person's employer, living quarters or state of health, falls within the notion of "personal or domestic affairs". The truth of the statement is no defence.<sup>33</sup>

The *Danish* Penal Code, 1933, contains a similar provision: it is prohibited to disclose to the public another person's "strictly private domestic affairs", and it is equally unlawful to disclose "other facts pertaining to private life which the person concerned may reasonably wish to withhold from the public" (§ 263, para. I, nos. 3 & 4).

The requirement of "publicity" implies that *e.g.* information about a person's economic and private affairs given by information agencies to individual applicants is not unlawful.<sup>34</sup> The case law developed on the basis of the provisions referred to and of earlier

<sup>33</sup> Skeie, *op. cit.*, pp. 126 ff.

<sup>34</sup> Krabbe, *op. cit.*, pp. 596 ff.

statutory rules will not be discussed below. Many cases—here as in Norway—concern the mentioning in the labour press of strike-breakers, and are of minor interest for present purposes.

(m) *Misuse of a Person's Words or Other Expressions*

78. In principle, the reproduction or publication of a person's words or other expressions, such as gestures, is undoubtedly lawful in itself, unless specific legal rules, either of the kind referred to under (a)—(1) above or, more particularly, the principles of copyright law, are violated by such reproduction or publication. However, the situation is different if such words or expressions are reproduced and/or published in a mutilated state, so as to give a false record of what was actually said or done. Such alterations would seem to be particularly dangerous where the matter thus altered makes an authentic impression, as can easily be the case with tape recordings, photographs or films which are subsequently "cut" so as to produce a misleading representation of facts.

Even more radical measures are conceivable, such as putting into a person's mouth words he has never uttered, publishing entirely fictitious "interviews", or even publishing whole books under the name of an author who has had nothing to do with their composition.

The question, now, is whether there are legal rules applicable to such acts, and whether the notions of "privacy" or of "rights of the personality" may be useful for repressing them.

The cases referred to may often fall under some rule of private or criminal law. Tampering with *documents* issued by another person, or producing such documents under a person's name, will obviously amount to forgery, and be punished as such. Alterations of *copyrighted material* will violate the author's moral right, where such rights are recognized (§ 3 of the Scandinavian Copyright Acts, 1960—1961; art. 6 French Copyright Act, 1957; § 14 German Copyright Act, 1965) or some specific provision in the law of copyright (cf. sec. 43, English Copyright Act, 1956). Actions for passing-off may also lie, at common law, in some cases of this kind.

Frequently, alterations of a person's words or other expressions are made in order to give such words or expressions a *defamatory* character. In certain cases, *e.g.* where a person's name is abused, the *right to one's name*, recognised in some jurisdictions, may be invoked, and similarly, where there is a general *right to a person's likeness*, that right may have been violated.

Nevertheless, there undoubtedly remain cases where none of the rules now discussed will be applicable. An abridged, or even a forged interview may cause harm without being a violation of any precise rule. This would seem to be a gap which could be filled out by the right of privacy or of the personality. On the other hand, it is an obvious necessity for the press, as for other mass media, to cut down speeches, interviews and even pictures in many cases. Some test for the reasonableness and legitimate character of such measures must be found.

(n) *Unauthorized Use of a Person's Name, Identity  
or Likeness*

79. The topic now to be discussed stands on somewhat firmer ground than those we have just considered. On the other hand, there are very important differences between the legal systems covered by this survey. Before we set out to analyse the applicable legal rules, it is necessary to examine the possible uses of the elements of human personality referred to in the heading of this paragraph.

A *name* may be envisaged from two entirely different aspects. It is, on the one hand, a mere label, attached to a given person; on the other hand, it is a "utility", an object of property, in itself. If a person calls himself Mr. Vere de Vere, this may be either in order to be taken for a certain person so called, or simply in order to have some designation by which to be addressed and referred to. Similarly, an author of fiction may call a villain Mr. Vere de Vere, and this may—if at least some other identifying factors are present—be taken to refer to a real person; it may also be considered as nothing but a convenient designation. The likelihood of a name being taken as a reference to a determined person depends upon

two facts: the commonness or uncommonness of the name and the amount of additional identifying factors accompanying the name.

Some names are famous, because they are the labels of famous persons. Others are utterly obscure, but uncommon. Most names are both common and obscure. The famous names have magic in them. If you call a cigar Henry Ford, you bestow upon it at least a pale reflection of the glory attached to the motor-car manufacturer. Reflections in the opposite sense are also possible. If you call a bad cigar Pontifex, there may be a person bearing that presumably uncommon name who feels disagreeably associated with bad cigars. If you call a cigar John Smith, nobody is likely to react.

These simple facts must be kept in mind when considering the legal problem of using a person's name. The *use* of it with a view to being mistaken for another person entitled to it may obviously be both dangerous or unpleasant for that person. The use of it without any such intention may also offend those who already bear it and who prefer that it be reserved for themselves. The use of it in connection with goods, or with advertising for goods, may equally offend its bearers, who do not want to be associated with such goods or advertising. The *mention* of it in connection with a report of facts may please or offend according to the nature of the facts and the total strength of identifying factors pointing to the person concerned or to some other person. The mention of it in connection with fictitious events produces the same effects. (cf. on misuse of a person's words, *supra*). Its mention in connection with alleged facts is almost regularly considered as offensive.

The distinction between use and mention is important, although not always clear. It corresponds, at least in part,—being wider—to Dean Prosser's distinction between appropriation on the one hand, and "false light" and "disclosure" cases on the other. There are, of course, doubtful cases: putting a name on a list of candidates for a political office is normally a "false light" case, but if the name is important enough, it may certainly be described as "appropriation".

The use-appropriation cases are a reasonably clear group, however. That cannot be said for the other category. Here, in fact, the name is nothing but an identifying factor among others. Its task is to

localize facts, as it were. Therefore, this group is indissociably connected with disclosure of private facts and with defamation. More often than not, it is through the mention of a name that a press report amounts to a "disclosure".

In those jurisdictions where an exclusive right in a person's name is recognized, it is against the *use* of the name, not against its *mention* that such a right arms its beneficiary. If the right has been occasionally invoked in cases of the latter category, it is submitted that the explanation is—where such decisions are not based upon false reasoning—that the right to a person's name has simply been used as the peg upon which to hang a protection of privacy.

What has been said about names applies, *mutatis mutandis*, to a person's likeness. There are certain kinds of usurpation which, for obvious reasons, cannot be committed with a likeness. On the other hand, a person's likeness can be *appropriated* in manners which are impossible with names. It has a substance, whereas names are mere symbols, whatever their ring of history or bank accounts. Thus, the name of Miss Elizabeth Smith, be she ever so pulchritudinous, will not make a cigarette sell better; her picture may, just as much as the portrait of the greatest statesman or comedian. Moreover, Miss Smith's portrait can fill out a page in a magazine, be she ever so anonymous. Many people who would laugh at the pretention of an exclusive right to their name may have a solid interest in a right to their likeness.

A person's likeness as an *identifying factor* is "stronger", as it were, than a name, unless the latter be uncommon, provided the accompanying additional identifying factors are equal. It has a greater power of suggestion, and attracts more attention. A press notice to the effect that John Smith has been fined for an offence gives little guidance to the culprit's identity; a photograph leaves no doubt. On the other hand, it has a far less efficient "localizing" effect; in modern communities, you have a reasonable chance of finding a person whose name you know, but the tracing of a face in the crowd will defy all efforts. As an identifying factor, the person's likeness works only among those who already know that person sufficiently to put a name under the portrait. That, however, is usually enough, for the reputation of most people is a strictly local

phenomenon. Therefore, there might be grounds for protecting a person's likeness more strictly than his name. There are also other grounds for such an attitude. In general there are fewer occasions where anyone has a legitimate interest in publishing a person's likeness than in mentioning his name: the portrait is often an ornament to the tale, no more. As soon as this is the case, there is an element of appropriation: the murderer's victim helps to fill out the two half-columns which the story could not fill. Moreover, a person's likeness is a more tangible thing than his name; it is simply easier from a technical point of view to institute an exclusive right modelled upon artistic copyright. Thirdly, the risks of abuse are greater, at least as far as the press is concerned: everybody knows that a verbal description in an article may contain some mistake, in short that it is the result of a journalist's work. But the camera, we all know, tells the truth, however unflattering. Finally, it would seem that persons portrayed in a newspaper or elsewhere feel themselves the greater power of suggestion, and react more strongly than to a simple mention of their name.

Conversely, there are cases where the right to a person's likeness is opposed to stronger interests, and must suffer greater exceptions, than the right to a person's name: you can make a press or a radio report of a riot without disclosing any names, but it is obviously impossible to televise the scene or to photograph it without showing at least something of the participants.

In short: a person's likeness can be appropriated, even more extensively than a name. As an identifying factor, it is less indissociably connected with actual information about the person portrayed, but where so connected it is rather more efficient, and usually less necessary for legitimate reporting purposes.

80. To what extent are there, in the legal systems considered here, legal rules on a person's right to his own *name*, the principles derived from a specific "right of privacy" being left aside?

On this point, there is a fundamental difference between the common law and the continental systems. The latter generally recognize, the former do not know, an exclusive right of this kind.

According to § 12 of the *German Civil Code*:



"A person whose right to use a name is contested by another person or whose interests are violated by the unjustified use of his name by another person, has a right to demand that such violation cease. If there is a risk of repeated violations, he may ask the court for an injunction."

It is not necessary to examine in detail the sense of this provision and the way it has been interpreted by the courts. The cases covered by the language of the enactment are obviously those where a name is *used* (cf. above), not those where it is mentioned.

There is no corresponding provision in *French* law, but very early the courts recognized an exclusive right to a person's name, which is protected with the greatest strictness; there are a great many decisions on this point. As in German case law, the exclusivity of the right is relative in the sense that there must be some risk of confusion between persons or families; this condition implies that the bearers of common names have not been successful in their actions.<sup>35</sup>

The *Scandinavian* countries have similar provisions, although less absolute; there is no reason to discuss these rules here.

It is a well-known principle of *common law* that any person is not only free to change his name, but may also assume a name already used by someone else.<sup>36</sup> American law has remained faithful to its origins on this point.<sup>37</sup> The limits are set only by the possibility of an action in cases of fraudulent use of a name to the prejudice of another person,<sup>38</sup> an action for defamation or for passing off.<sup>39</sup>

There are minor exceptions to and enlargements of the protection, *e.g.* in the law of trade marks and unfair competition, but these rules would seem to be of minor interest here.

In the second part of this study, we shall examine the question according to what principles and to what extent the exclusive right to a person's name has been used to protect interests relating to privacy.

<sup>35</sup> For a recent survey of case law, *vide* Professor Kayser in *Revue trimestrielle de droit commercial*, 1959, pp. 10 ff.

<sup>36</sup> *Du Boulay v. Du Boulay* (1869) L.R. 2 P.C. 430.

<sup>37</sup> Prosser, *op. cit.*, p. 403.

<sup>38</sup> *Re Talbot* (1932) Ir. 714.

<sup>39</sup> *Vide e.g. Forbes v. Kemsley Newspaper Ltd.* (1951) 2 T.L.R. 656.

81. In respect of a person's *likeness*, the same difference between continental law and common law can be noted. That there is, in principle, no such protection in *English* law would seem to be beyond doubt;<sup>40</sup> we shall return to the question of how various actions, in particular libel, have been used to fill out partly this gap. The standpoint of American common law, before the tort of invasion of privacy was generally recognized, was the same as in England.<sup>41</sup> In the course of this century, however, there has been legislation in New York and some other States, which prohibits the unauthorized use of a person's likeness for advertising and purposes of trade.<sup>42</sup>

In *French* law, there is no statutory provision on the right to a person's likeness, but the general principle that it cannot be published without the consent of the person portrayed was recognized towards the middle of the 19th century by the courts, and has been upheld ever since with considerable consistency. There is, however, no absolute agreement either on the classification of the right or on its precise limits; we shall have to return to modern case law below.<sup>43</sup> The statutory foundation of the right is normally art. 1382 *Code civil*.

We have already referred several times to §§ 22 and 23 of the *German Artistic Copyright Act*, 1907 (repealed in 1965); these provisions recognize, and regulate in detail, a person's right to his likeness. Case law founded on these enactments remained relatively scarce until the end of the second World War. By now, there exists a body of important decisions. At the same time as the statutory provisions referred to have furnished certain elements of importance for the balancing of interests in the application of the "general right of the personality", that right has been held, in its turn, to complete the protection granted by the Artistic Copyright Act.

According to § 22, portraits can be distributed or exhibited in

<sup>40</sup> *Vide e.g.* Winfield, *op. cit.*, p. 729.

<sup>41</sup> Cf. Prosser, *op. cit.*, p. 386.

<sup>42</sup> *Op. cit.*, p. 388; Brittan, *op. cit.*, pp. 252 ff.

<sup>43</sup> For a survey of the results achieved by earlier case law, *vide* Nerson, *Les droits extrapatrimoniaux* (1939), pp. 136 ff.

public only with the consent of the person portrayed; such consent is presumed if the model is paid. After the death of the person portrayed, the right to authorize public use of the portrait rests with his relatives according to principles laid down in detail. The exclusive right to authorize public use does not apply (§ 23) to: portraits pertaining to "contemporary history"; pictures where persons are secondary in relation to buildings or landscapes; pictures of assemblies, processions or similar proceedings in which the persons portrayed have taken part; portraits which have not been commissioned, if their public use is demanded by "superior artistic interests". The exceptions do not apply to a public use which violates the legitimate interests of the person portrayed.

Finally, § 24 makes the public use of pictures lawful if it serves the interests of the administration of justice or public security.

The standpoint of *Scandinavian* law is not uniform in respect of portraits. According to § 27, subsec. 2, of the Swedish Copyright Act., 1960, copyright in a portrait executed on commission may not be made use of without the consent of the person who commissioned it. Under § 14, of the Act on copyright in photographic pictures, 1960, the right to a photograph made on commission rests with the person who commissioned it; the photographer may, however, exhibit the photograph for advertising purposes unless expressly forbidden by the person who commissioned the picture. The Danish and Norwegian rules on photographs are the same as in Sweden; the limitation on copyright in commissioned portraits has not been adopted in Denmark and Norway. The Finnish rules are identical to those of the Swedish statutes.

The Norwegian Act on photographic pictures, 1960, contains, however, some additional provisions dealing with a person's right to his own likeness. According to § 15, the copyright in photographic portraits does not entitle the owner to reproduce or publish such portraits in any way without the consent of the person portrayed. The photographer may exhibit the picture for advertising purposes, unless this is explicitly prohibited by the person represented, and the portrait may further be published: if it has an "actual and general interest", if the likeness of the person portrayed is of secondary importance in relation to the principal subject-matter of the picture,

and where the picture represents assemblies, processions outdoors or events of general interest.

### (o) *Defamation*

82. Logically, there is no closer connection between those branches of privacy which deal with the publishing of information and the law of defamation than between the intrusion cases and assault and battery. Such invasions of privacy as disclosure of private facts and unauthorized use of a person's name and likeness may also amount to defamation, but from the point of view of the interests protected this is, in principle, immaterial.

There are three facts, however, which make it necessary to add here some short remarks on the principles of defamation in the countries covered by this study. First, there has been a strong tendency, particularly in England, to extend the existing defamation rules so as to comprise certain invasions of privacy. Secondly, the law of defamation is based upon a balancing of interests which has sometimes been used, sometimes overlooked, in privacy cases concerning matters closely related to defamation. Finally, the remedies granted for defamation have been used, to some extent, to sanction invasions of privacy, particularly by the press.

In Continental jurisdictions, defamation is primarily looked upon as a criminal offence; at common law, the tort aspect prevails, although defamation is also a concept of criminal law.

83. In all Continental systems, the law of defamation knows one basic distinction, that between expressions of contempt and allegations of facts.

Insult (§ 185 German Penal Code) is any expression, by words or signs, of contempt and disapproval. Defamation (*üble Nachrede*, § 186 Penal Code) consists of the allegation or propagation of dishonouring facts about a person, whether such facts be true or not. The allegation or propagation of dishonouring facts known to be false constitutes the crime of malicious falsehood (*Verleumdung*, § 187). The defence of truth is admitted, except in respect of clear insults (§ 192); the defence is invalidated if it is not proved

that the victim of the defamation has committed precisely the acts alleged by the defendant. A further defence is created by § 193 Penal Code: criticism in respect of scientific, artistic or professional performances, expressions used in the defence of one's own rights or for the protection of legitimate interests and some other specific groups of judgments and comments are defamatory only if they are insulting through their form or by reason of the attendant circumstances. Among the remedies should be mentioned a form of general damages (*Busse*, § 188)—otherwise unknown to German statutory law, with some exceptions—and the right to have the judgment published at the defendant's expense, if the defamation was made in public. If the defamation was contained in a newspaper or magazine, the successful plaintiff may demand that the actual decision of the court be published there.

There are special provisions on the responsibility of the press, but since press legislation is a matter for the different States of Federal Germany—most of which have introduced complete press statutes (whereas others abide by the Imperial Press Act, 1874), we shall refrain from discussing these provisions here.

With an exception without interest for present purposes, the *French* rules on defamation are contained in the Press Act, 1881. Art. 29 of that Act draws a distinction between insults (*injures*), which imply no allegation of facts, and defamation (*diffamation*); the latter term is applied to allegations or imputations pernicious for a person's honour or reputation; the publication, whether in direct form or in a report, of such allegations, is punishable, provided the victim can be identified. The defence of truth is admitted (art. 35) unless the facts concerned regard private life, are more than ten years old or fall within certain other cases. There is a presumption to the effect that the publication of defamatory matter was intentional (art. 35*bis*). In addition to ordinary criminal remedies, any person mentioned or designated in a newspaper has an unconditional right to publish a reply (*droit de réponse*) in the same newspaper. The exercise of this right is regulated in detail in art. 13 of the Press Act.

We can refrain, here, from discussing the *Scandinavian* rules on defamation. It is enough to state that the most recent statute, the

Swedish Penal Code of 1962, also maintains the distinction between defamation (chap. 5, § 1) and insult (chap. 5, § 3). It is a good defence to a defamation action that the defendant had a duty to make a statement or that the making of such statement was justifiable in the light of the circumstances of the case, provided the defendant proves that the facts imputed to the complainant were true or could reasonably be held true.

84. There are certain minor differences between *English* and *American* common law rules on libel and slander; the following short remarks are based on English authorities. The distinction between libel, which is not only a tort, but also a crime, and slander, which gives rise only to a civil action, lies in the means: slander is defamation by spoken words or gestures, libel demands a vehicle of some permanence. It is not necessary that the defamatory character of a statement—or other act conveying an opinion or an allegation of facts—should be explicit, according to the ordinary meaning of the words used; it is sufficient if an *innuendo*, a defamatory secondary meaning following from particular facts or circumstances, can be proved by the plaintiff.<sup>44</sup> Whereas libel is actionable *per se*, irrespective of any proved damage, an action in slander will not lie unless special damage is proved. The defence of truth is admitted; there are also special defences among which those which may be invoked by the press are of special interest here. Under the Defamation Act, 1952 (section 7 (3)), the privileges of the press may be invoked only if the matter reported or discussed is a matter of public concern, the publication of which is for the public benefit. Apart from such defences as a duty to make a statement or the protection of interests, the press may invoke the defence that the defamation was unintentional or that the incriminated statements were a fair comment on matters of public concern. Proved malice invalidates these defences.

In spite of the technical particularities of the common law of defamation, it would appear that the balancing of opposing interests which characterizes it is on most points of importance identical to that underlying the Continental systems referred to above.

<sup>44</sup> *Vide* Winfield, *op. cit.*, pp. 592 ff,

## E. SPECIAL LEGISLATION, BYE-LAWS, RULES AND STANDARDS SET BY PRIVATE ORGANISATIONS

### 1. General Remarks

85. The law does not purport to enforce moral standards beyond a certain point. Its task must be more modest, as far as ethics are concerned. This weakness, if it be one, is likely to be felt with particular strength in a field like privacy, where, even in legal systems which recognize and protect the individual's interest in being "let alone", the limit between the invasions demanding a legal sanction and those which only amount to bad manners is difficult to draw.

To get a complete view of the protection offered *de facto* to the interest referred to above, it is useful, therefore, to glance at such standards as may be set by organisations of persons whose activities are particularly important from the point of view of privacy. There are, on the one hand, organizations of professional or business men to whom is confided, in the course of their profession or business, information of a confidential character. On the other hand, there are the organizations of those who publish information of various kinds: the mass media and the advertising business.

The material which it has been possible to gather in order to obtain some notion about the standards set by these organizations, as a complement to legal rules, is very uneven. On some points, only Swedish material has been available. However, such as it is, this material will now be briefly examined.

The problem raised by any extra-legal system of principles in the field now considered would seem to be, in the first place, that of its *efficiency*. It is of little value if an organization proclaims lofty principles without being able to enforce them. On this point, there are considerable differences between the organizations which are of particular interest for present purposes: the expulsion of a practising lawyer from the bar to which he belongs is an extremely severe punishment, morally, socially and financially. A disapproving state-

ment about the methods of a newspaper published in the press by its own organization may be of no effect at all as far as the editors of that paper and its readers are concerned. The business world may be more particular; respectable firms are likely to do what they can to avoid advertising methods officially disapproved by the competent organizations.

## 2. Professional Organizations

86. It is natural that practising *lawyers* should pay special attention to questions of professional secrecy, whether there be statutory or other legal rules on the topic or not, and whether such rules exist in the form of criminal responsibility or, as in some jurisdictions, in the less general form of a right for counsel to refuse to appear as a witness or a prohibition against testifying. Thus article 35(1) of the *Règlement intérieur du barreau de Paris* imposes strict professional secrecy on the members of the bar; this duty comprises any information obtained in the course of the lawyer's professional activities, is unlimited in time and involves, *i.a.*, a prohibition against pleading against a former client where there is any relation between the cases.

The duty of secrecy is affirmed in § 34, para. 2, of the bye-laws of the Swedish Bar Association. The Board of the Association has seldom had to sanction violations of this duty, however.<sup>45</sup> There seems to be a reasonable amount of international agreement on the broad principles of the lawyer's duty to keep professional information secret; in the drafts for an international code of ethics, the International Bar Association has adopted two rules on this point: the confidential character of any oral or written communication between lawyers and the duty for a practising lawyer to observe strictly the secrecy of any information obtained in the course of his profession.<sup>46</sup>

<sup>45</sup> *Vide*, *Tidskrift för Sveriges Advokatsamfund*, 1956, pp. 17 and 20; 1960, p. 37; 1966 p. 36. All these cases concerned obvious but minor violations of the duty of secrecy and resulted in acquittal or an admonition.

<sup>46</sup> §§ 5 and 14 of the Monaco draft, 1954. *Vide* *Tidskrift för Sveriges Advokatsamfund*, 1956, pp. 103 ff.



Another problem which is of some interest here, and which has been discussed by the International Bar Association, is the tape recording of telephone or other conversations in the course of a lawyer's practice. At the Salzburg meeting of the Association (1960), a majority of the participants were of the opinion that such recording should not be performed unless the persons concerned had been warned.<sup>47</sup>

87. The duty of secrecy of *doctors* has already been touched upon insofar as it is regulated in general statutory or other legal provisions. In Swedish law, where no such general provision exists, there are, however, rules to the same effect in § 60 of the General Instruction for Doctors, 1930, and § 31 of the Hospitals Act, 1959. In addition to these rules—and the numerous administrative provisions applicable to the majority of Swedish doctors who are employed in the public service—the Swedish Medical Association adopted, in 1951, a *Codex ethicus*, which is not, however, sanctioned. According to article VIII of that Code, the doctor shall always take for granted that the patient wishes delicate personal problems to be kept secret and shall respect this, unless the patient's interests require that they be revealed. Under article IX, the doctor shall see to it that his subordinates also observe the duty of secrecy. Another principle in point is laid down in article XIII: the doctor shall avoid drawing unseemly press attention to himself and to his work.

88. *Bankers* and *accountants* are regularly the depositaries of both personal and business secrets. In most countries, there are statutory or customary rules to the effect that bankers are bound to keep such information secret.<sup>48</sup> There is a general rule to that effect in the Swedish Banking Act, 1955 (§ 192) and in all the special statutes on specific branches of banking. Restrictions on the duty of secrecy are laid down in a number of statutes, particularly in the field of fiscal law.

A problem of practical importance not only for bankers is the

<sup>47</sup> Vide Mr. Werhahn in *UFITA*, vol. 33 (1961), pp. 217 ff.

<sup>48</sup> Vide the comparative survey in H. Nial, *Banksekretessen*, 2nd ed., Stockholm, 1959, pp. 5 ff. (*Skrifter utg. av Svenska Bankföreningen*, no. 78).

extent to which information may be given about a person's economic position in general. An eminent Swedish expert states on this point that the solvency or general financial position of a customer is not a fact comprised by the bank secret; on the other hand, specific facts concerning the customer's affairs may not be revealed to third parties.<sup>49</sup>

A few words should be said, in this context, about those agencies which either deliver, upon demand, information about a person's financial position—such information is, today, frequently stored in electronic machines—or publish periodical reports of protested bills of exchange, court decisions, bankruptcy adjudications, etc.<sup>50</sup> There would seem to be a difference between the giving of information to single persons who claim some interest in the matter and the publishing of such information. In a recent Swedish Supreme Court decision<sup>51</sup> an agency was held liable for defamation when information given to a certain person was proved to be incorrect. It seems to be implied in the *ratio decidendi*, however, that the giving of correct information of this kind would not be actionable. Although communications of this kind are often felt to be defamatory, there are important interests opposed to the individual's claim not to have his economic transactions mentioned or made public.

*Accountants* are chartered, in Sweden, by a Chamber of Commerce, which may, by way of disciplinary sanction, revoke the charter or admonish an accountant who has disregarded his duties. Among these is the duty of secrecy, which the accountant must promise to observe upon receiving his charter. There are also special provisions, *i.a.*, in the Limited Companies Act, 1944, on this duty of secrecy.

<sup>49</sup> Nial, *op. cit.*, p. 15.

<sup>50</sup> *Vide* K. L. Karst, "The Files—Legal Controls over the Accuracy and Accessibility of Stored Personal Data" (*Law and Contemporary Problems*, vol. XXXI, 1966, pp. 342 ff.)

<sup>51</sup> *Nytt Juridiskt Arkiv* 1962, p. 31.

### 3. Advertising

89. Advertisers may come into conflict with the law of privacy on several points. The most important one is undoubtedly the conflict between the advertiser's interest in striking lay-outs and in profiting from a person's fame on the one hand and the privacy interest of not having one's name or likeness appropriated for business purposes on the other. The practice of quoting testimonials or certificates from known or unknown persons on the merits of advertised goods may lead to an abuse of a person's words or other expressions.

Disloyal or dishonest advertising practices interest not only the persons who are thus more or less involuntarily "appropriated"; they are also a matter of concern to business competitors and, more generally, to the business world as a whole. Since the 1930's, the International Chamber of Commerce has endeavoured to bring about a higher standard of advertising ethics. On a national level, similar efforts are being made. Thus in Sweden, there is a special Council of Swedish Trade and Industry (*Näringslivets Opinionsnämnd*) which gives, upon request, opinions on the compatibility of advertising and other business practices with acknowledged standards. The Council enjoys considerable authority; its statements are published in yearbooks. In advertising matters, it follows the standards laid down by the International Chamber of Commerce.

The "*International Code of Advertising Practice*" (1966), published by the International Chamber of Commerce, deals with certain questions of interest for present purposes. Under rule 5 of the Code "testimonials should be genuine" and not contain any statement or visual presentation likely to mislead nor should they be used in a manner having that effect. Testimonials which are obsolete or otherwise no longer applicable should not be used. It is further laid down that "advertisements should not contain any reference to any person, firm or institution without due permission. Nor should a picture of any identifiable person be used in advertising without due permission." The International Chamber of Commerce has established an International Council on Advertising Practice which examines, on the basis of the Code, cases of unfair advertising submitted to it by the parties concerned. The published opinions of the

Swedish Council referred to above do not comprise any cases of immediate interest for this study.<sup>52</sup>

#### 4. Mass Media

90. By tradition, the legislation on defamation in most countries takes particular account both of the special responsibility and the special needs of the *press*.<sup>53</sup>

In spite of the wealth of detailed provisions, responsible journalists have felt a need for ethical standards somewhat higher than those established by law, and there are, in several countries, press organizations which try to maintain such standards. In England, for instance, the Press Council works for an amelioration of press conduct, *e.g.* in matters concerning privacy. In Sweden, the Journalists' Club (*Publicistklubben*) has published, since 1923, "Publishing Rules" and examines complaints about the press; the only sanction available is the publication of the opinions of the Board.

The present "Publishing Rules", dating from 1956, are formulated as recommendations and advice. It is recommended, *i.a.*, that information about crimes denounced to the police but not proved be examined with particular care, that the victims of sexual offences, persons who have committed suicide and the name of suspects in criminal investigations be not mentioned where no serious interest demands it. In a new edition of the "Publishing Rules", actually in preparation, there is a special section on privacy, in which journalists are recommended not to publish details about a person's private life and affairs unless such publication is judged strictly necessary.

<sup>52</sup> In a couple of cases, the use of pictures of actresses in connection with advertising for ladies' hats was held unfair because the customers could be led to believe that the hats concerned were actually used by the stars portrayed. *Vide*, on the standards of Swedish advertising, Mr. Tengelin in *Den Svenska Marknaden*, 1951, nos. 3 and 4, 1955, no. 4.

<sup>53</sup> For an interesting discussion of press ethics in Scandinavia, *vide* Solums-moen, *Vaer Varsom Redaktør*, Oslo 1966, where the code of Norwegian Journalists is reproduced.

It should be added that, by reason both of their general form and of the absence of real sanctions, the "Publishing Rules" are not generally respected.

91. The new mass media—radio and television—are subject, in some countries, to the same legal rules as the press; in others special rules have been adopted. Generally speaking, the principles outlined under D above are applicable to the radio and the television, irrespective of the technical form of the applicable legislation.

Many radio and television enterprises—being generally very large and having, in many cases, a national monopoly in law or in fact—have issued internal rules and standards. Where there are many broadcasters in a country there are also organizations similar to those of the press. We shall deal briefly with the rules and standards of a few organizations and individual broadcasters.

The "Radio Code" (12th ed. 1966) and the "Television Code" (11th ed. 1966) published in the U.S.A. by the National Association of Broadcasters contain detailed rules on the contents of radio and television programmes. Privacy, however, is not particularly mentioned. In the "N.B.C. Radio and Television Broadcast Standards and Practices" (which summarizes the detailed manual issued by the Company) there are some provisions intended to prevent the abuse of a person's words in connection with interviews (No. 3d and e); misleading impersonations are also banned, and generally impersonations of living characters are subject to the person's consent. Similar rules are found in the "A.B.C. Standards and Policies" as revised, March 1966. These standards (section III, p. 9) also contain a general rule to the effect that references to living persons must be "within the bounds of fair comment". There are no specific provisions on privacy, however. Nor are there such rules in the "Code of Advertising Standards and Practice" (July 1964) of the British Independent Television Authority.

In the "Programme Rules" of the Swedish Broadcasting and Television Corporation (*Sveriges Radio-TV*) as presently in force, the "Publishing Rules" of the Journalists' Club (*vide supra*) are reproduced with comments. There are, in particular, detailed provisions on the use of a person's name in connection with reports on

criminal investigations and proceedings. Similar rules are in force in the other Scandinavian countries.

## 5. Conclusions

92. This short survey of a few selected documents from various organizations and companies justifies no far-reaching conclusions. There is no doubt that there is a clear tendency towards greater respect of privacy among responsible persons in the advertising branch and the mass media. The problem, however, is to what extent such attitudes can be backed up by effective sanctions. Generally speaking, this problem cannot be considered as solved except where there are firmly organized and financially independent bodies with powers to inflict disciplinary sanctions with effects approximately equivalent to those administered by courts. This would not seem to be the case so far in respect of the press and other mass media.

## F. JUSTIFICATIONS FOR INVASIONS OF PRIVACY

### 1. General Remarks

93. In our general survey of legal rules applicable to acts implying invasions of privacy (under D above) we have only considered statutory provisions and such well-established legal rules as are not founded upon the recognition of a particular “right of privacy” or of “rights of the personality”. It should be pointed out, for the sake of clarity, that this limitation is not applied in the following parts of the study.

It does not seem necessary to develop at length general considerations on the grounds upon which invasions of privacy committed by any of the acts examined above may be justified. It is obvious that the applicable defences will vary according to the nature of the incriminated act. *Prima facie*, it would seem likely that where privacy interests are protected by clear statutory provisions or where these interests are held to constitute “absolute rights” there would be less room for defences than where the principal technical instrument for the protection of such interests is the law of torts. Upon closer examination, however, it will be found that this difference is far less important than would seem to follow from the different terminologies.

The following survey of justifications will deal with the principles only, not with details. In the course of the study of applicable legal rules, defences have already been discussed on several points; further examination of them will follow in the second part. This survey merely aims at systematizing such justifications as may be invoked in cases involving privacy.

Such a classification is given in article 8, para. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (*vide* no. 42 *supra*): the right of privacy may be disregarded by public authorities in the interest of national security or public safety, the economic well-being of a country, to prevent dis-

order or crime, to protect health and morals, or to protect other persons' rights and freedoms. To these justifications can be added three others, which are not mentioned explicitly in the Convention, either because they are treated elsewhere or because they do not concern public authorities: the investigation and punishment of a crime already committed (cf. article 5 of the Convention) and, more generally, the enforcement of lawful decisions of courts and other authorities, the freedom of information and debate (cf. article 10 of the Convention) and, finally, consent given by the person whose privacy is invaded. In special cases, there are other interests which may be in point: the freedom of art or of science (cf. § 23 of the German Artistic Copyright Act, 1907, above).

## 2. Public Interest

94. *National security* may justify various kinds of invasions: intrusions, telephone tapping, interception of correspondence, surveillance in various forms. What is important here is on the one hand that the cases where such acts are admitted are defined with precision and that there are guarantees for such invasions being performed only upon the order of responsible officials, for determined periods and in determined places, and in such forms that the privacy of third parties is safeguarded. In short, there must be guarantees for the rule of law in such cases.

If we have largely left the invasions justified on this ground aside in the foregoing survey, it is in the first place because these conditions would seem to be fulfilled in the countries concerned, although there are considerable differences between them. As a general proposition, it seems justified to state that these cases cause some serious problems in the U.S.A., whereas they have at least aroused less attention in Europe.

The invasions justified on grounds of *public safety* have equally been disregarded above. This defence may be invoked in cases of intrusion (*e.g.* where the extinguishing of a fire makes it necessary to enter upon premises), in case of otherwise unlawful publications of a person's likeness (cf. § 24 of the German Artistic Copyright



Act), and, presumably, in other cases such as the disclosure of facts necessary for the identification of a dangerous lunatic. Broadly speaking, it would seem more difficult to define with precision the conditions necessary for this defence to be applicable. General provisions or principles on emergency as a universal ground of justification are likely to be invoked. On the other hand, the risk of undue invasions would seem to be smaller than where the vague and politically inflamed notion of "national security" is involved: the emergency cases referred to are mostly distinct, and those general principles which may be applicable usually demand some proportion between the protected and the sacrificed interests.

What is the *economic well-being* of a country may be more doubtful. The right for customs officials to search goods and persons would seem to belong under the heading "prevention of crime" rather than under this somewhat pretentious title. The same observation applies to such exceptions as exist, in some countries, for purposes of taxation (*e.g.* the breaking of the bank secret under Swedish tax law in certain cases). On the other hand, in those countries where the rule of law prevails, the vagueness of the justification referred to in the European Convention is a relatively small evil, since no authority can commit an otherwise unlawful invasion of privacy without invoking a specific rule.

This would seem to be true also about the defence of "*prevention of disorder or crime*", although this is in fact a point which has caused considerable problems in practice: to what extent is the police justified in taking preventive measures before there are grounds to believe that a crime has actually been committed?<sup>54</sup> The question arises, in particular, in communities where organized crime exists as a constant phenomenon, and where the police has to "keep in touch" with *milieux* where the investigation of crimes already committed seldom fails to provide information about crimes being planned. There seem to be few detailed rules on this aspect of police activities in criminal codes and even in administrative

<sup>54</sup> *Vide* Professor Peters in *Verhandlungen des 46. deutschen Juristentages*, 1966, vol. I, 3 a, pp. 142 ff., and Mr. Davis in *Montana L.R.*, vol. 27 (1966), pp. 175 ff.

regulations for the police (*e.g.* in France and in Sweden). The silence of the law, or the general character of the terms used to define the preventive aspects of police work, would seem to justify the conclusion that preventive measures involving invasion of privacy (and other violations of legally recognized interests) are allowed only where there are precise indications to the effect that crime or disorder is imminent—in which case emergency principles may be applicable—or where explicit statutory provisions (*e.g.* on the right of policemen to take care of young persons found in places or under circumstances clearly defined) justify preventive action.

The measures which may be justified as *protecting health or morals* are easier to describe, although the relativity of the notion of morals makes it awkward to apply. Invasions of privacy for the protection of health are *e.g.* searches of premises, compulsory examinations of persons, in some cases disclosure of information given to medical men and public disclosure—warning the public—of private facts in connection with epidemics and venereal diseases. All the countries concerned have laws on these, or at least on some of these, points. The protection of morals normally demands no more than the use of ordinary powers of the police in connection with the investigation of crimes against such criminal enactments as concern public morality. There may be special rules in some legislations, *e.g.* on the seizure of immoral publications. In a recent German decision, post office officials had seized (under a special enactment) immoral pictures sent from Denmark to a person in Germany. The court, however, refused to admit the pictures as evidence against the addressee, accused of the propagation of immoral publications, on the ground that the evidence had been secured in violation of the post secret.<sup>55</sup>

The defence of morals can also be invoked by private parties in defamation cases or in actions concerning recommendations to the general public to boycott a person's goods (considered in German law as a violation of the "right of the personality"). There are a

<sup>55</sup> *Landgericht Stuttgart*, September 29, 1964, in *NJW* 1965, p. 595; *vide* the criticism of Professor Peters, *op. cit.* p. 100.

number of German decision on this point;<sup>56</sup> in the boycott cases the defence has not been upheld.

Except for the last-mentioned cases, the invasions justified by the defences now referred to have the common feature that they are normally applicable to the intrusion and, to a smaller extent, the information-gathering branch of the law of privacy, whereas they will only exceptionally be invoked in matters concerning publication (disclosure of facts, use of name and likeness).

95. The same statement applies to a defence with which we can deal very laconically: *the enforcement of an order or a final decision by a competent court or other authority*. It is only exceptionally (*e.g.* in press cases) that such a decision will provide a good defence to anyone violating a person's privacy by a publication. Court orders may justify the gathering of information by otherwise unlawful means, *e.g.* telephone tapping; the enforcement of a decision may justify law enforcement officers in such acts as violating the domicile.

96. *Freedom of information and debate* is the interest most frequently invoked, in some form, as a defence in actions concerning the disclosure of private facts, the use of a person's name or likeness, and defamation. In one way or another, this interest is recognized in all the legal systems considered here. In French press law, it is implicitly recognized by the existence of the defence of truth, which does not apply where facts relating to private life are concerned (article 35, as amended, of the Press Act, 1881), and by the judge-made *droit de la critique* and those equally judge-made exceptions to the exclusive right in a person's name and, more particularly, likeness which are generally adopted. In English and American common law, the defence of fair comment in defamation cases is an example of this ground of justification. In English statutory law, the qualified privilege of newspapers (section 7 and part II of the schedule to the Defamation Act, 1952) is another example; the most important limit of the defence is that it applies only to

<sup>56</sup> *Vide GRUR* 1952, p. 410; *UFITA*, vol. 31 (1960), p. 370; vol. 32 (1960), p. 85.

matters of public concern, the publication of which is for the public benefit (section 7(3)).

The statutory bases of the justification now referred to in German law are article 5 of the Constitution, where freedom of expression is proclaimed as a fundamental right, §§ 186 and 193 of the Penal Code, where the defence of truth is admitted and the protection of legitimate interests is recognized as a good defence in some defamation cases, and finally § 23 of the Artistic Copyright Act, 1907, on the publishing of portraits belonging to contemporary history. These provisions which, according to their tenor, apply only to particular cases, have been developed by the courts into general principles, valid in the field of "rights of the personality". In particular, the notion of "protection of legitimate interests" has been extended considerably: the press is considered as the depository of the legitimate interest of the public in being informed and of the general interest in a free debate on matters of public concern.

### 3. Private Interests

97. There are, obviously, many cases where the defence of a person's private interests may demand that another person's privacy be invaded. Given the multiplicity of possible conflicts, it seems difficult to lay down any general principles. Physical intrusions may exceptionally be justified in emergency situations; searching a person may be lawful in the exercise of legitimate self-defence where such a right exists, at least in cases of *flagrant délit*. Eavesdropping, tape recording, filming and perhaps also interception of correspondence may be lawful if it is the only possible way of securing evidence of importance. We shall return later to the question of the admissibility as evidence of material obtained by methods normally unlawful.

The protection of a person's own interests is more seldom raised as a defence to those invasions of privacy which are committed by means of *publication* in one form or another. The promotion of such interests by the appropriation of another person's name or likeness for commercial purposes is clearly unjustifiable. It is also

difficult to see how the disclosure of private facts could be justified on this ground. In defamation cases, the use of harsh language may be excused if indulged in by a person defending his own rights (§ 193 German Penal Code), and bringing an action against a person on grounds which may be considered as defamatory is equally a privileged case unless the action is actuated by malice (cf. art. 373 French Penal Code, § 164 German Penal Code).

The only universally valid principles which could possibly be formulated in respect of the scope of the defence now under consideration would seem to be that the incriminated invasion must be the only possible way of protecting the interest concerned and that there must be some reasonable proportion between the interest protected and the interest sacrificed. These principles are often stressed in German decisions, particularly those which concern the securing of evidence by otherwise unlawful means, but they would also seem to be applicable in other cases, where the conflict is not solved by clear rules. The obvious difficulty in applying these tests is the ranking of the opposing interests at stake. It may be easy enough with physical intrusions (cf. French cases quoted above, no. 52), but with regard to the gathering of evidence by unlawful means it raises considerable problems, not least because the opposing interests are frequently incommensurable.

#### 4. Consent

98. There are two principles to be considered under this heading: the adage *volenti non fit injuria* and the notion of *ordre public*, which may, for present purposes, be equated with principles of public policy and morality. Normally, consent deprives an invasion of privacy of its unlawfulness, even where the law of privacy is analysed in terms of "rights of the personality" which cannot, by definition, be sold or otherwise disposed of. Consent, like any declaration of intention, has to be interpreted; hence certain conflicts about its scope, *e.g.* where a person consents to have his picture published and there is disagreement as to whether the authorization extends to all or only to some particular forms of publication.<sup>57</sup>

<sup>57</sup> Vide *e.g.* Prosser, *op. cit.*, pp. 419 f.; *Landgericht Aachen in UFITA*, vol. 30 (1960), p. 113.

One problem—which may also be considered as relating to the definition of the liberty to publish such details about public figures as would normally be considered as private facts rather than as a matter relating to consent—is the question whether there is such a thing as an irrevocable consent of a universal nature: does a person assiduously inviting the press to publish everything about his life and habits thereby lose the right to invoke any right of privacy? The problem has been considered particularly in recent French decisions. Broadly speaking it seems justified to answer it in the negative.

Another problem, which can only be mentioned here, and to which we shall not return, is who can give a valid consent. Where the right of privacy is considered as a “right of the personality”, it would seem to follow from prevailing theories on the nature of such rights that a minor or a lunatic cannot be represented by his guardian or committee in the exercise of it.<sup>58</sup> On the other hand, the minor’s well-being and moral development, and consequently the responsibility of the guardian, may be involved.

Obviously, if consent to what would otherwise be an unlawful invasion of privacy amounts to an immoral contract, e.g. in the case of an authorization to publish an immoral picture, general principles of private law invalidating such contracts are applicable. However, the notion of *ordre public* may intervene to make a consent ineffective in other cases also, e.g. in respect of disclosure of secrets given to professional advisers.<sup>59</sup>

<sup>58</sup> Cf. Nerson, *Les droits extrapatrimoniaux*, pp. 463 ff.

<sup>59</sup> Cf. Mr. Martin in *R.T.D.C.* 1952, pp. 247 f.

## G. REMEDIES

### 1. General Remarks

99. *De lege lata*, the remedies granted for invasions of privacy in the legal systems considered are clear enough, although the systems of remedies, particularly in actions concerning the press, are fairly complicated. Here, as in respect of justifications, we must stick to principles, for remedies are often influenced by national procedural and institutional technicalities which make them difficult to compare.

On the other hand, the term "remedies" will be used in a very broad sense here. Not only civil and criminal sanctions will be considered, but also interlocutory measures, extra-legal action, the principles governing the admission of certain information as evidence—in short, all those legal rules which may sanction or otherwise deter from invasions of privacy.

100. *De lege ferenda*, the question must be faced whether existing remedies are adequate, given the highly particular nature and diversity of the interest or interests commonly called privacy. It would be false to overstress one common feature of these interests: that the wrong can never be completely redressed. For in that respect invasions of privacy are not alone: the infliction of both physical harm and mental distress cannot be completely rectified by any sanction either. Only where specific restitution is possible can there be a completely adequate redress.

A brief analysis of the different kinds of invasions is sufficient to make the highly differentiated demands upon adequate sanctions appear.

Physical intrusion is analogous to any other wrong to persons or property and would seem to require no other remedies than those generally applied to such wrongs.

Intrusions committed by means of peeping, eavesdropping, spying and prying raise two major problems: that of defining the ele-

ments of the act and that of taking measures to ensure that information obtained in this way is not abused. To meet the latter problem, traditional rules on defamation (and on *e.g.* blackmailing) would seem to be enough, however difficult may be the task of making them really effective. As for the first problem, its existence may be an indication against *criminal* sanctions, except for clearly defined cases. It seems useful to recall here the Danish rule on certain invasions of this kind: they become criminal only if continued after a warning by the police (cf. no. 64 above). This system seems rational, since the otherwise vague acts are defined, as it were, by the warning, and the culprit is made aware of the unlawfulness of acts which may otherwise easily be considered as relatively harmless.

Tape recording, photographing and filming would also seem, in general and except for cases clearly defined by the place, the occasion and the subject matter, to defy definitions sufficiently clear for the purposes of criminal rules. Normally, these acts are lawful, and there must be a particular conflict of interests to make them reprehensible. On the other hand, the mere existence of unauthorized records of pictures creates a permanent danger to the privacy interests involved, a danger which is not entirely eliminated by legal rules prohibiting and sanctioning the *publishing* of such material. Among the civil sanctions applicable, it therefore seems necessary to have such rules as make possible the seizure and destruction of material unlawfully obtained, and possibly also of lawfully made records and pictures, once they have served their purpose. In a recent German decision, it was held that after his acquittal, an accused had a right to demand that fingerprints and photographs taken by the police in the course of the investigation be destroyed.<sup>60</sup>

Interception of correspondence is an act defined with sufficient clarity to admit criminal sanctions, although there are certainly marginal cases of some difficulty (such as the reading of letters by secretaries and other employees).

The essential question raised by telephone tapping and electronic surveillance seems to be—to judge from the American experience—how to fight them with sufficient efficiency. On the other hand,

<sup>60</sup> *Verwaltungsgericht Neustadt*, June 12, 1965, in *NJW* 1965, p. 1934.



both the devices and the acts of using them are clearly defined. Moreover, except for criminal investigation, there seem to be very few cases where any legitimate interests can be invoked in favour of the use of such devices, and these cases—belonging to the sphere of natural sciences, medicine, national defence and possibly some other activities—are both sufficiently few and sufficiently well-defined to make a licensing system possible. Given the extreme difficulty of discovering such devices and their use, the author submits that in order to attain a maximum of efficiency they should be subject to criminal and, where necessary and possible, civil rules on every possible level: manufacturing, export, import, sale, and use should be subject to licensing; criminal sanctions should apply to violations of the rules on each of these points, and whenever such devices are used so as to invade a person's privacy civil remedies should be available. The author can find no reasons for a more lenient treatment of the business interests involved, of "amateurs" or whoever may have some interest in the use of such devices than is granted in respect of arms and poison. If, as stated in some American articles, business has acquired the habit of using such devices—claimed to be "practical", "efficient", "time-saving" or whatever other reasons are put forward as respectable in such connections—it is for business to change. Money could be made before electronic devices were invented; no superstitious respect for the alleged needs of business should restrain lawgivers from action in respect of such manifest threats to fundamental human values.

Those invasions of privacy which concern the publishing of material about a person must be met with moderation and tact rather than with vigour. Particular cases, such as the use of a person's name or likeness for advertising purposes, can undoubtedly be singled out for special treatment, but in most cases the complexity of opposing interests with some claim to recognition makes this field one where angels have good reason for fearing to tread. A study of cases is necessary to make the principal problems appear.

In the following survey we shall examine briefly the remedies actually applied. Such remarks *de lege ferenda* as may be found necessary in addition to those already made will be made in the course of Part II.

## 2. Criminal Sanctions

101. Very little need be said here about the criminal sanctions applicable to invasions of privacy. Although there are differences between the legal systems considered—*e.g.* in that several cases, such as physical intrusion or defamation, are primarily considered from the aspect of civil liability in common law countries, whereas the criminal law aspect prevails in the Continental legal systems—the cases where privacy is protected in criminal law are roughly the same. Thus, in particular, intrusions committed by means of physical violence and defamation are punished in all the countries concerned, as are violations of the secrecy of correspondence and wire-tapping.

What should be pointed out is that with few exceptions—cf. on Danish and Norwegian law, no. 77 *supra*—the notion of privacy as an interest distinct from others is unknown to criminal law and has not been made the subject of systematic studies of any importance. It is submitted that such studies would be of great value; the influence exercised in the American law of torts by the Warren-Brandeis article, the chief merit of which was to put a number of seemingly disparate legal rules into a new and unified perspective, seems to show that studies of this kind may be of the greatest importance for the further development not only of legal science but also of positive law. The protected interests being at the basis of most classifications of criminal law rules, an analysis of the common or different features of the interests violated by invasions of privacy may considerably advance the protection of such interests.

## 3. Civil Remedies

### (a) *Damages*

102. As would have appeared from the survey of national developments in the field of privacy, such invasions as are sanctioned in England and the U.S.A. are considered as torts, whether they be recognized as belonging to a special group under that heading or be ranged under one of the traditional actions. The normal remedy for a tort is damages. It would also have appeared that the civil sanction most frequently, indeed almost exclusively, used in France

is damages under article 1382 *Code civil*. We have also stated that, after many vicissitudes, the German development towards full recognition of the "general right of the personality" has recently led to the adoption of pecuniary damages as a sanction for at least certain cases of invasion. Although there are such differences of importance between the Scandinavian legal systems in respect of damages and remedies in general that they cannot be discussed here, it may be stated that *in principle* damages are also an applicable sanction in these countries, where invasions of privacy are sanctioned at all.

A few remarks should be made on the principles according to which damages are granted in the jurisdictions concerned.

It will be recalled that *English* common law makes a distinction between cases where special damage must be proved and where the amount granted is at least based upon that damage, and cases where "general damages", intended to cover both material and moral injuries suffered, are awarded; general damages may also be granted in addition to special damages. In cases of the kind now considered, general damages are frequently resorted to, the actual harm being difficult to prove. Some torts, *e.g.* trespass and libel (as opposed to slander) are actionable *per se*: the plaintiff will recover general damages without proving any special damage. There is considerable freedom in the assessment of general damages, the conduct and motives of the parties being frequently taken into account. Damages may be "nominal"—*i.e.* have a merely symbolic value—"contemptuous", where the plaintiff's conduct, although he has a right of action, is disapproved and the smallest possible amount, a halfpenny, is awarded. The term "substantial damages" is used to denote larger sums intended to compensate an injury which is felt to be important, although difficult to assess. Finally, the particular blameworthiness of the defendant's conduct may justify "punitive", "vindictive" or "exemplary" damages. Generally speaking, the damages awarded by English courts, particularly in actions for defamation, are far higher than those normally granted on the Continent.<sup>61</sup>

<sup>61</sup> This survey is based on the German *Bundestagsdrucksache* 1237 (1959), pp. 119 ff.

In the *U.S.A.*, there seems to be agreement that no proof of special damage is required in privacy cases, and that substantial damages may be awarded for the mental suffering likely to result from an invasion and for other probable harm. Special damage, duly proved, can also be recovered, and punitive damages are granted if justified by the defendant's conduct.<sup>62</sup>

In *France*, where both *préjudice matériel* and *préjudice moral* are recoverable under article 1382 *Code civil*, the general principle is that recovery presupposes both that the defendant has committed a fault and that special damage has occurred.

Fault is easily proved, particularly in defamation cases, and the existence of a *préjudice moral* requires even less proof. Under the influence of certain writers, who considered the recovery of money for non-pecuniary damage as immoral, there was for a long time a considerable reluctance to award more than nominal damages, *le franc symbolique*, but more recently substantial damages, although generally lower than in the common law countries, are granted for *préjudice moral*.<sup>63</sup>

The position of *German* law is somewhat more restrictive. In the leading case from 1958 (cf. no. 11 *supra*), general damages amounting to DM. 10,000, were awarded on the ground of a strained analogy. In later cases, the *Bundesgerichtshof*, followed by the majority of courts, has laid down new principles: recovery of damages, which has the function of giving the plaintiff some kind of redress (*Genugtuung*), is possible in actions for violations of rights of the personality, if the injury is of a serious character, *e.g.* because there has been widespread publicity; the question whether the defendant acted for purposes of gain is also of importance.<sup>64</sup> It should be stressed, however, that the problem of pecuniary recovery for non-pecuniary damage is not finally solved in German

<sup>62</sup> Prosser, *op. cit.*, p. 409.

<sup>63</sup> *Vide* Professor Stoll in *Verhandlungen des 45. deutschen Juristentages*, 1964, vol. I: 1, pp. 75 ff.

<sup>64</sup> *Vide* Bundesgerichtshof in *GRUR* 1962, pp. 105 and 324; 1963, p. 490; 1965, pp. 254 and 256 (cf., however, 1962, p. 211) and *NJW* 1965, p. 2395.

law; the matter is being intensely discussed,<sup>65</sup> and some Courts of Appeal have refused to follow the Supreme Court.<sup>66</sup>

It should be added that in cases concerning the appropriation of a person's name or likeness German courts sometimes apply other principles for the assessment of damages. Thus if the plaintiff has previously authorized the use of his name or likeness and would have given a licence in the case at issue, damages are based upon the licence fee he would have been able to ask if he had authorized the use. The same result may also be obtained by use of the principles of unjust enrichment.<sup>67</sup>

### (b) *Action for a Judicial Declaration*

103. Where admitted, actions for a judicial declaration are intended to secure a pronouncement to the effect that the plaintiff has a certain right, or to define the legal position as between the parties. There seems, in general, to be little scope for this kind of action in the field of privacy (as stated above, cases concerning alleged usurpation of names, where this action is frequently resorted to, do not fall within our sphere of interest). Theoretically, newspapers, advertisers, and other mass media could have an interest in obtaining declarations, *e.g.* relating to their right to use a person's name or likeness on the basis of a contract, but to the author's knowledge no such cases have been reported.

In a few German cases, persons who claim that their "right of the personality" has been violated have asked for a judicial declaration to the effect that the defendant's behaviour gives rise to civil liability.<sup>68</sup> In such cases, the plaintiff may also ask for an order enjoining the defendant to account for his profits, *e.g.* from the unlawful use of the defendant's likeness. However, the action is avail-

<sup>65</sup> *Vide* the discussion in the work cited in note 63 above and Mr. Hartmann in *NJW* 1964, pp. 793 ff.

<sup>66</sup> Courts of Frankfurt and Karlsruhe in *NJW* 1962, p. 2062; *Landgericht München* in *UFITA*, vol. 41 (1964), p. 333.

<sup>67</sup> *Vide GRUR* 1956, p. 427; 1959, p. 430.

<sup>68</sup> *Vide UFITA*, vol. 26 (1958), p. 366, and vol. 28 (1959), p. 342.

able only where the plaintiff's right cannot be fully protected by other means, *e.g.* by an injunction.<sup>69</sup>

Thus an action for a declaration may be used if damage has been caused but cannot yet be ascertained, because all the consequences of the invasion are not foreseeable.<sup>70</sup>

### (c) *Injunction*

104. Where an imminent invasion of privacy is foreseeable, or there are grounds to believe that an invasion already perpetrated will be repeated, the most efficient remedy is undoubtedly to obtain an injunction enjoining the defendant to refrain from such invasion. An *interlocutory* injunction, putting an end to further invasions, may also be useful in actions for other remedies.

It seems to be clear that both interlocutory and perpetual injunctions for such invasions of privacy as are actionable may be granted in *English* and *American law*; this means, as far as English law is concerned, that whenever such invasion falls within the definition of an existing action in tort this remedy is available, except in cases of assault and battery or false imprisonment. Interlocutory injunctions in defamation cases are granted only with caution, and only in perfectly clear cases. Since such invasions of privacy as are actionable under the law of libel and slander are usually doubtful, this is likely to reduce the importance of interlocutory injunctions as a means of protection. There is a further limit to be considered: injunctions will not be granted where damages would be an adequate remedy. For present purposes, however, this would only appear to mean that there must be a risk of repeated invasions.<sup>71</sup>

Since they are recognized as "absolute rights", the rights of the personality are protected, in *German law*, by an "action for cessation" (*Unterlassungsklage*), as developed by the courts by the application by analogy of §§ 12, 862 and 1004 BGB. A judgment granted in such an action corresponds in practice to a perpetual injunction. It presupposes that there is a risk of a violation or repeat-

<sup>69</sup> *GRUR* 1965, p. 551.

<sup>70</sup> Cases cited in note 68 above.

<sup>71</sup> Winfield, *op. cit.*, pp. 101 ff.

ed violations. On the other hand, it is granted irrespective of any guilt or fault on the defendant's part.<sup>72</sup> The plaintiff can also obtain an *einstweilige Verfügung*, corresponding to an interlocutory injunction.<sup>73</sup>

There exists, in German law, another remedy which may be mentioned here, the so-called *Beseitigung*, or "elimination", of facts and things amounting, objectively, to a violation of an "absolute right". The use of this remedy, which may be granted together with damages and an order for *Unterlassung*, and which was equally created by the courts on the model of §§ 12, 862 and 1004 BGB, is confined to cases where the violation produces lasting effects which can be eliminated.<sup>74</sup> Such elimination may be realized in various ways: by the destruction of material unlawfully produced,<sup>75</sup> by the defendant's declaration that he no longer maintains an allegation.<sup>76</sup> We shall return below to certain special remedies based on the same principle (*Widerruf, Gegendarstellung*).

In principle, all the remedies now referred to exist under other names, with some modifications of detail, in *French* law. An injunction can be secured,<sup>77</sup> and it is also possible to ask for the elimination of lasting effects, where they are present (*e.g.* where a name or a picture has been unlawfully used in a book.<sup>78</sup> Although it would seem possible also to obtain—from the *juge des référés*—an interlocutory injunction, the measure most frequently resorted to in recent litigation relating to disclosure of private facts and unauthorized use of a person's name and likeness has been the seizure of the publication concerned on the order of the *juge des référés* (*vide infra*).

<sup>72</sup> Professor Nipperdey in *UFITA*, vol. 30 (1960), pp. 24 f.

<sup>73</sup> *Vide e.g.* *GRUR* 1957, p. 296.

<sup>74</sup> Nipperdey, *loc. cit.*

<sup>75</sup> *Vide GRUR* 1961, p. 138.

<sup>76</sup> *GRUR* 1960, p. 500.

<sup>77</sup> *Vide e.g.* *Gaz. Pal.* 1956. 1. 284.

<sup>78</sup> *D.* 1948. 93; *D.* 1965. 566 (second case).

(d) *Seizure by Order of a Court*

105. There can be no doubt, in *French* law, that the seizure of an object, usually a publication, containing defamatory matter or anything amounting to an actionable invasion of privacy, can be ordered by a court, and that the destruction of such object, or the suppression of the incriminating parts, can be carried out;<sup>79</sup> the problem raised by a number of recent cases is whether such seizure can be lawfully ordered, by way of interlocutory measure, by the *juge des référés* in press actions. The Court of Paris has adopted this solution, which has found support among legal writers.<sup>80</sup>

It would appear from what has been said above about the *German* notion of *Beseitigung* that various measures in the nature of a seizure are equally possible in German law. As an interlocutory measure, seizure of newspapers is admitted in some German press laws (*vide e.g.* §§ 13 ff. of the Press Act of Baden-Württemberg, 1964), but this measure would not seem to be adopted in privacy cases.

In *English* and *American* privacy litigation, seizure equally seems to be unknown, although the courts have powers to order objects of importance to be detained.

(e) *Right of Reply*

106. As already mentioned, an unconditional right of reply is recognized by the *French* Press Act, 1881; this right needs no judicial intervention, but is exercised by any person mentioned or made identifiable in a newspaper.<sup>80a</sup> A similar remedy is the right to have the court's decision, or the essential parts of it, published at the expense of the defendant. This right is granted upon request in actions for defamation and, generally, any act inflicting *préjudice moral*. Where it is obvious that no prejudice has been sustained, the publication of the judgment (and the award of costs) may in fact be the only recovery granted by the courts.

<sup>79</sup> *Vide* the cases cited in note 78; cf. also *D.* 1882. 1. 73 and *D.P.* 1931. 2. 88.

<sup>80</sup> *D.* 1967. 181 with note by President Mimin.

<sup>80a</sup> For a recent study, *vide* Toulemon in *J.C.P.* 1967. I. 2082.



In *English* law, there is an institution which has approximately the same function as the right of reply: offer of amends under sec. 4 of the Defamation Act, 1952. If such an offer is accepted, no proceedings for defamation may be taken; if not accepted, the offer is a good defence—subject to some further conditions—provided it was made immediately and the defamation is shown to have been unintentional as far as the person making the offer is concerned.

The *German* press and criminal laws contain several rules of this kind. *Widerruf*, or revocation, of a defamatory statement may be ordered by the court, but only if it is quite clear that the statement was not true.<sup>81</sup> If the falsity of the statement is not proved, the defendant may be ordered to declare that he “no longer maintains it”.<sup>82</sup> The publication of the judgment can also be ordered, if the defamatory statement had appeared in a publication.<sup>83</sup> A newspaper which has published a defamatory statement may be ordered to publish a *Gegendarstellung* (rectification),<sup>84</sup> i.e. a right of reply similar to the French institution under that name.

#### 4. Inadmissibility as Evidence

107. Although not a remedy, the inadmissibility as evidence of material obtained in violation of the right of privacy is of considerable importance, for a large proportion of those invasions which aim at acquiring information about a person are undoubtedly committed with a view to securing such evidence against that person as could not otherwise be obtained.

There is not much to be said on this point about *English* law. There are firm rules on the powers of the police to secure evidence in criminal actions,<sup>85</sup> and the privileges concerning professional confidences, matrimonial communications, incriminating questions and questions of adultery in divorce cases are also well-established,

<sup>81</sup> *GRUR* 1962, p. 632.

<sup>82</sup> Nipperdey, *op. cit.*, p. 26.

<sup>83</sup> *Loc. cit.*

<sup>84</sup> *NJW* 1962, p. 48.

<sup>85</sup> Phipson on *Evidence*, 10th ed. 1963, pp. 13 ff.

although their application may cause difficulties.<sup>86</sup> Generally speaking, the common law rules on the admissibility of evidence are less concerned with the protection of privacy as such than continental rules on this topic.

Basically, the rules of evidence in *American* common law are the same as in England. Some new elements were added, as pointed out above, by the Constitution of the U.S.A. The problems of particular interest in this connection have been created by the extensive use of wire-tapping and electronic eavesdropping by law enforcement officers; such practices may have been carried on without any formal authority, or under court orders. In either case, constitutional issues arise. The fourth amendment to the Constitution—which prohibits unreasonable search and seizure—was construed narrowly (against strong dissents by Brandeis and Holmes, JJ.) in the famous Supreme Court decision *Olmstead v. United States*,<sup>87</sup> where evidence obtained through wire-tapping was admitted on the ground that the tapping had not involved any trespass. Sec. 605 of the Federal Communications Act, 1934, made wire-tapping illegal, and in *Benanti v. U.S.*<sup>88</sup> the Supreme Court held that State legislation and State courts could not interfere with that provision. The next step towards a wider protection of privacy was taken in *Silverman v. U.S.*,<sup>89</sup> where the use of a microphone, pushed through a wall, was held a violation of the fourth amendment although it did not constitute a trespass. Various other police practices, such as the use of *agents provocateurs*, were considered in recent cases, where such practices were however not held to invalidate evidence.<sup>90</sup>

108. In *France*, the questions most intensively discussed have concerned the right of entry of *huissiers* in adultery cases and the admissibility of evidence thus procured, the use of blood tests (*vide*

<sup>86</sup> *Op. cit.*, pp. 250 ff.

<sup>87</sup> 277 U.S. 438 (1928).

<sup>88</sup> 355 U.S. 96 (1957).

<sup>89</sup> 365 U.S. 505 (1961).

<sup>90</sup> *Osborn v. U.S.*, *Hoffa v. U.S.*, *Lewis v. U.S.*, 87 S. Ct. (1966) 408, 424, 429; the dissenting opinion of Douglas, J., in 87 S. Ct. 439, contains a full and interesting statement of the actual problems of privacy in the United States.

no. 58 *supra*) and the admissibility of confidential letters in civil actions. As for telephone tapping, there are two cases in point. In 1952, the *Chambre criminelle* of the Cour de Cassation reversed a decision, in a criminal case, which was founded upon evidence secured by means of a trap: an *agent provocateur* had offered, in the course of a telephone conversation, a bribe to a public servant suspected of corruption, and the official had accepted it; the telephone was tapped by a police officer acting under a general authorization of the *juge d'instruction*.<sup>91</sup> The *ratio* of the Cour de Cassation was that the rights of the defence had been violated. In 1955, the second civil section of the *Chambre civile* also reversed a decision which rejected the claim, under art. 1382 *Code civil*, of a person who was in the habit of calling anonymously a married couple, whom she covered with abuse; her identity having been revealed by a police officer who, by virtue of a general authorization, had tapped the wire, she sued her victims and a company which had made the tapping technically possible. The Cour de Cassation again insisted on the rights of the defence.<sup>92</sup> The decision has been criticized—it is submitted justly—by Dean Savatier.<sup>93 94</sup>

The problems relating to confidential letters have been discussed for a very long time, particularly in divorce cases. The general principle is that the consent of both writer and addressee is required to make such letters admissible as evidence.<sup>95</sup> In divorce actions, however, this principle has been partly abandoned; what remains is that neither spouse is entitled to produce as evidence letters which he has intercepted or otherwise acquired in an unlawful or disloyal manner. Thus, confidential correspondence between one of the spouses and an unknown third party, which could not have been acquired by the other spouse except in a disloyal manner, was not

<sup>91</sup> *J.C.P.* 1952. II. 7241.

<sup>92</sup> *D.* 1955. 573.

<sup>93</sup> Note to the decision in *D.* 1955. 573.

<sup>94</sup> A recent, very full survey of the problems related to the admissibility of evidence in French, Italian, Spanish, Belgian and Swiss criminal procedure is given by Professor Nuvolone in *Verhandlungen des 46. deutschen Juristentages*, 1966, vol. I: 3 a, pp. 57 ff.

<sup>95</sup> Cour de Riom, *Gazette des Tribunaux*, Oct. 13, 1891.

admitted in a recent decision.<sup>96</sup> There is a vast and not entirely coherent body of decisions and legal writing on the matter.<sup>97</sup>

There are a few decisions, in divorce and affiliation cases, where one of the parties has produced secretly-made records of matrimonial conversations in evidence. Rejected in 1939,<sup>98</sup> such records were admitted, although not as evidence in a formal sense, in 1955 and 1957.<sup>99</sup> Conversely, a medical certificate which contained information about both plaintiff and defendant was rejected in an affiliation case.<sup>1</sup>

109. The *German* rules have already been touched upon above. As for the case law, developed within the fields not covered by clear rules, it seems justifiable to state, in a general way, that evidence obtained in violation of "rights of the personality", or the production of which would constitute such violation, is in principle inadmissible; on the other hand, the "right of the personality" is only one interest among many which may be involved in civil or criminal actions. It is for the courts to decide which of the opposing interests is the strongest in the light of the circumstances of the case. One of the tests used for the purposes of that decision is that the unauthorized and, in principle, unlawful recording of a conversation may be a kind of legitimate self-defence where a person can find no other way to protect a serious interest.<sup>2</sup>

## 5. Miscellaneous

110. Legitimate self-defence is recognized, at common law, at least in respect of some torts, such as trespass, conversion, and nuisance.

<sup>96</sup> *D.* 1961. 343.

<sup>97</sup> *Vide Dalloz, Répertoire de droit civil*, 1952, vol. II, "Divorce", nos. 798 ff.

<sup>98</sup> *Gaz. Pal.* 1939. 2. 353.

<sup>99</sup> *D.* 1955. 583; *Gaz. Pal.* 1957. 1. 309.

<sup>1</sup> *D.* 1952. 729.

<sup>2</sup> On criminal procedure, *vide* Professor Peters in *Verhandlungen des 46. deutschen Juristentages*, 1966, vol. I: 3 a, pp. 93 ff. Among the numerous decisions see *GRUR* 1956, p. 47; 1958, p. 615; *UFITA*, vol. 32 (1960), p. 362 and 367; vol. 42 (1964), p. 329; *Betriebsberater*, 1959 p. 828; *NJW* 1965, pp. 362, 595 and 1677.

In *German* law, the principle of self-help has a somewhat wider scope; we have seen above that it has been invoked as a *defence* in privacy actions concerning unauthorized tape recording. In *French* law, the notion of *légitime défense* also exists. Without going into details, it seems justifiable to state, however, that self-help will hardly be a remedy of value except in intrusion cases. There is no authority for believing that it could be exercised against those invasions of privacy which involve publication, and it is difficult to see how it could be resorted to against such prying or other gathering of material about a person as does not involve elements of actual intrusion. Where the notion of a "sphere of privacy" as the object of a "right of the personality" is adopted, as in German law, self-defence would seem to be lawful, *e.g.* where a "Peeping Tom" annoys persons taking a bath.<sup>3</sup>

*Disciplinary measures by professional or business organizations* have already been discussed. It should be added that in Scandinavia—where the importance of organizations would seem to be rather greater than elsewhere, and where there is, on fairly solid grounds, a good deal of confidence in their ability to solve legal problems for themselves—an eminent expert has pronounced himself in favour of leaving, at least for the time being, those privacy problems which concern the mass media to the organizations themselves, except for particular questions (*e.g.* the use of surveillance devices).<sup>4</sup>

Finally, such measures as investigation and action by the *Ombudsman*—where there is one—and *administrative appeals*, resulting in the reversal of unlawful administrative acts, are obviously among the remedies which must be kept in mind. When there are special constitutional courts, or where the ordinary courts of justice are competent to try the constitutionality of administrative acts, or even of legislation, constitutional rules on privacy may be protected by decisions of these courts.

An example of such constitutional control is offered by a recent Indian case.<sup>5</sup> Under the police regulations of Uttar Pradesh, per-

<sup>3</sup> Cf. *NJW* 1962, p. 1782, where this principle seems to be implicitly recognized.

<sup>4</sup> Grönfors, *Personlighetsskyddet och massmedia*, pp. 20 ff.

<sup>5</sup> 1964, 1, Supreme Court Reports, *Kharak Singh v. State of Uttar Pradesh et. al.* graciously communicated by Mr. P. Trikamdas.

sons defined in sec. 237 of the regulations are subject to certain measures of police surveillance, comprising secret picketing, reporting and even domiciliary visits by night (sec. 236). A person who had been acquitted, for want of evidence, in a robbery trial, was subject to such surveillance. A constitutional court of five judges held (by a majority of three), that the measures prescribed in sec. 236 of the police regulations were incompatible with art. 21 of the chapter on fundamental rights in the Indian Constitution, which contains a general prohibition against acts depriving a person of personal liberty except according to procedure established by law.

## H. LEGISLATIVE INITIATIVES IN THE FIELD OF PRIVACY

### 1. U. S. A.

111. It is impossible here to take into account the very numerous private and public proposals for State legislation in respect of privacy in the U.S.A. These proposals are most frequently connected with the most recent and most alarming developments of technical devices which make possible surveillance without actual intrusion and, quite frequently, without coming into conflict even with relatively modern statutes on wiretapping and similar practices already known for a long time.<sup>6</sup>

On the federal level, it is of some interest to examine a recent bill introduced by a member of the House of Representatives in 1966 (*89th Congress, 2nd Session, H.R. 15980*). The bill is intended to prohibit wire-tapping by persons other than duly authorized law enforcement officers engaged in the investigation or prevention of specified categories of criminal offences and for other purposes. In the findings (sec. 2) it is stated, *i.a.*, that wire communications being normally conducted on an interstate network, and existing laws being inconsistent and inadequate, Congress must intervene to "protect the integrity of interstate communications and the privacy of parties to such communications". The necessity of wire-tapping for law enforcement purposes is stressed, but it is proposed that, since the privacy of innocent persons may be invaded, the privilege of the police should be limited to certain major offences, and accompanied by safeguards to insure that the interception is justified and that the information obtained thereby is not misused.

Under sec. 3 of the bill, the interception (including attempts and instigation) of wire communications, the wilful disclosure of the contents of intercepted messages and the wilful use of the contents of intercepted messages are punished under sec. 1362, title 18, U.S. Code (an amendment to that enactment, providing for a punish-

<sup>6</sup> An example: G. L. Davis in *Montana L.R.*, vol. 27 (1966), pp. 187 ff.

ment of a pecuniary fine not exceeding \$10,000, or imprisonment not exceeding two years, is proposed in sec. 7 of the bill). Exceptions are made for switchboard operators and agents of common carriers of communications acting in the normal course of their employment. A further exception is made for the President exercising his constitutional power to obtain information necessary to protect the Nation from actual or potential attack or other hostile acts of foreign powers or to protect essential military information against foreign intelligence activities. However, the contents of communications intercepted under this privilege are inadmissible as evidence and may not otherwise be disclosed.

Intercepted messages may not be admitted as evidence before any Federal or State court or other body if disclosure of the contents of such messages would be in violation of the proposed sec. 3 (sec. 4).

Secs. 5, 6, 8 and 9 of the bill regulate in detail the conditions for a court order allowing wire-tapping and the procedure to be observed in such cases. Such orders may be granted only when the interception of a wire message may provide evidence about a number of specified serious crimes (including narcotic drug or marihuana dealing; sec. 5) and only where the judge is satisfied on the basis of the facts submitted in prescribed form that there is probable cause for belief that the offence concerned is being, has been, or is about to be committed, that facts concerning the offence may be obtained through wire-tapping, that no other means are readily available for obtaining such information, and that the facilities from which messages are going to be intercepted are used by, or belong to, the indicated culprit.

It should be noted that the term "interception" applies to any method for obtaining the contents of a wire communication by an "interception device", the latter term applying to any device or apparatus except an extension telephone furnished by the common carrier of communications in the ordinary course of its business as such carrier (sec. 10, subsec. (5) and (6)). Thus the use of an extension telephone is not in any case considered to be wire-tapping for the purposes of the bill.

The proposed legislation would necessitate certain amendments



in sec. 605 of the Federal Communications Act, 1934, in respect of interception of wire messages.

The prospects of the bill are unknown to the present writer.

## 2. England

112. As far as the present writer knows, the first attempt at legislation on privacy in England was Lord Mancroft's Right of Privacy Bill, introduced in the House of Lords in 1961, supported by a majority of the Lords, but ultimately withdrawn, allegedly because of lack of Government support. The attempt was renewed in 1967, in a private member's bill in the House of Commons;<sup>7</sup> also in 1967, a private member's bill on telephone tapping was brought before the same House.<sup>8</sup> Finally, the English Law Commission is at present examining the right of privacy with a view to legislation. Apart from these official initiatives, there have been proposals for the introduction of statutory or judge-made rules on privacy in law review articles;<sup>9</sup> a recent one, by Mr. Yang, even contains a proposed statutory text dealing with most of the aspects of privacy discussed in American decisions and legal writing.<sup>10</sup>

Lord Mancroft's Right of Privacy Bill—reproduced as *Appendix I* to this study—only deals with disclosure cases. According to the proposed sec. 1, a person shall have a right of action against any other person who without his consent publishes of or concerning him in any newspaper or by means of any cinematograph exhibition or any television or sound broadcast any words—that term including, under sec. 5 (1), pictures, visual images, gestures and other methods of signifying meaning—relating to his personal affairs or conduct.

It follows from the extreme generality of this provision that the rules relating to defences are of particular importance. According to sec. 2, it is a good defence to prove: either that the reference to

<sup>7</sup> *Parliamentary Debates*, H. C., 1967, col. 1565 ff.

<sup>8</sup> *The Guardian*, February 21, 1967.

<sup>9</sup> Winfield in *L.Q.R.*, vol. 47 (1931), pp. 23 ff. (at p. 39); Glanville Williams, *op. cit.*, p. 76.

<sup>10</sup> *I.C.L.Q.*, vol. 15, 1966, pp. 189 ff.

the plaintiff was unintentional; or that the publication took place on an occasion of absolute or qualified privilege; or that the plaintiff was, at the time of the publication, the subject of reasonable public interest by reason of his holding some office or position or by reason of some aspect of his conduct, and that the words published related only to matters which were, by reason of such office, position or conduct, the subject of reasonable public interest or were fair comment thereon; or, finally, that at the time of publication the plaintiff was the subject of reasonable public interest by reason of some contemporary event directly involving the plaintiff personally, that it was reasonably necessary to disclose the identity of the plaintiff, and that the words published related only to matters which, having regard to the event and the plaintiff's position, were the subject of reasonable public interest, or were fair comment thereon.

The bill proposes that the defences set out above be invalidated if the plaintiff could prove that the defendant or his servants or agents acquired such material as is used in the published words by force or threats or by any means calculated to cause distress or embarrassment to the plaintiff or through unauthorized entry onto premises owned or occupied by the plaintiff or members of his family or household (sec. 3).

For the purpose of assessing damages, it is proposed (in sec. 4) that the courts should have regard to the conduct of the parties and to such mental distress or humiliation as may have been caused to the plaintiff either by reason of the publication as such or by reason of the manner in which the material used was obtained.

The debate on Lord Mancroft's Bill in the House of Lords<sup>11</sup> was of considerable interest not only because of the examples of press conduct given by Lord Mancroft and the supporters of the Bill, but also because the difficulties of defining, in particular, the notion of "public interest" were brought out. The Lord Chancellor, opposing the Bill, recalled the misgivings expressed (in 1948) by the Porter Committee on the Law of Defamation, which suggested that action should be taken by the press itself as a problem of external discipline. Lord Denning stated that in his opinion there was

<sup>11</sup> *Parliamentary Debates*, H. L., 1961, col. 607 ff.

nothing in any opinion of the House of Lords to prevent an evolution of English common law similar to that which has taken place in this field in America.<sup>12</sup>

It should be added, finally, that in 1966, a private member's bill, called "Freedom of Publication Protection Bill" was introduced in the House of Commons (Bill 46, printed 15 June, 1966). There is no real need to examine the bill in any detail here, but it is of some interest in that it reflects a tendency opposed to the movement in favour of increased privacy protection.

The prospects of Mr. Yang's proposals (*I.C.L.Q.*, vol. 15, 1966, pp. 189 ff.) being adopted in a statute seem slight. We shall refrain from a closer analysis of this most interesting and carefully elaborated text. It is sufficient to state that it is based upon Dean Prosser's classification of the different elements of the law of privacy and that each of these elements is treated in the greatest detail. The intrusion cases are dealt with by criminal provisions, whereas the disclosure, false light, and appropriation cases are the subject of civil provisions. This distinction would seem to deserve some attention.

### 3. France

113. Already in the nineteen-twenties the introduction of more general rules on the "rights of the personality" was proposed by the Franco-Italian Private Law Commission;<sup>13</sup> the proposals were used in the Italian Civil Code, to which we have already referred above (no. 12).

The *Commission de réforme du Code civil*, appointed in 1945, proposes a chapter with the heading "*Des droits de la personnalité*" (arts. 148—165) in the *Avant-projet* presented to the Minister of Justice in 1953 and published in 1955.<sup>14</sup> The proposed rules were

<sup>12</sup> *Op. cit.*, col. 639.

<sup>13</sup> *Vide* Professor Stoll in *Verhandlungen des 45. deutschen Juristentages*, 1964, vol. I: 1, p. 43, note 174.

<sup>14</sup> *Avant-projet de code civil, Première Partie*, Paris 1955, pp. 235 ff. (proposed provisions), pp. 75 ff. (exposé des motifs).

discussed extensively by the Commission in 1951 on the basis of a draft by Professor Houin. It seems unlikely that the proposed text will be enacted within the foreseeable future.

In conformity with French traditions, the *Avant-projet* of 1953—reproduced as *Appendix II* to this study—deals with a range of legal questions considerably wider than those commonly denoted by the notion of “privacy”. The first provisions (arts. 148—150) concern legal capacity and related matters, and identification of persons; arts. 156—161 deal in great detail with legal problems concerning the body of deceased persons, particularly with the right of determining the form of burial.

Arts. 153 and 154 are of somewhat greater interest for present purposes. According to these provisions, a person may always refuse to undergo a medical examination or treatment, unless such examination or treatment is provided for by a statute or administrative regulations. However, by refusing to accept medical treatment not involving abnormal risks, a person forfeits the right to invoke in his favour the disease which the treatment could have cured. Similarly, the refusal to undergo a medical examination ordered by a court leads to the result that the judge may consider as proved the facts which such examination was intended to ascertain.

The “rights of the personality” mentioned in the *Avant-projet* which are of particular interest for present purposes are defined in arts. 162 and 163. Under the first of these provisions, a person has the right to obtain an injunction to stop any unauthorized publication, exhibition or other use of his likeness and to recover damages for any pecuniary or moral prejudice resulting from its unauthorized use. The right is vested, after the death of the person portrayed, in his consort and direct ascendants or descendants in the first degree; however, the right can only be exercised if the use of the deceased person’s likeness amounts to defamation.

Art. 163 deals with confidential letters; these cannot be published or otherwise made known to third parties without the author’s consent, but may be used before a court if a serious interest be proved. The right to confidential letters also passes to the author’s representatives, who may ask the court, after the death of the addressee, to order that such letters be returned to the author’s representatives,

destroyed, handed over to a person designated for that purpose or dealt with in any other manner thought appropriate.

According to art. 164, the "rights of the personality" are unassignable, and consent to any restriction upon their exercise is valid only if not incompatible with public policy.

Finally, a very general provision concludes the chapter on *Droits de la personnalité*: any unjustified violation of these gives the injured party a right to ask for an injunction ordering such violation to stop; the plaintiff retains his right to recovery under the rules on civil liability. The preparatory works do not shed any light upon the cases considered. Conversely, it may be mentioned that, in the course of the discussion concerning the proposed art. 162, some members of the *Commission de réforme* wanted to protect a person not only against the use of his likeness, but also against an unauthorized publication of his voice and words. This idea was rejected, because the subject-matter was held to belong to the field of copyright.<sup>15</sup> Although the correctness of this affirmation may be doubted, since the French law of copyright, at least after 1957 when a new statute on that branch of private law was passed, defines the protected works in terms which would seem to exclude such letters as do not fulfil certain conditions of originality, the Commission's opinion would seem to exclude the protection of the spoken word from the field of application of the proposed art. 165. Another question which was touched upon by the Commission and seems to have been answered in the negative is whether photographing a person should be actionable *per se*.<sup>16</sup>

It is noteworthy, finally, that the exclusive right to a person's picture suffers no exception in the interest of public information and debate. The problem was present in the Reform Commission's mind but does not seem to have found a definite answer. The explanation for the silence of the draft on this point may be that there is a tendency in French law to assume an implicit consent in the

<sup>15</sup> *Travaux de la Commission de réforme du code civil*, année 1950—1951, Paris 1952, pp. 59 ff.

<sup>16</sup> *Op. cit.*, p. 60.

case of at least some public figures.<sup>17</sup> Another explanation may be that, faithful to French legislative technique, the Commission preferred to formulate the broad principles, leaving the details to the courts.

#### 4. Germany

114. In the field of penal law, legislative interest in the protection of at least some aspects of privacy goes back, in Germany, to the beginning of the 20th century.<sup>18</sup> Penal reform has been discussed, and partially carried out, ever since. In the draft Penal Code published in 1962, the introduction of a new offence is proposed (§ 182), which consists of unjustified publishing or spreading of imputations of such dishonourable facts concerning another person's private or family life as are not of public interest. The defence of truth is excluded. Another entirely new offence consists of the unauthorized recording of a person's words, or the use or communication to a third party of such recording (§ 183), provided the act is not justifiable, according to the "reasonable man" test, by reason of its grounds, its purpose, and the relations between the parties. Finally, the 1962 draft provides for an extended protection of the secrecy of correspondence (§ 184).<sup>19</sup>

115. By far the most important attempt to legislate on "the rights of the personality" in Germany is the very detailed Government Bill introduced in 1959 (*Deutscher Bundestag, 3. Wahlperiode, Drucksache 1237*); earlier attempts (the so-called *Böhm Bill*, concerning films) and actually adopted provisions ("Lex Soraya", in favour of foreign Heads of State) can be left aside here.

The 1959 bill met with such opposition in the press—a vast body

<sup>17</sup> *Vide* M. Lindon in *J.C.P.* 1965. I. 1887 in respect of the stars of the entertainment world.

<sup>18</sup> *Vide* the very detailed study of Professor Henkel on the criminal law protection of privacy, in *Verhandlungen des 42. deutschen Juristentages*, 1957, vol. II, pp. 59—145, at pp. 100 f.

<sup>19</sup> *Vide* Professor Jeschek in *Revue de science criminelle et de droit pénal comparé* 1966, pp. 552 ff.

of controversial writing came into existence within a year of its introduction—that its destiny seems highly doubtful. Moreover, the courts have already adopted many or most of the principles proposed in the bill. Nevertheless, this document—reproduced as *Appendix III* to this study—deserves some attention. With its very full and illuminating explanatory memorandum (*exposé des motifs*), it is undoubtedly the most interesting attempt made in a European country to create a complete statutory protection of privacy.

The bill was intended to replace certain provisions in the German Civil Code and other statutes and the proposed provisions are numbered accordingly.

The proposed text commences with the statement of a general principle (§ 12 BGB): any person who acts in violation of another's personality has a duty to rectify all consequences of such violation, particularly in the cases provided for in §§ 13—19; if there is a risk of repeated violations, an injunction can be obtained. The problem of limiting the scope of this very general definition is solved in part by the description of specific violations in §§ 13—19, in part by a reservation added to § 12: intrusions which, in a reasonable man's judgement, must be tolerated in human society, are not to be taken into account. Cases covered by this general limitation are exemplified in the explanatory memorandum:<sup>20</sup> tape recording of telephone messages in the course of business, publication of photographs where persons appear accidentally in connection with *e.g.* landscapes. It is also stressed in the explanatory memorandum that the unlawfulness of a violation of another's personality in general—as opposed to the specific rights defined in §§ 13—19—must be determined on the basis of a careful balancing of the interests involved.<sup>21</sup> § 12 further contains provisions on the survival of the right of action and on the protection of the personality of deceased persons.

According to § 13, attacks upon the life, body, health or liberty of a person are violations of the victim's personality in the sense of § 12.

Generally speaking, § 14 deals with attacks upon a person's hon-

<sup>20</sup> At p. 13.

<sup>21</sup> At pp. 11 ff.

our or reputation, § 15 with disclosure of private facts, § 16 with violations of a person's exclusive right to his own name, § 17 with the right to a person's likeness, § 18 with unauthorized recording, and § 19 with eavesdropping in any form. The other provisions in the bill are concerned with remedies, procedure, and certain technicalities of less interest.

The defamatory statements prohibited by § 14 are of two kinds: insults and defamatory statements relating to facts which cannot be proved by the defendant. It is a good defence if the insult or defamatory statement is made in the execution of a legal duty, or is an adequate measure for the protection of legitimate public or private interests. The press, the radio and the cinematographic industry may claim to protect a legitimate interest when they inform the public or engage in criticism pertaining to their public functions. Positive knowledge of the falsity of a statement of fact invalidates the defences referred to and, as soon as these are no longer extant, the injured party may demand that the attack cease. Defamatory statements made at public meetings may be reported by press, radio, television or film if such report be truthful and serve a legitimate public or private interest.

Deprecatory judgements about a person's achievements or conduct and defamatory statements proved to be true are lawful, subject to the principles laid down in § 15, unless made in an insulting or otherwise immoral form (§ 14, subsec. 4).

Unwarranted statements of fact relating to a person's private or family life are violations in the sense of § 12 unless made in the defence of a legitimate public or private interest; such violation may also consist in the publication of the confidential contents of letters or of personal notes (diaries, etc.) The consent of the author—in case of confidential letters of both author and addressee—and the protection of legitimate interests are good defences. In both these cases, however, knowledge of the falsity of a statement invalidates the defence of legitimate interest (§ 15).

§ 16 reproduces, in essence, the present rule in § 12 BGB: it is a violation within the meaning of § 12 to contest a person's right to his name or to usurp that name.

Likewise, § 17 is closely similar to the rules in §§ 22 ff. of the



Artistic Copyright Act, 1907, on a person's right to his own likeness. One provision has been added, however: the *making* of a person's likeness is unlawful if it is contrary to the manifest wish of the person portrayed or violates the legitimate interests of that person. A rule corresponding to § 24 in the 1907 Act is found later in the bill.

§ 18 deals with the recording of a person's voice and the transmission of that voice, either directly or by means of a recording, to the public. This act is unlawful if there are no particular grounds for it; there is an exception for public meetings, but only if no legitimate interests are violated.

Under § 19 the act of acquiring knowledge about such messages or conversations as are not intended for the listener's ear or concern private or family life is unlawful if committed with listening devices or in a similar manner.

Of the remaining provisions, only one needs mention. It is proposed to replace the present § 847 BGB by a rule which is, essentially, in harmony with the solutions adopted by the *Bundesgerichtshof* in respect of damages for non-pecuniary prejudice.

Mention should be finally made of a recent German bill (*Referentenentwurf eines Gesetzes zur Änderung und Ergänzung Schadensersatzrechtlicher Vorschriften*) published by the Federal Ministry of Justice in 1967. Less ambitious than the 1959 bill, it contains proposals for such modifications of the BGB (in particular §§ 254, 823, 824, 847) as would give statutory support to the solutions already adopted by the Supreme Court in respect of pecuniary recovery for non-economic damage.

116. In *Scandinavia*, where problems relating to the protection of privacy have attracted attention more recently, the Swedish Minister of Justice appointed a Royal Commission in 1966, to which was given the task of preparing necessary legislative measures dealing, in the first place, with wire-tapping and eavesdropping devices. The Commission was given a free hand to study such further measures as may be thought useful in the field of protection of privacy.

## J. CONCLUDING REMARKS

117. It would have appeared, in the course of the survey we are now about to conclude, that the conflicts arising when a person's interest in being "let alone" and in remaining master of such elements of his personality as his name or likeness is threatened or violated cannot easily be envisaged as a unity. We shall not discuss here the theoretical problems raised by the definition and classification of these conflicts and of the possible impact of such classification upon the further question whether it is or is not appropriate to consider privacy as a unity or simply as the common name for a number of different interests. We have already touched upon these questions and sketched, rather than developed, the idea that it may not be strictly necessary to solve them: disagreement over them may be largely due to the adoption of different levels of abstraction.

For the practical purposes of this study, it seems justified to draw three essential distinctions. In the first place, some of the conflicts considered above seem to fall—although they certainly *also* concern the protection of the private sphere—within the definitions of acts traditionally sanctioned by civil or criminal remedies. This group comprises the cases of physical intrusion and physical interference with bodily integrity; it further embraces the defamation cases. We have found, as far as the former cases are concerned, that the purpose of protecting the private sphere may not have been foremost in the minds of the legislators and judges defining the applicable rules; there may be amendments to make in order to secure an efficient protection of privacy. Generally speaking, however, these cases are less problematic than the remaining ones. We shall therefore leave them aside in the second part of the study.

Secondly, within the remaining group of cases, a distinction can be made between those cases where privacy is threatened by public authorities, in particular by the police, and those where invasions

are committed by private subjects. Broadly speaking, authorities seldom encroach upon the sphere of privacy by publishing information about a person or by using his name or likeness; their field of action is rather the gathering of information by various means. Now there would seem to be a considerable difference between the situation in the United States and that prevailing in Europe with regard to the activities of public authorities. It can certainly not be denied that the State, in Europe, is or may become a threat to privacy, but it seems justified to submit that, so far, the activities of public officers and other public servants are under control. The emphasis, in the following survey, will be laid on *conflicts between private subjects*. For this, there is another valid reason: the vast majority of decisions of interest concern such conflicts.

Among the remaining cases, interest will be focused upon those which are doubtful in the sense that traditional rules of law in most or some of the countries concerned are not, or are only partly, applicable to them; where a full protection has been granted, it has been based either upon the recognition of "invasions of privacy" as a special group of torts, as has been the case in the USA, or upon the adoption by the courts of the notion of "rights of the personality" as has been the case in Germany and, to a lesser extent, in France. These "doubtful cases"—doubtful at least from the point of view of English and Scandinavian law—may be roughly divided into two groups: eavesdropping cases (prying and obtaining information by technical means) and invasions by publication (disclosure or private facts, abuse of words, name, and likeness).

We shall concentrate our attention on judicial decisions likely to illustrate the problems which seem to be solved by the adoption of special rules for these cases and the problems which seem to remain unsolved, or even to be raised, by such rules.

118. The second part of the study will deal with

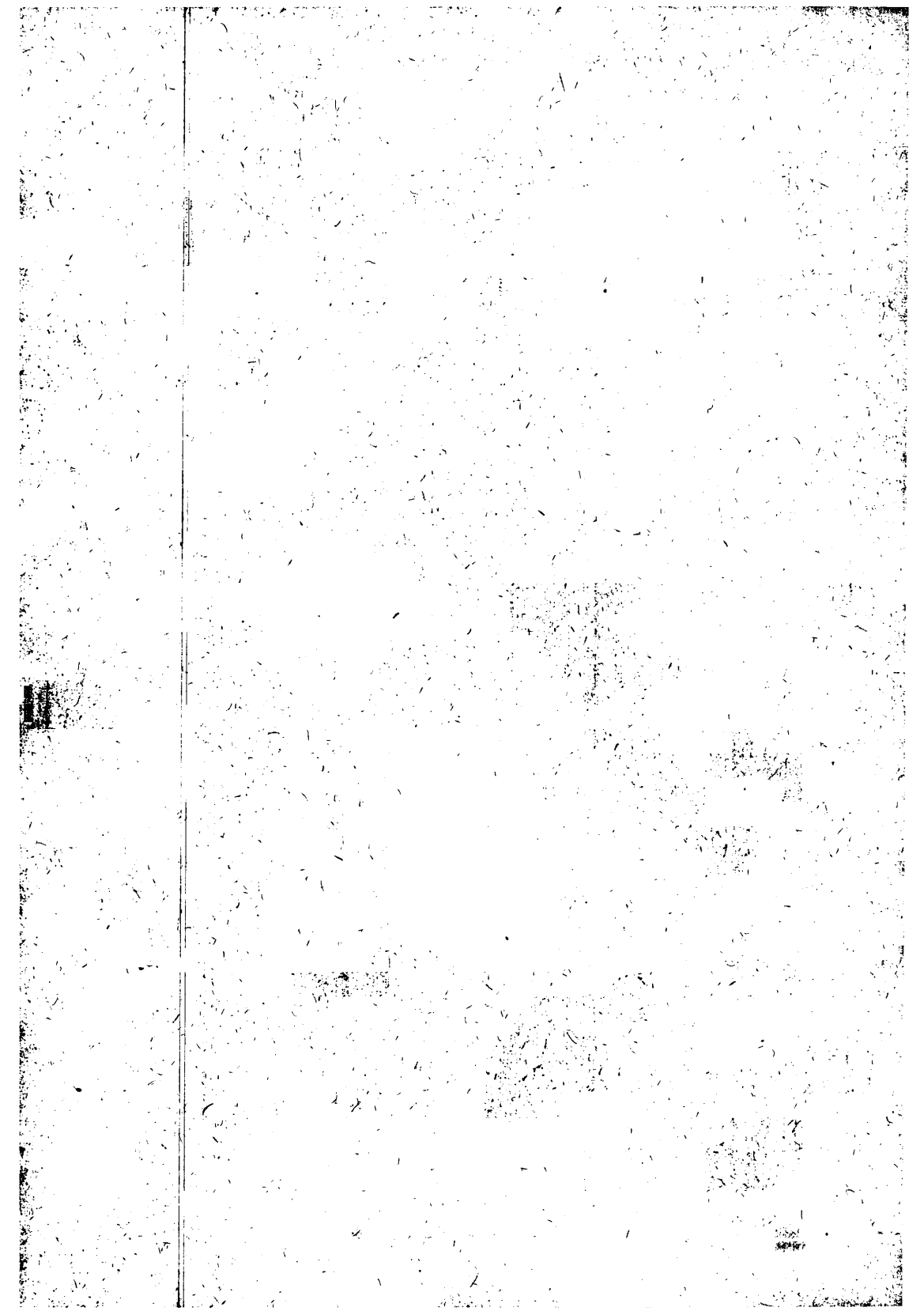
- a) Intrusions upon a person's solitude, seclusion or privacy (including importuning by the press or mass media);
- b) Unauthorized recording, photographing and filming;
- c) Interception of correspondence and eavesdropping by technical devices;

- d) Public use of a person's name and likeness;
- e) Public misuse of a person's words or other expressions;
- f) Public disclosure of private facts.

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## II.

# PROBLEMS RELATING TO SPECIAL INVASIONS OF PRIVACY



## A. INTRUSION UPON A PERSON'S SOLITUDE, SECLUSION OR PRIVACY

*(by following a person, misuse of the telephone, prying into private facts, importuning by the press and other mass media).*

119. The question to be faced here is whether the introduction of the notion of privacy (or of "rights of the personality") has contributed to a rational solution of the problems raised under this heading, *i.e.* a solution which offers a reasonable protection of the interest to be let alone without sacrificing such other interests as a reasonable freedom of action, legal security and economic interests.

There are very few European decisions in point; the vast majority of relevant *American* cases have not been available to the author. It seems justifiable, therefore, to make use of Dean Prosser's analysis, based on a very considerable case material.

Actions for "invasions of privacy" have been sustained—or, at least, have not been rejected on the ground that a tort of this kind has not been committed—in cases concerning peering into the windows of a home, "telephone terror" by a creditor, unauthorized prying into a person's bank account. In similar cases, however, the ground for relief has been nuisance (*e.g.* spying into windows, harassing by creditor). The requirements which must be fulfilled for an action under this branch of the tort to lie, are, according to Dean Prosser, "that there is something in the nature of prying or intrusion", as opposed to mere noise or insult, that the object of this prying is private, and that the acts complained of amount to something objectionable or offensive from the reasonable man's point of view.<sup>22</sup>

The "privacy" test seems to exclude from protection public records: it also means that there is no protection against such shadowing as takes place in a public place and does not amount to "rough shadowing" (which has been held libellous in a case referred to above, no. 62).

<sup>22</sup> Prosser, *op. cit.*, pp. 390 ff.

As already pointed out above, where we examined the statutory rules possibly applicable to invasions of privacy of the kind now discussed (no. 62), it seems difficult to draw up principles of general validity in a field as complex as the one we are now considering. It should be added, with regard to the American decisions, that in some of the cases falling under this heading there would seem to be no need for recourse to the concept of privacy, since the tort of intentional infliction of mental distress covers at least the clearest cases of this kind (anonymous letters, etc.)

In *France*, the notion of "rights of the personality" does not seem to have been used in respect of the cases under consideration.<sup>23</sup> Art. 1382 *Code civil* has been applied to at least one category falling under the heading of "intrusions", viz. the sending of letters, whether anonymous, obscene or otherwise undesirable, to a person's home.<sup>24</sup> As a general proposition, it seems probable that invasions fulfilling the conditions deduced by Dean Prosser from the American cases would be, in France, actionable under art. 1382. In fact, the test of offensiveness seems, in general, sufficient to make that provision applicable, particularly as French law protects, to a very large extent, such similar interests as feelings of affection.<sup>25</sup>

To the author's knowledge, there are no reported *German* decisions in point; to obtain a notion of the probable effects of the recognition of the "rights of the personality" in the field concerned, it is necessary to consult legal writers. There is no doubt that such concepts as the "spheres of privacy" and "intimacy" are considered, not only in German legal writing, but also in judicial decisions (in cases concerning tape recording and disclosure), as protected by the "general right of the personality". According to Professor Nipperdey, unauthorized acts for the purpose of obtaining knowledge about facts and events pertaining to both these "spheres" are violations of the right. Thus eavesdropping, systematic watching and

<sup>23</sup> *Vide*, however, Carbonnier, *op. cit.*, p. 240, where the right to claim protection in such cases is considered as a "civil liberty".

<sup>24</sup> *Vide* D. 1895. 2. 537 and 1899. 2. 52; *Gaz. Pal.* 1903. 2. 23 and 1931. 2. 133; S. 1930. 2. 89.

<sup>25</sup> *Vide*, for a short survey, Stoll, *op. cit.*, pp. 75 ff.



prying by spies or reporters are held unlawful.<sup>26</sup> There is no complete agreement on this point; another eminent expert, Professor Hubmann, states that only the sphere of intimacy in the strict sense, not that of privacy, is protected against attempts to obtain information.<sup>27</sup> The “spheres”, as analysed by German writers, are not necessarily defined by such formal criteria as the publicity or private nature of the place where an event occurs<sup>28</sup> or of documents inspected to obtain knowledge about a person.<sup>29</sup> They are some sort of common sense appreciation of what is generally considered as private and confidential. As we have found above when discussing the distinction between “private” and “public” in general, there is hardly any consistent attitude, in German decisions, with regard to the question whether business or professional activities are elements of the private sphere, although it is perhaps justified to state that the prevailing tendency is to consider them as such, at least in so far as such activities do not imply immediate contact with the general public and the facts in issue are not of importance for such contact.<sup>30</sup>

The most important difference between the American (and the French) approach and the principles affirmed by German writers would seem to be that in the latter the “objectionable” test is not put forward as a necessary element in the definition of what amounts to a violation. On the other hand, it should be stressed that German writers are more preoccupied with the purpose of such intrusions as are now considered—that of obtaining information, for some future unauthorized and disloyal use—whereas the intrusion as such, resulting in mental distress, is more emphasized in the American cases as analysed by Dean Prosser. The somewhat narrower scope of German theoretical analysis on this point—which, in its turn, may be due to the fact that German *penal* law offers a fairly efficient protection against various kinds of intrusion—may

<sup>26</sup> Nipperdey, *op. cit.*, pp. 17 f.; in the same sense Mr. Süss in *Festschrift für Heinrich Lehmann*, vol. I (1956), p. 205.

<sup>27</sup> *NJW* 1957, p. 524.

<sup>28</sup> Cf., however, Schönke—Schröder, *op. cit.*, p. 350, on the decision in *NJW* 1962, p. 1782.

<sup>29</sup> Cf. already *Reichsgericht* in *RGZ* vol. 115, p. 416.

<sup>30</sup> *Vide Oberlandsgericht München* in *UFITA*, vol. 29 (1959), p. 107.

explain why the “objectionable” test is of less interest. This may also be explained by the German construction of privacy as an “absolute right”. The real difference is small, however, since it is generally recognized in German law that only “undue” violations of the rights of the personality are unlawful;<sup>31</sup> this amounts to stating that serious and legitimate interests justify such violations to such an extent that what remains are in fact “objectionable” acts.

120. It is not easy to answer the question whether and to what extent the introduction of the notion of “privacy” (or of “rights of the personality”) has contributed to an adequate solution of the conflicts concerning intrusions committed without physical violence (and without the use of specific technical devices). American case law can hardly be considered, in so far as the author can venture to pass any judgment, as a complete and coherent system. What seems to keep the cases together is the protected interest, the interest in being let alone. Dean Prosser’s conclusion that this interest, as protected by this branch of the law of privacy, is similar to that which is taken into account in actions for infliction of distress, seems rather narrow, since even acts which, because unnoticed, do not provoke any such reaction at all are presumably actionable if the material unlawfully obtained is subsequently published. The French cases concerning *préjudice moral*—among which those mentioned here are only a minor fraction—defy any classification; they are founded upon an extremely broad conception of those interests for which a man may claim some protection. The prevailing German views, finally, are hard to assess until they have been put to the test in a number of actual conflicts. The idea of different “spheres”, which are entitled to protection, is a good instrument of analysis in cases concerning publication, but seems less useful in the vague category we are now examining.

In those countries where the concepts of privacy or of personal rights are not adopted, there exists—as we have seen above—a piecemeal protection secured by different legal provisions. Thus the Swedish rules on “annoying” go a long way towards protecting a person against wilful disturbances, like nightly telephone calls.

<sup>31</sup> *Vide* in particular the German Government Bill of 1959, pp. 11 f.

Similar principles are adopted in Danish or Norwegian law. Now, it may be argued that if intrusions of this kind—which have no reasonable purpose at all or, anyway, not the purpose of obtaining information—are sanctioned, at least in more serious cases, those intrusions which aim precisely at collecting confidential or private material about a person need no special treatment provided there are rules preventing any disloyal use of the material thus obtained, *e.g.* by publishing it or by producing it as evidence in court, let alone by blackmailing the person concerned. It may also be argued, however, that both with regard to publications and evidence there is a need for a definition of the notion “material obtained by unfair or unlawful methods”; the problem of defining objectionable prying would thus return in a different form.

The author submits that, however vague it may be, a *mores* test is preferable here to one based upon an attempt to define in general terms the concept of privacy. For, as already stated, the distinction between private and public is essentially relative, with few exceptions which are usually covered *e.g.* by statutory rules on interception of correspondence.

The conclusion of this analysis would be, therefore that what is needed (and already exists in some of the countries covered by this survey) are general rules under which it is unlawful (1) to annoy a person by wilfully disturbing him, *e.g.* by telephone calls and letters pursuing no reasonable purpose, or by following him; and (2) to gather information about a person by objectionable or unfair practices, such as peeping, eavesdropping and enquiries likely to reflect upon his reputation.

There remains one group of cases which would not be covered by such rules; importuning by the press or other mass media. To improve the manners of journalists is, the author submits, a task which could hardly be entrusted to legal rules. If reporters make use of such objectionable or unfair practices as referred to above, they would, of course, become liable under the proposed rule. If they are only intrusive and inquisitive, it is submitted that the remedy lies, on the one hand, in rules concerning unauthorized tape recording and photographing, on the other hand in provisions which restrain the publishing of certain material.

## B. UNAUTHORIZED RECORDING, PHOTOGRAPHING AND FILMING

121. The question whether the recording of a person's voice, or the photographing or filming of his likeness, amounts to an invasion of privacy has not often been raised as a problem distinct from that which concerns the subsequent use of such material. There are, however, in those countries which recognize in one form or another a special "right of privacy" or "rights of the personality", a number of decisions where this question is at least touched upon *obiter* and from which some conclusions may be drawn.

In the *United States* there are at least some cases where the liberty to photograph a person has been discussed, whereas recording hardly seems to have been the object of decisions except in litigation about the lawfulness of wire-tapping and eavesdropping with technical means. In an action brought by the actor Charlie Chaplin against a broadcasting company which had given publicity to a recorded telephone conversation between the plaintiff and the defendant's servant, the court held that there was no material difference between such a record and a written report, which the defendants were free to publish.<sup>32</sup> On the other hand, the cases concerning wire-tapping and electronic eavesdropping (*vide* above) would seem to justify the general statement that recording made possible by methods prohibited *per se* or by the surreptitious introduction of recording devices into homes or places otherwise protected from intrusion would probably be held unlawful.

That these principles apply in respect of photographing and filming, it seems safe to assume. In places open to the general public, photographing is held lawful—there is even a decision where the right to take photographs is considered as a liberty protected by the Federal Constitution—whereas photographing in a hospital, and probably also in a person's home, is held to be an invasion of

<sup>32</sup> *Chaplin v. National Broadcasting Co.*, 15 F.R.D. 134 (1953).

privacy.<sup>33</sup> This would also seem to follow, *a fortiori*, from such publication cases as concern photographs taken in public places, even where they depict scenes of a private character.<sup>34</sup>

We have already stated that in *French* law there are no general rules on photographing in the street; some local authorities have issued regulations which have, however, had no connection with the notion of *droits de la personnalité*. To the author's knowledge, the only decisions relating to recording are those (indicated above, no. 108) where records have been produced as evidence. Apart from the case from 1955 where such record had been made by means of wire-tapping, the courts did not seem to consider recording as such as a violation of any right (in the divorce case, of 1937, where a record was not admitted as evidence, the ground invoked by the court was a formal one).

As for photographing, the prevailing view would seem to be that the photographing or filming of a person does not itself amount to a wrongful act.<sup>35</sup> There is, in fact, a judgement from a particularly important court of first instance, where it is explicitly affirmed that a person's likeness, being a *prolongement de sa personnalité*, cannot be photographed without his consent.<sup>36</sup> There is further a recent decision of the *Cour de Cassation* which seems at least to imply that there are situations—*in casu*, photographs had been taken of a child in a hospital—where photographing amounts to an *immixtion intolérable dans la vie privée*.<sup>37</sup> However, the gist of the action was the *publishing* of the photographs.

122. *German* case law in the field now considered is almost exclusively concerned with litigation concerning tape recording.<sup>38</sup> Photographs have also been extensively discussed, but the cases have concerned the use made of photographs lawfully taken, or there have been other elements involved which prevent any con-

<sup>33</sup> Prosser, *op. cit.*, pp. 391 f.

<sup>34</sup> *Op. cit.*, pp. 414 ff.

<sup>35</sup> *Vide* Professor Nerson in *R.T.D.C.* 1966, p. 67; M. Stoufflet, in *J.C.P.* 1957. I. 1374, no. 10; *contra* Professor Desbois in *J.C.P.* 1963. II. 13364.

<sup>36</sup> Tribunal de grande instance de la Seine, in *D.* 1966. 566.

<sup>37</sup> Cass., 2<sup>e</sup> Ch. civ., in *D.* 1967. 181.

<sup>38</sup> For a recent survey, *vide* Mr. Werhahn in *UFITA*, vol. 33 (1961), pp. 205 ff.

clusion as to the lawfulness of photographing as such. There is, in one of these cases (*vide* no. 36, note 7, *supra*), a *dictum* by the *Bundesgerichtshof*, which seems to indicate that the surreptitious taking of a photograph in the course of a conversation between newspaper reporters and the plaintiff in the latter's shop (which was obviously open to the public) was unlawful. *Obiter*, the Court goes as far as to affirm that in principle even public characters are not bound to tolerate photographs being taken within their sphere of privacy, which normally includes their business premises. This principle is a result of the recognition of the "general right of the personality". On the other hand, the Court explicitly declines to give a definite answer as to the application of the principle in detail; it is sufficient, says the Court, to state that a surreptitious photographing with a view to publishing is unlawful.

As for tape recording, the applicable general principle is equally clear. The recording of a person's voice, considered as an element of his personality,<sup>39</sup> is a violation of that person's "rights of the personality".<sup>40</sup> It should be pointed out, by the way, that this idea has been used, in many cases (*e.g.* the last of the decisions referred to in note 40), in order to create a "neighbouring right" in favour of performing artists; we shall not deal with these cases. However, the general principle is subject to several exceptions. Thus it has been held that tape recording (for the purpose of broadcasting) in courtrooms is lawful, since the proceedings are public and the general public has a legitimate interest in being informed about them.<sup>41</sup> On the other hand, it has been held by the Supreme Court that counsel has an unconditional right to refuse to plead when he knows that the proceedings are being recorded; it is not for the court, in such a case, to balance the opposing interests engaged.<sup>42</sup>

Such balancing of interests has been held lawful and necessary, on the other hand, in a number of cases. First, it is generally held that the recording of matter-of-fact conversations in the course of business is lawful in principle. There are moreover, several deci-

<sup>39</sup> Cf. Prosser, *op. cit.*, p. 395, note 103.

<sup>40</sup> *GRUR* 1956, p. 47; 1958, p. 615; 1960, p. 614.

<sup>41</sup> *GRUR* 1951, p. 474; cf. also *UFITA*, vol. 24 (1957), p. 245.

<sup>42</sup> *UFITA*, vol. 24 (1957), p. 247.

sions where recordings have been admitted as evidence and where the question of their lawfulness has been discussed. Thus, in 1956, it was held that recordings of matrimonial quarrels could be produced in divorce proceedings, where the plaintiff had no other means of proving her complaints.<sup>43</sup> In 1958, the Supreme Court went further and introduced a general self-defence test,<sup>44</sup> the obtaining of evidence about threats and blackmail was cited as an example. In a criminal case a few years later, the Court refused to admit tape recordings as evidence of attempts to make a witness commit perjury, but held open the possibility of using similar evidence in criminal cases where special interests were involved<sup>45</sup> and tape recordings have in fact been admitted in some cases.<sup>46</sup>

123. There would seem to be agreement between the solutions adopted in the legal systems now considered on at least some basic principles; photographs taken surreptitiously or without consent on private premises seem to be considered as unlawful; recording by surreptitious means is equally prohibited. Beyond these clear statements, it is not easy to find common solutions.

*De lege ferenda*, some distinctions seem useful. Broadly speaking, recordings would seem to imply greater dangers for the interest in remaining master of one's own person. A recording of a person's words reveals, as a rule, more of his personality than a picture; in particular, it normally comprises such aspects of his personality as a man will not exhibit to all and sundry, whereas a picture, unless made under special circumstances, does not reproduce more than the public can see. Moreover, the natural use of a picture is to publish it; this does not apply quite as regularly to records. This means, *i.a.*, that rules against certain forms of publishing are a fairly efficient weapon against photographing; they do not offer the same protection against unauthorized recording.<sup>47</sup>

<sup>43</sup> *GRUR* 1956, p. 47.

<sup>44</sup> *GRUR* 1958, p. 615.

<sup>45</sup> *UFITA*, vol. 32 (1960), p. 362.

<sup>46</sup> *NJW* 1956, p. 558; 1965, p. 1677; the latter decision contains a very full survey of the problem.

<sup>47</sup> Cf. Stoufflet, *loc. cit.* Vide, however, the American case *Friedman v. Cincinnati Local Joint Executive Board*, cited by Dean Prosser (*op. cit.*, p. 391,

These distinctions do not solve the whole problem, however. Both in respect of photographing and recording there are clear cases in which they are of small interest. Thus the recording of business calls or of calls to a medical practitioner meets obvious practical needs; similarly, the surreptitious photographing of a person in his home, in a neglected dress, or in bed, is obviously objectionable.

As a rough principle, however, one could adopt the solution that photographing should be licit unless special circumstances speak against it, recording should be unlawful unless justified by particular reasons.

The test by which to decide in what cases photographing should be prohibited is difficult to find. The notion of "spheres" is hardly helpful here. Tests based on the nature of places, occasions, or subject-matters may be of some assistance for analytical purposes but are difficult to formulate clearly enough. Distinctions between photographing with and without the intention to publish are manifestly useless as elements in general rules, although such intention may be of relevance *in casu*. One test, based upon the nature of premises, seems safe, however; in places protected, in the continental countries, by the criminal rules on violation of domicile—corresponding, roughly, to the area protected under the physical intrusion branch of the American law of privacy—a person could reasonably ask that his permission be asked for before his likeness is taken. This principle would seem to be in harmony with the solutions adopted in those legal systems which have adopted the notion of "privacy" or of "rights of the personality". For other cases, it is submitted that a *mores* test is the only practicable solution, however vague it may be. Surreptitious photographs of persons in embarrassing situations, *e.g.* taken by ruthless reporters in connection with crimes, accidents etc., should be prohibited. Such a prohibition would not be made superfluous by provisions on the publishing of a person's likeness, for the liberty to photograph will obviously produce many "striking" pictures which are so tempting to journalists that they will run the risk of an action for unlawful publica-

note 81), where a trade union was enjoined from using photographs of customers crossing a picket line for purposes of retaliation.



tion. Thus some rules on photographing as such would have a useful preventive effect.

As for recording, the difficulty is to find criteria for the exceptions where it is lawful. We can disregard, in this context, the complicated copyright aspects of the problem. One reasonably safe principle would seem to be that recording should be permitted (if not otherwise prohibited under special rules, *e.g.* in respect of churches or courtrooms) in places where the general public is admitted but only in respect of the public proceedings in question. As for routine calls in the course of business, the difficulty is to define such calls; frequently enough, remarks of a more personal character may be made during such conversations. A practical solution would seem to be that recording of telephone calls is lawful where the existence of recording devices is clearly indicated in all official or commonly used telephone directories. Apart from these cases, it seems reasonable that the speaker's authorization be obtained before his words are recorded.

The adoption of the principle that recording should normally require consent raises the problem of records as evidence in court or before other authorities. This, in fact, would seem to be the only case where an exception of a general scope must be considered. It does not seem advisable to add, to a general rule on the unlawfulness of *making* records, a provision justifying otherwise unlawful recording if performed with a view to obtaining evidence otherwise impossible to secure for the purpose of expected court proceedings involving important interests. It is submitted that this question must be left to be solved under such general principles concerning self-defence as may be accepted in the different legal systems concerned, and such principles of procedural law as deal with evidence improperly obtained. As we have already found, when discussing the use in courts of letters and information obtained by wire-tapping and eavesdropping, such problems are by no means unfamiliar to courts of justice, and it seems most reasonable to leave it to them to apply such rules as have been laid down in respect of similar problems. Generally speaking, these rules, however formulated, seem to be based on a balancing of opposing interests which can hardly be defined with precision but must be done *in casu*.

### C. INTERCEPTION OF CORRESPONDENCE AND EAVESDROPPING BY TECHNICAL DEVICES

124. We shall be very laconic on this point. Interception of correspondence is sanctioned in all the legal systems examined, and we have given sufficient attention to the rules existing on this point. We have also drawn attention to some of the American statutes and leading cases concerning wire-tapping and eavesdropping and to those few European texts and decisions that exist (nos. 69—72); usually the lawfulness of such practices has been discussed in criminal actions where evidence obtained thereby has been produced (nos. 107—109). Finally, we have already had an opportunity of stating our opinion on the measures which should be taken with regard to electronic surveillance devices (no. 100).

What should be added here is that the methods for obtaining information referred to in the heading of this section are sanctioned as invasions of privacy in the United States<sup>48</sup> and that they undoubtedly fall under the definition of violations of the “general right of the personality” under German law.<sup>49</sup> Most legislations offer a reasonable protection against interception of correspondence, including telegrams. Norway has introduced rules which cover the whole field in a satisfactory manner. It should be pointed out that the problem raised by the production of evidence obtained by the means now referred to is basically identical to that concerning unauthorized recordings (*vide supra*).

To conclude, it is proposed that wire-tapping should be penalized, where that is not already the case, irrespective of the technical means used, and that the manufacture, export, import, sale and use of devices for tapping and electronic surveillance should also

<sup>48</sup> Prosser, *op. cit.*, p. 390.

<sup>49</sup> *Vide* Nipperdey, *op. cit.*, p. 18. Secret overhearing of telephone conversations by means of extension devices or otherwise has usually been considered as normal business practice in Germany. *Vide Betriebsberater*, 1959, p. 828, and *UFITA*, vol. 42 (1964), p. 173, and a recent survey in *NJW* 1965, p. 2094.

be sanctioned by criminal law and subject to licensing. Sufficient penal rules would seem to make special civil legislation unnecessary in those jurisdictions where criminal offences always give rise to civil liability; where that is not the case, the same acts as would be made criminal must also be sanctioned in private law.

## D. PUBLIC USE OF A PERSON'S NAME AND LIKENESS

### 1. Introductory Remarks

125. As already stated, there are considerable differences on important points in respect of both the interests involved and the purposes pursued by the unauthorized use of a person's name on the one hand and his likeness on the other. This would speak in favour of treating these problems separately. At the same time both groups are closely connected with the misuse of a person's words and the public disclosure cases, and this would be an argument for treating all the four categories together. There are, however, great differences between national approaches, and the wish to avoid confusion has finally persuaded the author to consider separately both the kinds of invasions and the legal systems concerned. To obtain a synthesis, we shall consider the problems together in the concluding remarks of the present section.

### 2. U.S.A.

126. As far as *names* are concerned, it should be recalled that there is no such thing, in American common law, as an exclusive right in a person's name (*vide* no. 80 *supra*). A protection of names against certain kinds of unauthorized public use cannot, therefore, be derived from general rules. On the other hand, some actions in tort will lie where specific circumstances are present; there are early English decisions sustaining actions in defamation and passing off in respect of the unauthorized use of an author's name in connection with books he has not written or approved.<sup>50</sup>

In modern American law, the public use of a person's name in such contexts as lead people to believe he has given a testimonial

<sup>50</sup> *Byron v. Johnstone* (1816) 2 Mer. 29; *Archbold v. Sweet* (1832) 5 C. & P. 219; *Forbes v. Kemsly Newspapers Ltd.* (1951) 2 T.L.R. 656.

for advertised goods, holds a certain political opinion, or is a candidate for office is actionable as an invasion of privacy.<sup>51</sup> The similarity between these cases and those which imply misuse of words or opinions actually pronounced by the plaintiff is obvious. It is also clear that such use of a name as has been referred to very often amounts to defamation. Dean Prosser groups these cases together under the heading "putting the plaintiff in a false light"; according to this learned writer, it must be proved, for an action for invasion of privacy to be sustained, that the defendant's conduct is objectionable from a reasonable and normally sensitive man's point of view. The interest protected is that of reputation. It may be objected to this construction that the emphasis, in privacy cases, seems to lie rather on the defendant's motives or lack of respectable motives, than on such harm as may possibly have been inflicted on the plaintiff's good name. In some cases, *e.g.* those concerning spurious testimonials or false statements about candidacy for office, there is clearly an appropriation element. In others, *e.g.* where a name is published in engagement announcements etc., the wilfulness of the act is evident.

To choose the simplest common denominator, the "false light" cases all concern lying about a person in public. Error, at least when it relates to trivial details, does not appear to be actionable.<sup>52</sup> Dean Prosser expresses some anxiety about the development of this branch of privacy: is it not, he asks, capable of swallowing up the whole law of public defamation, and are there not reasons to fear, in that case, that all the limitations imposed upon defamation claims "in the interest of freedom of the press and the discouragement of trivial and extortionate claims" will be swept away?<sup>53</sup>

It is submitted that there seems in fact to be a need for some caution in these cases. It may be asked whether it would not be enough to allow an action (1) where the plaintiff's name has been intentionally appropriated for the defendant's use (which need not necessarily be commercial) and (2) where the name has been used, by

<sup>51</sup> Prosser, *op. cit.*, pp. 398 ff.

<sup>52</sup> *Op. cit.*, p. 400.

<sup>53</sup> *Op. cit.*, p. 401.

malice, in such contexts as amount to imputing a particular act (*e.g.* an engagement to be married) to the plaintiff.

127. The second group of invasion where the plaintiff's name is abused is defined by Dean Prosser<sup>54</sup> as "appropriation". This group comprises cases concerning the use of a person's name in *advertising* (*e.g.* by mentioning him in such contexts, by putting his picture and name—here, the two usually accompany each other—on goods or separately in packing), in the naming of companies or otherwise. The conditions for recovery are that, in the light of all the attendant identifying factors, the name concerned is really that of the plaintiff. If this is the case, an action will also lie for the use of the name in *fiction*.<sup>55</sup> Dean Prosser also analyses, in this group, certain cases where the plaintiff's name is used for the defendant's benefit in a manner which comes very close to the "false light" cases. However, Dean Prosser contends that there is a clear difference: what is protected in the appropriation cases is the name (or likeness) as the object of some kind of proprietary right "upon which the plaintiff can capitalize by selling licenses".<sup>56</sup>

It is submitted that this definition is correct in so far as the advertising cases are concerned. It seems most doubtful where the use of names in fiction is concerned. Although it is possible, and certainly occurs frequently, that persons who are in the public eye sell information about themselves to the newspapers, the novelist who describes a person under a name identical or closely similar to that of the plaintiff, with supplementary identifying factors, does not encroach upon a proprietary right: he either discloses facts, private or public, or makes himself liable in defamation. Similarly, the right to use a name in such contexts as petitions or on election lists may perhaps be an article which can be bought, but it seems more logical to range these cases among those concerning "false light".

One of the reasons why so many disparate cases have been brought under the "appropriation" group may be the desire to allow recovery in jurisdictions where—as is the case in New York—only ap-

<sup>54</sup> *Op. cit.*, pp. 401 ff.

<sup>55</sup> *Vide op. cit.*, notes 169—174.

<sup>56</sup> *Op. cit.*, p. 406.

appropriation is statutorily recognized.<sup>57</sup> It is submitted that, to avoid confusion, the appropriation group should comprise only those cases where a name—or rather the goodwill attached to a name—is used (with or without a picture) in advertising and for similar purposes.

128. As far as American law is concerned, we may speak very briefly about the invasions of privacy consisting in the unauthorized use of a person's likeness. What has been said above about names applies *mutatis mutandis*, to portraits. A few additional remarks must be made, however, for unlike a name, which is a mere symbol, clearly defined and delimited, a person's likeness is a "substance" and may be appropriated as such (*e.g.* as the cover of a magazine). It may also be accompanied by such other pictorial elements as make its publication a disclosure of facts, put the person portrayed in a false light, or make possible abuses similar to those which may be made with a person's words or other expressions.

These possible uses of a picture will now be considered in turn.

In Dean Prosser's classification, the publication of a person's likeness—or, more exactly, of pictures representing, *i.a.*, a person's likeness—first appears in the category of cases implying disclosure of private facts: is the publishing of a photograph representing a drunken citizen in a public place, or an embrace between two married people in a market an invasion of this kind?<sup>58</sup> The question is not answered. The present writer submits that the discussion of such cases should be reserved for the section dealing with disclosure.

Secondly, pictures may be used to put the plaintiff in a false light in the public eye.<sup>59</sup> An invasion under this branch of the tort is said to be committed where the likeness of an innocent taxi driver is used to illustrate an article on the cheating habits of that class of citizens, or that of a model to adorn a study on "man-hungry" women. Conversely, where a person's likeness is used to illustrate a book or article on strike-breaking,<sup>60</sup> the public interest in such

<sup>57</sup> *Loc. cit.*

<sup>58</sup> *Op. cit.*, p. 394.

<sup>59</sup> *Op. cit.*, pp. 398 ff.

<sup>60</sup> *Op. cit.*, p. 414.

matters is held to justify the publication. This, incidentally, is a point where American law seems to be clearly different from the law of France and Germany, and where the difference between a protection offered by an action in tort and an "absolute right" in one's likeness appears clearly. Even under Dean Prosser's classification, such cases would seem to constitute appropriations.

The appropriation group is the third in which public use of a person's likeness appears in Dean Prosser's article. We may refer, on this point, to what has been said about a person's name.

In matters concerning the publication of pictures, justifications are almost as important as the general principle they partly invalidate. We have already mentioned one justification, that of public interest, as a bar to actions concerning the use of a person's likeness to illustrate books. The most important ones, however, are those which make the publication of pictures lawful if they represent "public figures" and persons involved in "news". We have discussed these notions sufficiently above. One remark should be added, however: it would seem that, subject to some exceptions, a person remains deprived of protection not only as long as the "news" is new but also when it is recalled to public memory.<sup>61</sup>

We shall not attempt here any critical analysis of American law as expounded by Dean Prosser. Before any judgement is passed, the corresponding European cases will be examined.

### 3. England

129. The principal question to be faced in respect of English law is that stated by Mr. Brittan:<sup>62</sup> "Has England solved the problem with other means?"

It has already been stated that, like the American common law, the law of England knows of no exclusive right to a person's name, but that using a name for spurious publication may be actionable as defamation or passing off.<sup>63</sup> This protection in "false light" or ap-

<sup>61</sup> *Op. cit.*, p. 418.

<sup>62</sup> *Tulane L. R.*, vol. XXXVII (1963), p. 256.

<sup>63</sup> *Vide* cases cited in note 50 and *Ridge v. The English Illustrated Magazine* (1913) 29 T.L.R. 592; *Lee v. Gibbins* (1892) 67 L.T. 263.



propriation cases is far from complete, however. In *Clark v. Freeman*,<sup>64</sup> an action by a well-known doctor, whose name was used on the label of pills, was unsuccessful (*vide* also *Dockrell v. Dougall*, 80 L.T.R. (n.s.) 556 (C.A. 1899)). The action of passing off requires that the pecuniary interests of the plaintiff have been encroached upon in one way or another.<sup>65</sup> Defamation is possible only where some *innuendo* can be found, as in *Pryce & Son, Ltd. v. Pioneer Press, Ltd.*,<sup>66</sup> where the use of a printer's imprint on a poster was held to imply that the printer had committed a breach of contract. Mr. Brittan also mentions a couple of cases where the unauthorized use of names for advertising purposes was held actionable because it subjected the plaintiffs to the risk of incurring some responsibility for the advertised goods.<sup>67</sup>

A sweeping statement on the position of English law cannot be ventured without a systematic examination of the cases. On the basis of the material available to the author, it seems beyond doubt, however, that there are important *lacunae* in the protection granted to a person's interest in defending his name. It will not be discussed here whether this conclusion necessarily implies that reform is needed on this point. We shall return to the question of possible solutions below.

130. What has been said about names also applies to a person's *likeness*. A frequently cited decision is *Corelli v. Wall*,<sup>68</sup> where the plaintiff failed to obtain an injunction against the publication of postcards with coloured representations of the plaintiff in the midst of imaginary scenes in her life. Another case, to which we have referred above, is *Tolley v. Fry*,<sup>69</sup> where a learned Lord Justice regretted that no remedy was available against the use of an amateur golfer's picture in advertising for chocolate; the case had a happy end, however, for in the House of Lords it was held that the pub-

<sup>64</sup> 50 Eng. Rep. 759, Ch. 1848.

<sup>65</sup> *Corporation of the Hall of Arts and Sciences v. Hall* (1934) 50 T.L.R. 518; *Hines v. Winnick* (1947) Ch. 708.

<sup>66</sup> 42 T.L.R. 29 (K.B. 1925).

<sup>67</sup> *Op. cit.*, p. 261.

<sup>68</sup> 22 T.L.R. 532 (Ch. 1906).

<sup>69</sup> (1930) 1 K.B. 467.

lication was libellous, as it could be inferred from the incriminated advertisement that the plaintiff prostituted his amateur status for profit.<sup>70</sup>

It may be stated, in a general way, that it is by a liberal interpretation of *innuendoes* in actions for defamation, and by a wide application of the notion of breach of contract<sup>71</sup> that a person can prevent the publication of his likeness or have such publication sanctioned under English law. There is a very full analysis of cases in the German Government Bill of 1959,<sup>72</sup> and we can refrain from what would demand a lengthy discussion of cases. It is sufficient to state here that however liberal the attitude of the courts may be, protection is limited by all the technicalities characteristic of the law of defamation, and also by the test requiring some harm to the plaintiff's reputation.

#### 4. France

131. In France, litigation about private *names* has loomed large in the reports for more than a hundred years. Most of the cases are of slight interest for present purposes: they concern usurpation of family names.<sup>73</sup> What will be discussed here is the *mentioning* of names under circumstances amounting to appropriation for commercial or other purposes, putting the bearer of the name in a false light, or otherwise inflicting, by referring to a name, some other harm than that inflicted by defamation or disclosure of private facts.

One general principle seems to be valid in all cases: in spite of declarations, in legal writing and decisions, that a person has an exclusive right—on the nature of which there is, incidentally, no agreement<sup>74</sup>—to his name, actions for the protection of that name

<sup>70</sup> (1931) A.C. 333.

<sup>71</sup> *Pollard v. Photographic Co.*, 40 Ch. D. 345 (1888).

<sup>72</sup> *Bundesdrucksache* 1237, pp. 100 ff. and 126 ff. A number of recent cases which cannot be analysed here are discussed briefly in the review *Droit d'auteur* 1967, pp. 57 ff.

<sup>73</sup> For a good recent survey, which includes administrative law, *vide* Professor Kayser in *R.T.D.C.* 1959, pp. 10 ff.

<sup>74</sup> *Vide* the survey and references in Carbonnier, *op. cit.*, pp. 191 f.

presuppose that the unauthorized use of it may lead to confusion and that such confusion causes some moral or pecuniary prejudice to the plaintiff.<sup>75</sup>

There are some decisions founded on the notion of a right to a person's name which would seem, upon closer examination, to be better explained by a "right of the personality" not to be associated publicly with something which the person concerned prefers to avoid: thus, a Jewish lady has been held entitled to prohibit the publication of her name in a list of French Jews<sup>76</sup> and the relatives of a deceased person have been allowed to prohibit the use of the deceased's name on a monument.<sup>77</sup> It is difficult, however, to base any firm principles on those few decisions which exist. In some cases, similar to the "appropriation" or "false light" categories of Dean Prosser, a person has been held entitled to react against the use of his name on lists of election candidates;<sup>78</sup> the legal basis, in these cases, was art. 1382 *Code civil*.

There is an important body of decisions on one particular problem which, in French legal writing, is usually envisaged from the point of view of the right to a person's name: the unauthorized use of names in fiction and plays.<sup>79</sup> To summarize in a few words the principles adopted in these decisions, it is a well-established rule that a person may prohibit the use of his name when given, in a novel or a play, to a character who is—as the decisions usually state—"ridicule" or "odieux".<sup>80</sup> There is no complete agreement, however, on the strength of the identifying factors necessary to make an action lie. It has been held that identity of names is sufficient,<sup>81</sup> but there seems to be more authority for the view that the plaintiff—who will usually proceed under art. 1382 *Code civil*—has to

<sup>75</sup> Cf., however, *J.C.P.* 1962. II. 12763, where relief was granted although the name was a common one and the risk for confusion small.

<sup>76</sup> *D.* 1897. 2. 174.

<sup>77</sup> *Gaz. Pal.* 1921. 1. 412; *D.P.* 1924 .3. 25.

<sup>78</sup> *D.* 1901. 2. 415; *D.* 1905. 2. 55.

<sup>79</sup> For a very full survey, vide Savatier, *Le droit de l'art et des lettres*, (1953), nos. 211 ff.

<sup>80</sup> Vide e.g. *D.* 1910. 5. 46; *D.H.* 1927. 127.

<sup>81</sup> *Gaz. Pal.* 1938. 2. 401.

prove such additional circumstances as produce some risk of confusion.<sup>82</sup>

132. There is hardly more agreement on the nature of a person's right to his own likeness, which is also an ancient judge-made institution.<sup>83</sup> Although some writers claim, on the strength of certain authorities, that the adoption of the notion of *droit de la personnalité* has had the effect that courts no longer impose upon the plaintiff the burden of proving fault and prejudice, at least in certain cases,<sup>84</sup> it is submitted that the courts, whether they use such expressions as *droit de la personnalité*, *droit de propriété* or discuss the individual elements of tortious liability, have not made a clear choice and that the difference between the two approaches is, in practice, of secondary interest.<sup>85</sup> The principle that a person has in fact a right to his own likeness is beyond any doubt.<sup>86</sup>

Many of the most important recent decisions concern publications where pictures are used to illustrate articles on the private life of notorious characters in the world of entertainment; it is difficult to deduce from these decisions—to which we shall return when discussing disclosure of private facts—any principle specifically applicable to portraits. A couple of cases will be mentioned here, which illustrate the main difficulties raised by the notion of a right to one's own likeness: the position of public characters, the rules applicable to photographs of public scenes, and the effects of consent.

First, it should be mentioned, however, that there are very few French decisions on appropriation in the narrower sense of use for advertising and similar purposes; in these cases, which also dealt with the problem of the scope of consent, the courts seem to have considered the possible licence incomes lost to the plaintiffs.<sup>87</sup>

<sup>82</sup> *Vide e.g. D.* 1948. 587; *D.* 1950. 762.

<sup>83</sup> For a recent survey, *vide* M. Stoufflet, in *J.C.P.* 1957. I. 1374.

<sup>84</sup> *Vide* M. Stoufflet, *op. cit.*, nos. 19 f.; Professor Martin in *R.T.D.C.* 1959, pp. 250 ff.

<sup>85</sup> In the same sense, note signed Cl. F.—P., *D.* 1966. 566.

<sup>86</sup> *Vide e.g. D.* 1966. 566.

<sup>87</sup> *Vide J.C.P.* 1966. II. 14711 and 14890.

As for the position of public characters—in respect of whom there is a tendency, in French decisions, to presume some sort of tacit consent, except in the case of statesmen and politicians, where the public interest is invoked—writers agree that they should be granted at least a “sphere of intimacy”, and that, in the case of those who do not belong to the category of politicians, only their public functions as such are subject to the freedom of the press.<sup>88</sup> The distinction between the public and private spheres of a film star,—*in casu* Mme Bardot, heroine of many lawsuits,—was brought out in two decisions of 1965:<sup>89</sup> the publication of unauthorized photographs of the actress in very scanty dress, sitting in her garden, and of the actress with her little son, also on private ground, was held unlawful.

There has been little litigation about public scenes. An incident which caused some emotion in the press but was never brought to court concerned the use of photographs, surreptitiously taken with a tele-photo lens, which represented prostitutes in a Paris street. A decision of 1932 recognizes the liberty to publish photographs of public scenes, but grants the persons represented a right to have their faces made unrecognisable.<sup>90</sup>

Consent makes the publication of a person's likeness lawful, but the courts interpret any contract of this kind with the utmost strictness; it is for the defendant to prove that the plaintiff's consent covered the use made of the photograph.<sup>91</sup> The idea of an irrevocable consent by public characters, even those who have eagerly solicited the attention of the press, is generally rejected by the courts.<sup>92</sup>

<sup>88</sup> *Vide* references in note 84 above, Mr. Lindon in *J.C.P.* 1965. I. 1887, and Mr. Sarraute in *Gaz. Pal.* 1966. 1. Doctrine, pp. 12 ff.

<sup>89</sup> *Gaz. Pal.* 1966. 1. 37 and *J.C.P.* 1966. II. 14521.

<sup>90</sup> *Gaz. Pal.* 1932. 1. 855.

<sup>91</sup> *Vide* the cases cited in note 87 *supra* and *D.* 1966. 566.

<sup>92</sup> *J.C.P.* 1965. II. 14223 and 1966. II. 14521; *Gaz. Pal.* 1966. 1. 37. Cf., however, *D.* 1967. 182 and *Le Monde*, March 17, 1967.

### 5. Germany

133. German *name* cases can be roughly classified according to the same principles as the American or French ones. The right to a person's name was originally invoked with greater consistency than in the corresponding French cases; the reason would seem to be that there was a statutory support which could be used to justify even decisions which had, in reality, little to do with the conflicts originally solved by § 12 BGB.

Thus, the right to a person's name was resorted to in an early decision where Count Zeppelin objected to his name (and likeness) being used to give lustre to a cigar.<sup>93</sup> In post-war decisions, the use of a person's name for advertising purposes is prohibited as a violation of the "general right of the personality". The leading case, decided by the *Bundesgerichtshof* in 1959, concerned an advertisement in the form of a confidential communication by an actress, in which the name of a famous singer was merely mentioned incidentally; the singer was successful in her action for an injunction. In this case, the court insisted on the "false light" element—usually present in all appropriation cases—but that would not seem to have been decisive.<sup>94</sup>

In some decisions from before the second World War, the right to a person's name was successfully invoked in respect of the public use of names in fiction; as in France, additional identifying factors were required.<sup>95</sup> Exceptionally, the use of a historical name for ridiculous and unattractive characters in a film was held unlawful in one decision.<sup>96</sup> In modern case law, the use of names—together with such other identifying factors as direct attention to a person living or dead—in fiction or films is considered either, as the case may be, as defamation or as a disclosure of private facts.

134. The right to a person's likeness being statutorily recognized (§ 22 ff. Artistic Copyright Act, 1907), the problems discussed in modern decisions and legal writing essentially touch upon the limits

<sup>93</sup> *RGZ*, vol. 74, p. 308 (1910); cf. also *UFITA*, vol. 2 (1929), p. 682.

<sup>94</sup> *GRUR* 1959, p. 430; *vide* also *GRUR* 1960, p. 394.

<sup>95</sup> *GRUR* 1931, p. 1096; *UFITA*, vol. 3 (1930), p. 207; vol. 16 (1943), p. 113.

<sup>96</sup> *UFITA*, vol. 15 (1942), p. 267.

of that right in respect of public persons and persons involved in events arousing public interest. There is a very important body of decisions, many of which concern the disclosure of private facts.

One group of cases can be defined clearly: after some hesitation,<sup>97</sup> it was recognized that even public characters are protected against the use of their likeness for advertising purposes, even if stage photographs are used.<sup>98</sup> A decision may be cited which seems to illustrate with particular clarity the difference between German law and the American principle according to which photographs may be used to illustrate books or articles on topics of general interest. A well-known couple from the entertainment world had married, duly attended by press photographers. A photograph taken on this occasion was published, as a particularly well-staged spectacle of matrimonial bliss, to illustrate a newspaper column dealing with lonely people advertising for marriage partners. The married couple were successful in their action against the newspaper: the defence that they were persons of "contemporary history" failed on the ground that the photograph had been published not because it represented *them*, but as any photograph of married people; there was, further, the *innuendo* that they had met by advertisement.<sup>99</sup>

As for the remaining cases, they express principles which may be summarized thus: the portraits of public characters, including, particularly, statesmen and politicians, but also criminals and, generally, persons involved in news, may be freely published. All the categories concerned have some claim to a sphere of intimacy. As for other persons, such as public servants, the notion of "protection of legitimate interests" (applicable to defamation under § 193 Penal Code) may sometimes justify the use of their names and—to a lesser extent—portraits in the press, if such publication is necessary for the purposes of public information and debate.<sup>1</sup> The pub-

<sup>97</sup> *Vide* in particular *UFITA*, vol. 2 (1929), p. 463.

<sup>98</sup> *Vide* the leading case *GRUR* 1956, p. 427; also *GRUR* 1961, p. 138; *UFITA*, vol. 38 (1962), p. 186.

<sup>99</sup> *GRUR* 1962, p. 211.

<sup>1</sup> The need for publishing denied, upon lengthy analysis of the problem, in respect of policemen whose conduct in arresting a minor offender was criticized: *UFITA*, vol. 29 (1959), p. 111.

lishing of a "public" person's likeness is unlawful if it occurs in a manner capable of encroaching upon legitimate interests, *e.g.* by some *innuendo* in the accompanying text.<sup>2</sup> The privilege concerning persons belonging to "contemporary history" only through some function or some specific event covers such information as has a reasonable relation to the facts making such persons "public", and does not extend to those only indirectly involved, such as the *fiancée* of a criminal.<sup>3</sup>

The German cases on the scope of *consent* are, as a whole, of minor interest. The courts do not adopt the same strict attitude as in France but seem to apply the same principles as in respect of contracts in general.<sup>4</sup>

## 6. Other Countries

135. Mention will be made here only of a Danish case, which is of some interest because even in the absence of special provisions relief was granted with reference to "general principles of law".

In a case of 1946, a person bearing an unusual family name protested against the use of that name for an unattractive character in a film. The protest did not lead to any result, however; the film was shown to the public, and the person concerned instituted an action for an injunction and damages. It would seem to follow from general principles of law, according to the Court of Appeal of Copenhagen, that a person is entitled to prohibit the unauthorized use of his name. However, it was not found necessary to define that right more precisely, since the plaintiff's protest and the unpleasantness of the character using his name in the film, were sufficient grounds for an injunction. No damages were awarded, since no special damage had been proved.<sup>5</sup>

<sup>2</sup> *GRUR* 1957, p. 494, and 1962, p. 324.

<sup>3</sup> *GRUR* 1958, p. 508.

<sup>4</sup> *GRUR* 1953, p. 404; 1956, p. 427; 1957, p. 296.

<sup>5</sup> *Ugeskrift for Retsvaesen* 1946, p. 456; for a case concerning a person's likeness, *vide* same review 1965, p. 126 and a Norwegian case in *Norsk Rettstidende* 1952, p. 1147.



## E. MISUSE OF A PERSON'S WORDS OR OTHER EXPRESSIONS

136. The particular kind of invasion referred to here has not often been analysed as a separate tort; nevertheless, it presents some particularities which may justify a few remarks and examples. As already stated, cases of this kind come near those "false light" cases which concern spurious testimonials and similar invasions. The difference is that in the cases now considered, there is an authentic expression of opinion of a person, which is disloyally used.<sup>6</sup>

In two well-known German cases, newspapers published letters of protest in a mutilated form; this was held a violation of the "general right of the personality", although it did not amount to defamation.<sup>7</sup> In a case where an article, partly based upon information actually received from a famous doctor, gave the impression of an interview with him, containing several direct quotations, there was the *innuendo* that the doctor had violated his professional duty of secrecy. The case was considered a violation of the "sphere of privacy".<sup>8</sup>

A case already referred to as an illustration of the strictness with which the French courts interpret consent to an otherwise unlawful publication illustrates the complications of cases belonging to the category now considered: a person had allowed a photographer to take a picture representing himself sitting with a young woman in a Paris *bistrot*.<sup>9</sup> It was held that the manner in which the picture was used amounted to a violation of the plaintiff's right to his likeness; the photograph, after various *retouches*, was used with an

<sup>6</sup> On the particular risks run by persons whose words are recorded, *vide* Mr. Neergaard in *Juristen* (Denmark), 1964, pp. 472 ff.

<sup>7</sup> *GRUR* 1955, p. 197, and 1960, p. 449.

<sup>8</sup> *GRUR* 1960, p. 42; cf. also the spurious interview case in *GRUR* 1965, p. 254.

<sup>9</sup> *D.* 1966. 566.

accompanying text which implicitly gave the scene an ambiguous character.

Although cases of the kind now illustrated often give rise to an action in defamation (cp. the English case *Honeysett v. News Chronicle, Ltd.*,<sup>10</sup> where the title of the article illustrated—"Un-chaperoned Holidays"—was held enough to make the publication defamatory) or have, at any rate, been dealt with successfully by the courts without recourse to the concept of "privacy", they would seem to constitute a special group requiring some attention.

<sup>10</sup> Quoted by Mr. Brittan, *op. cit.*, p. 258.

## F. PUBLIC DISCLOSURE OF PRIVATE FACTS

## 1. U.S.A.

137. In the U.S.A., the leading case on public disclosure of private facts would still seem to be *Melvin v. Reid*:<sup>11</sup> a woman with a doubtful past culminating in a sensational murder trial, in which she was acquitted, had taken up, and led for many years, a life of respectability, when a film representing her earlier life and using her name ruined her new existence. Her action against the film company was successful; the publication of her past was held an invasion of privacy.

Various decisions have followed which express, according to Dean Prosser,<sup>12</sup> the common principle that the incriminated act amounts to publication, as opposed to communicating information to a closed group, and concerns private facts, not such as are available to the general public. We have already noted one of the major problems raised by this branch of invasion and so far left without an answer: does the fact that an event takes place in a public place deprive the persons concerned of all claims to protection? Dean Prosser seems to conclude that this is the case, and there are in fact striking cases supporting that statement (*e.g. Gauthier v. Pro-Football, Inc.*,<sup>13</sup> where the plaintiff did not recover against a company which had televised his animal act, performed at a football game).

The second question is whether information which can be had from public records can ever be said to be private. *Melvin v. Reid* is a case in point, since the information published in the film was contained in court records. On examination of cases where no relief was granted, Dean Prosser concludes that only in the presence

<sup>11</sup> 297 Pac. 91 (1931).

<sup>12</sup> *Op. cit.*, pp. 393 ff.

<sup>13</sup> 106 N.Y.S. 2 d 119 (1950).

of particular circumstances will public records of information which is available to the general public be considered as private.<sup>14</sup>

The third problem discussed by Dean Prosser<sup>15</sup> concerns the requirement that the publication complained of be objectionable to a reasonable man. The “*mores test*” is illustrated by a comparison between *Melvin v. Reid* and a well-known decision of 1940, where it was held that an article, full of details, about a man, living in utter obscurity and following peaceful pursuits, but who had once been an infant prodigy, was not unlawful, although the person concerned suffered heavily from its publication.<sup>16</sup>

The notions of “news”, and of “public characters” have the same importance in respect of disclosure of private facts as with regard to publishing a person’s likeness. We may refer to what has already been said about public figures: this group comprises both those who make “news” and those who become “news”. The “news” concept, as analysed by American courts, is extremely broad and also covers entertainment and amusement: thus the public has been held to get some benefit from witnessing the exertions of fat women reducing with new devices.<sup>17</sup> Also the families of the “leaders, heroes, villains and victims” of modern life are public, within certain limits. Dean Prosser formulates the general principle that there must be “some logical connection between the plaintiff and the matter of public interest”.<sup>18</sup> This test is, however, satisfied in cases already referred to, where *e.g.* a strike-breaker is photographed to illustrate a book on strike-breaking. Voluntary and involuntary public figures need not put up with every form of publicity, but the limits are liberal: Dean Prosser goes no further than to suggest that the private sex relations of actresses, and the private letters of the high and mighty, are likely to be closed to the press, and suggests that “there is some rough proportion . . . between the importance of the public figure or the man in the news, and of the occasion for the public interest in him, and the nature of the private facts

<sup>14</sup> *Op. cit.*, p. 396.

<sup>15</sup> *Op. cit.*, pp. 396 f.

<sup>16</sup> *Sidis v. F.-R. Publishing Corp.*, 113 F. 2 d 806 (1940).

<sup>17</sup> *Sweenek v. Pathe News*, 16 F. Supp. 746 (1936).

<sup>18</sup> *Op. cit.*, p. 414.

revealed". Thus the President of the United States is likely to be "public" from most aspects, whereas minor public characters may claim privacy in respect of those sections of their life which lie outside the events or functions which are of general interest. It should be pointed out that, although there are very important differences between the non-moralizing attitude of American courts when defining what is newsworthy and what is not and the more severe approach of French and German judges, this suggestion is strikingly similar to the ideas prevailing in the last-mentioned countries as to the limits of publicity (*cf.* above).

Finally, Dean Prosser draws such conclusions as may be formulated in respect of the question whether a person who was once in the news remains fair game for the press. On the strength of decisions indicating that this is indeed the case on the one hand, and *Melvin v. Reid* on the other, he suggests a "*mores test*" as the only possible solution.

## 2. England

138. Again, it is necessary to start with the statement that English law offers no protection against the disclosure of private facts as such. Relief can be granted only if one of the existing actions in tort or some other legal principle (*e.g.* breach of contract, which has been successfully invoked by Royalty against the gossip of ex-servants) can be resorted to. The question to what extent the law of defamation offers a protection approximately similar to that granted by American courts under the right of privacy doctrine obviously depends upon the readiness of courts to find *innuendoes* in statements about a person's private life. Copyright may offer some protection where written documents are concerned, and a most efficient weapon would seem to be, within its limited field of application—which comprises, in particular, revelations about accused persons before the end of the trial—injunctions against imminent acts amounting to contempt of court<sup>19</sup> or damages awarded for such acts already committed.<sup>20</sup>

<sup>19</sup> *R. v. Evening Standard*, 40 T.L.R. 833.

<sup>20</sup> *Cf.* Mr. Webber in *Current Legal Problems*, 1958, p. 40.

Generally speaking, the protection against disclosure of private facts seems rather less developed in English law than the protection granted against other kinds of invasion.

### 3. France

139. Actions founded upon the tort of disclosure—against which the remedy is to be found in art. 1382 *Code civil*, even if the language used in decisions sometimes indicates the recognition of some kind of exclusive right in a “*patrimoine moral*”<sup>21</sup>—had hardly ever been brought before the French courts until the actress Marlene Dietrich brought an action in a case which involved both an element of misuse of a person’s words (*vide supra*) and an element of defamation—a newspaper had published a largely spurious interview with the actress, containing several details relating to her private life; her action was sustained.

Since the Dietrich case, a series of actions of a similar kind has forced the courts to consider the disclosure problem. In two cases concerning detailed articles on children exposed to the public eye, the teen-age starlet France Gall and the son of the actor Gérard Philippe, the *juge des référés* ordered the seizure of the newspapers containing the articles.<sup>22</sup> The scope of the decisions is not very broad, however; in both cases the courts stressed that the publication involved dangers for the moral development of minors; in the Philippe case, the photographs accompanying the article had been obtained under circumstances amounting to physical intrusion, and in the Gall case the text contained important spurious elements.

A more “pure” case opposed the artist Pablo Picasso to the editors of his former mistress, author of an autobiography, *Vivre avec Picasso*, where many details of the couple’s life in common were exposed to the public. The artist was unsuccessful. Private life, said the Court of Appeal of Paris, is a concept which has a special meaning in the case of a man of world-wide fame, who has never shunned publicity; the secrets revealed belonged not only to him, but also

<sup>21</sup> *D.* 1955. 295.

<sup>22</sup> *J.C.P.* 1965. II. 14223 and *D.* 1967. 181; *Gaz. Pal.* 1966. I. 40.

to his mistress, and to reveal her part of them, she could not avoid speaking about Picasso. Moreover, the work is not scandalous, but throws light upon a personality whose life is indissociably connected with his work.<sup>23</sup> In two recent actions concerning gossip about a well-known actor, a Paris court stated that it is only exceptionally that an actor's activities outside the theatre are legitimate news; damages amounting to considerable sums were awarded.<sup>24</sup> Finally, the husband of Mme Bardot, M. Sachs, failed in a recent action for the seizure of a newspaper containing an article entitled "Sexy Sachs" and containing a vast amount of gossip about the plaintiff. M. Sachs, the court states, had already been analysed in numerous articles and had led a life inviting curiosity.<sup>25</sup> The tone of the decision is contemptuous. Thus the very great and the assiduous publicity seekers would be deprived of almost any privacy, at least as long as the publication of private facts is not clearly malicious or scandalous. However, the Picasso decision has not gone without criticism in legal writing.

The "right of oblivion", successfully invoked in the American case *Melvin v. Reid*, was not recognized in a recent French case where the ageing mistress of the famous murderer Landru had brought an action against a company which had produced a film on the life of that enigmatic, and undoubtedly public, character. The action was successful on another ground: the actress impersonating the plaintiff exposed her nudity in a way which was held to violate the plaintiff's reputation.<sup>26</sup> On appeal, the judgment was reversed, however. The Court of Paris held that the publicity given to the plaintiff's private life by court proceedings and books about the Landru case—publicity which the plaintiff had not previously shunned—justified a representation which did not involve unnecessary defamatory details.<sup>27</sup>

<sup>23</sup> *Gaz. Pal.* 1966. I. 39.

<sup>24</sup> *J.C.P.* 1966. II. 14835.

<sup>25</sup> *D.* 1967. 182.

<sup>26</sup> *J.C.P.* 1966. II. 14482.

<sup>27</sup> *J.C.P.* 1967. II. 15107,

#### 4. Germany

140. German decisions on the disclosure of private facts follow with remarkable consistency a number of principles essentially identical to those we have already summarized in respect of the unauthorized publication of a person's likeness. It does not seem necessary, therefore, to set out at any length the numerous cases decided.

Public characters may be represented in films or in writing, with such true details as are neither defamatory nor elements of the sphere of strict intimacy and with such imaginary details as are not deprecatory.<sup>28</sup> Where politicians and other characters active on the public stage are concerned, even their private life may be of public interest,<sup>29</sup> but it is only the *legitimate* need for information about matters of public concern which can be freely satisfied; gossip or sensational journalism cannot claim any privilege,<sup>30</sup> and although the defence of "protection of legitimate interests" may be invoked to a large extent, particularly in political journalism, even public characters have a "right of oblivion": the publication, with a revealing text, of the picture of a politician in the company of a woman with whom he had sinned, long ago, is an unjustifiable invasion.<sup>31</sup> It should be added that political journalism is also granted special privileges in defamation cases; there is a considerable body of cases where "disclosure" is interwoven with critical comments upon the conduct of political leaders.

The lesser objects of public curiosity are fair game only to the extent strictly necessary for the information of the public; thus the story of a girl who had eloped may be told, but there is no need to name her.<sup>32</sup> "Relative" persons of contemporary history may be discussed only in so far as they are connected with the event raising them to notoriety, and only as long as that event is in the newspapers; after six months, it has been held, a woman involved in a scandal in this indirect way may claim the "right of oblivion".<sup>33</sup>

<sup>28</sup> *Vide* e.g. *GRUR* 1960, p. 40.

<sup>29</sup> *UFITA*, vol. 42 (1964), p. 338.

<sup>30</sup> *UFITA*, vol. 29 (1959), p. 107.

<sup>31</sup> *UFITA*, vol. 41 (1964), p. 322.

<sup>32</sup> *GRUR* 1965, p. 256.

<sup>33</sup> *NJW* 1965, p. 2148.



## 5. Other Countries

141. Two decisions will be mentioned here, which illustrate the trend towards the recognition of a right of privacy on fairly weak statutory bases in countries as different as Japan and Norway.

In a much-discussed *Japanese* decision,<sup>34</sup> relief was granted for the representation, in a film, of certain political events in which the plaintiff had been involved; there were, *i.a.*, scenes representing disputes between the plaintiff and his wife. The court held that some fairly narrow provisions of criminal law ("Peeping Tom" provisions and the rules prohibiting interception of correspondence) were a sufficient basis for the conclusion that Japanese law recognized a right of privacy. Another interesting point was made: although it is not for the court to judge in conflicts between the right of privacy and the liberty of artistic expression, the quality—and the literary or merely scandalmongering ambitions—of a work must be taken into account in cases of this kind. Finally, the court stated that conflicts between privacy and freedom of expression must be decided *in casu*.

In *Scandinavia*, a case (already referred to in no. 12 above) closely similar to *Melvin v. Reid* gave rise to a famous decision by the Supreme Court of Norway and to intense debate in Nordic law reviews.<sup>35</sup> A man once convicted of participating in a murder had served his term of imprisonment and taken up a respectable life. A film was being prepared about the murder, which had been a most sensational event some twenty years earlier. The ex-convict obtained an injunction prohibiting the public showing of the film.<sup>36</sup> The majority of the Norwegian Supreme Court held that there existed, in Norwegian law, a general protection of the personality

<sup>34</sup> Graciously communicated by Professor Takayanagi; cf. Mr. Ito in *Law in Japan: an Annual*, vol. 1, 1967.

<sup>35</sup> For a recent survey of privacy in Scandinavian legal discussion, *vide* Professor Löfgberg in *Festskrift till Håkan Nial*, Stockholm 1966, pp. 358 ff. (in particular pp. 375 ff.) *Vide* also Professor Andenaes in *UFITA*, vol. 30 (1960), pp. 30 ff; Arnholm, *Personretten* (1959), pp. 80 ff; Mr. Daehlin in *Ophavsretlige Perspektiver*, 1954—1958, pp. 140 ff; Mr. Selmer in *Nordiskt immateriellt rättsskydd*, 1955, pp. 1 ff; Professor Nelson in *Svensk juristtidning*, 1954, p. 21.

<sup>36</sup> *Norsk Rettstidende* 1952, p. 1217,

in addition to those statutory provisions which granted relief on certain points. The scope of this principle is uncertain, however; the Court insisted on a number of particularities in the case at issue.

#### **6. Conclusions on Use of Name and Likeness, Misuse of Words or Other Expressions, and Disclosure of Private Facts**

142. The difficulty, when attempting to analyse the rules discussed above, consists in finding a rational classification of cases, on which considerations *de lege ferenda* can be based. It is submitted that such a pragmatic approach is rather more fertile than the declaration of general principles in these cases, where there are present strong and legitimate interests which are opposed to each other on decisive points. Generally speaking, the interests conflicting with that of being let alone are far more respectable in these cases than in those concerning eavesdropping and physical intrusion. The foremost of these interests is freedom of expression, information and debate.

Some elements of the problems facing us may be singled out, however, as reasonably simple: the appropriation cases and those which involve spurious, malicious or otherwise improper use of a person's name, likeness or expression. No legitimate interests would seem to be seriously threatened by rules prohibiting such uses, and there seems to be some need for rules on these points.

Such provisions, which need not be founded on such theoretical concepts as an absolute right to a person's name or likeness or a "general right of the personality", might include prohibitions against:

- 1) the unauthorized use of a person's name or likeness in advertising;

- 2) publishing words and similar expressions falsely described as the words and expressions of a named person or publishing words and expressions of such person altered so as to express, on matters of any importance, a sense clearly different from the true one.

This, it is submitted, would be sufficient as far as a person's *name* is concerned. As for the use of names in fiction, it might be useful to add a rule to the effect that, when clearly intended to expose a

person to contempt or ridicule, the use of that person's name to denote an imaginary character is unlawful, but both the problems of producing sufficient evidence and the wish not to impose unreasonable restraints on literary creation militate strongly in favour of leaving the problem to the existing rules on defamation.

The use of a person's *likeness* raises somewhat different problems. The positions of the legal systems considered are so different that it seems improbable that a common solution can be found. Leaving aside, for that reason, the question whether the basic principle should be an exclusive right or liberty to publish a person's likeness, we limit ourselves to pointing out some cases where it seems reasonable to prohibit such publication;

3) where a person is represented in a place, *e.g.* his home, or in a situation, in which he may reasonably claim to be let alone;

4) where the portrait is accompanied by such words, or appears otherwise in such a context, as are clearly against the interests of the person portrayed. Most cases of this kind would seem to fall within the definition of defamation, however.

Finally, in the interest of clarity and completeness, a fifth rule, which is perhaps superfluous, might be added:

5) A person's name or likeness, and words or other expressions of a person, may not be published in connection with an unauthorized disclosure of private facts or so as to identify the person to whom such disclosure relates.

The *disclosure* cases pose the greatest problems. If the rules above are adopted, the difficult problems relating to the distinction between "public characters" of various kinds and ordinary citizens are avoided in those legal systems which do not recognize a right to a person's name or likeness as a general principle. Where disclosure is concerned, this distinction—involving a choice between the non-moralizing American and the stricter European attitude to "news"—must be made. The author favours the European approach, although it seems extremely doubtful whether it is possible to enforce it. As for the details in respect of "public" and "non-public" character, the German principles (*vide* no. 140 *supra*), based on intense discussion and solid judicial experience, seem able to give the best guidance.

## APPENDIX I

## RIGHT OF PRIVACY BILL (1961)

1. A person shall have a right of action against any other person who without his consent publishes of or concerning him in any newspaper or by means of any cinematograph exhibition or any television or sound broadcast any words relating to his personal affairs or conduct.
2. In any action under this Act it shall, subject to the provisions of the next following section, be a good defence if the defendants prove—
  - (a) that they did not intend to refer to the plaintiff; or
  - (b) that the words were published on an occasion of absolute or qualified privilege; or
  - (c) that at the time of the publication the plaintiff was the subject of reasonable public interest by reason of some office or position then held by him or by reason of some conduct of the plaintiff, and that the words published related solely to matters which, having regard to such office, position or conduct of the plaintiff, were the subject of reasonable public interest or were fair comment thereon; or
  - (d) that at the time of the publication the plaintiff was the subject of reasonable public interest by reason of some contemporary event directly involving the plaintiff personally, and
    - (i) that it was reasonably necessary to disclose the identity of the plaintiff, and
    - (ii) that the words published related solely to matters which having regard to the event and the position of the plaintiff were the subject of reasonable public interest, or were fair comment thereon.
3. Notwithstanding anything contained in the last foregoing section, a defendant shall not be entitled to rely on a defence set

out in that section if the plaintiff proves that the defendant or any servant or agent employed by him obtained any material on which the said words were based by force or threats or following the entry without permission on to premises owned or occupied by the plaintiff or any member of the family or household of the plaintiff.

4. In awarding damages in an action under this Act regard shall be had to the conduct of the parties and to any mental distress or humiliation caused to the plaintiff by reason of the publication of the words or by reason of the manner in which the material on which the said words were based was obtained.
5. (1) Any reference in this Act to words shall be construed as including a reference to pictures, visual images, gestures and other methods of signifying meaning.  
 (2) In this Act "cinematograph exhibition" means the exhibition of moving pictures produced on a screen by means which include the projection of light.  
 (3) In this Act "television broadcast" means visual images broadcast by way of television, together with any sounds broadcast for reception along with those images, and "sound broadcast" means sound broadcast otherwise than as part of a television broadcast.  
 (4) In this Act "newspaper" means any paper containing public news or observations thereon, or consisting wholly or mainly of advertisements, which is printed for sale and is published in the United Kingdom either periodically or in parts or numbers at intervals not exceeding thirty-six days.
6. (1) This Act may be cited as the Right of Privacy Act, 1961  
 (2) This Act shall come into operation on the first day of January, one thousand nine hundred and sixty-two.  
 (3) This Act extends to Northern Ireland.

## AVANT-PROJET DE CODE CIVIL (1953)

*Des droits de la personnalité*

## Art. 148

La personne humaine est sujet de droit à partir de sa naissance jusqu'à sa mort.

Elle a la jouissance et l'exercice de tous les droits privés sauf les exceptions prévues par la loi.

L'enfant simplement conçu est réputé né toutes les fois que son intérêt l'exige pourvu qu'il naisse vivant et viable.

## Art. 149

L'enfant est réputé conçu dans la période comprise entre le 180<sup>e</sup> et le 300<sup>e</sup> jour précédant sa naissance.

## Art. 150

L'identification d'une personne peut se faire par tout moyen de preuve.

## Art. 151

L'acte par lequel une personne dispose de tout ou partie de son corps est interdit lorsqu'il doit recevoir exécution avant le décès du disposant, s'il a pour effet de porter une atteinte grave et définitive à l'intégrité du corps humain.

Il en est autrement si l'acte est justifié par les règles de l'art médical.

## Art. 152

Est toujours révocable l'acte par lequel une personne dispose de tout ou partie de son corps, que cet acte doive recevoir exécution du vivant de son auteur ou après son décès.

### Art. 153

Une personne peut toujours refuser de se soumettre à un examen ou à un traitement médical ou chirurgical à moins qu'elle n'y soit tenue en vertu d'une disposition de la loi ou d'un règlement d'administration publique.

Toutefois, si l'examen ou le traitement auquel on lui demande de se soumettre ne comporte aucun risque anormal, elle perd, en cas de refus, le droit de se prévaloir de la maladie ou de l'infirmité que le traitement aurait pu empêcher, supprimer ou atténuer.

### Art. 154

Lorsqu'une personne refuse de se soumettre à une expertise médicale ordonnée en justice sur la demande d'une partie au procès et ne comportant que l'application de méthodes conformes à la science et sans danger sérieux pour le corps humain, le juge peut considérer comme établis les faits que l'expertise avait pour but de constater.

### Art. 155

Tout aveu ou manifestation de volonté obtenu par des procédés portant atteinte à la personnalité est nul.

### Art. 156

Lorsqu'une personne a, de son vivant, exprimé formellement sa volonté de soustraire son corps à toute autopsie ou à tout prélèvement, ces mesures ne peuvent être pratiquées que sur décision du procureur de la République, du magistrat instructeur ou du président du tribunal statuant en référé.

Les mêmes règles son applicables lorsqu'après le décès d'une personne, son conjoint ou ses parents se sont opposés à ces mesures.

Un règlement d'administration publique déterminera les dérogations qui pourront être apportées au présent article en cas de péril imminent pour la salubrité publique.

### Art. 157

La dissection ne peut être pratiquée au cas où une volonté contraire a été manifestée soit par le défunt lui-même, soit par son conjoint,

ses parents ou son légataire universel, soit par les personnes qui se sont chargées des funérailles.

En aucun cas la dissection ne peut être pratiquée moins de vingt-quatre heures après le décès.

#### Art. 158

Toute personne capable de tester peut, par acte en forme de testament, régler les conditions de ses funérailles.

Elle peut charger une ou plusieurs personnes de veiller à l'exécution de ces dispositions.

Les personnes ainsi désignées et, à leur défaut, toute autre personne justifiant d'un intérêt matériel ou moral, peuvent saisir le juge de paix du lieu du décès en vue de faire respecter les dispositions prises.

#### Art. 159

Si le défunt n'a pas exprimé sa volonté dans la forme prévue à l'article précédent, les conditions de ses funérailles sont fixées par son conjoint, ses parents ou son légataire universel.

A défaut de conjoint, de parents ou de légataire universel, présents ou connus lors du décès, elles sont fixées par les personnes qui en prennent l'initiative.

En cas de contestation, le juge de paix du lieu du décès peut être saisi par la partie la plus diligente.

#### Art. 160

Dans les cas prévus à l'article précédent, toute personne justifiant d'un intérêt matériel ou moral peut saisir le juge de paix du lieu du décès en vue de faire fixer les conditions des funérailles si elle établit que les mesures arrêtées sont en contradiction avec la volonté du défunt.

#### Art. 161

Le juge de paix saisi en application des dispositions des articles 158 à 160 statue dans les vingt-quatre heures. Appel de sa décision peut être interjeté devant le président du tribunal qui statue également dans les vingt-quatre heures.



La décision du juge de paix ou du président du tribunal est notifiée au maire qui est chargé d'en assurer l'exécution.

#### Art. 162

En cas de publication, d'exposition ou d'utilisation de l'image d'une personne, celle-ci peut, à moins qu'elle n'y ait consenti à l'avance, demander qu'il y soit mis fin, sans préjudice de la réparation de tout dommage matériel ou moral.

Le même droit appartient au conjoint et aux parents en ligne directe au premier degré d'une personne décédée dont l'image serait publiée, exposée ou utilisée après son décès dans des conditions de nature à porter atteinte à son honneur ou à sa considération.

#### Art. 163

Le destinataire d'une lettre missive confidentielle ne peut en divulguer le contenu sans le consentement de son auteur.

Il peut toutefois la produire en justice s'il justifie d'un intérêt sérieux.

En cas de décès du destinataire, et à défaut d'accord amiable, l'auteur de la lettre ou ses héritiers ayant droit aux souvenirs de famille peuvent demander au tribunal d'en ordonner la restitution, la destruction ou le dépôt entre les mains d'une personne qualifiée, ou de prendre toute autre mesure appropriée.

#### Art. 164

Les droits de la personnalité sont hors du commerce. Toute limitation volontaire apportée à l'exercice de ces droits est nulle si elle est contraire à l'ordre public.

#### Art. 165

Toute atteinte illicite à la personnalité donne à celui qui la subit le droit de demander qu'il y soit mis fin, sans préjudice de la responsabilité qui peut en résulter pour son auteur.

ENTWURF EINES GESETZES ZUR  
NEUORDNUNG DES ZIVILRECHTLICHEN  
PERSÖNLICHKEITS- UND EHRENSCHUTZES  
(1959)

Artikel 1 — *Änderung des Bürgerlichen Gesetzbuches*

Das Bürgerliche Gesetzbuch wird wie folgt geändert:

I. An die Stelle des § 12 treten die folgenden §§ 12 bis 20:

§ 12

Wer widerrechtlich einen anderen in seiner Persönlichkeit verletzt, ist ihm zur Beseitigung der Beeinträchtigung verpflichtet; dies gilt insbesondere in den Fällen der §§ 13 bis 19. Sind weitere Beeinträchtigungen zu besorgen, so kann der Verletzte auch auf Unterlassung klagen. Beeinträchtigungen, die nach verständiger Auffassung im menschlichen Zusammenleben hinzunehmen sind, bleiben ausser Betracht.

Ist der Verletzte gestorben oder richtet sich die Verletzung gegen einen Verstorbenen, so sind seine Angehörigen, falls jedoch der Verstorbene eine andere Person bestimmt hat, so ist diese befugt, die Ansprüche nach Absatz 1 geltend zu machen. Nach Ablauf von dreissig Jahren seit dem Tode des Verletzten kann ein solcher Anspruch nicht mehr geltend gemacht werden, es sei denn, dass er vor diesem Zeitpunkt durch Vertrag anerkannt oder rechtshängig geworden ist.

Angehörige im Sinne des Absatzes 2 sind der überlebende Ehegatte und die Kinder oder, wenn weder der Ehegatte noch Kinder vorhanden sind, die Eltern oder, wenn auch Eltern nicht vorhanden sind, die Geschwister und die Enkel des Verstorbenen. Sind mehrere Angehörige des gleichen Ranges vorhanden, so kann jeder allein die Ansprüche nach Absatz 1 geltend machen; durch Zustim-

mung wird die Widerrechtlichkeit nur ausgeschlossen, wenn alle zugestimmt haben.

### § 13

Eine widerrechtliche Verletzung im Sinne des § 12 liegt vor, wenn jemand unbefugt das Leben, den Körper, die Gesundheit oder die Freiheit eines anderen verletzt.

### § 14

Eine widerrechtliche Verletzung im Sinne des § 12 liegt vor, wenn jemand einen anderen durch Kundgabe von Missachtung beleidigt oder wenn jemand über einen anderen eine ehrenrührige Behauptung tatsächlicher Art, deren Wahrheit er nicht zu beweisen vermag, gegenüber einem Dritten aufstellt oder verbreitet.

Der andere kann die Äusserung nicht verbieten, wenn sie der Erfüllung einer Rechtspflicht oder der angemessenen Wahrnehmung eines berechtigten öffentlichen oder privaten Interesses dient. Presse, Rundfunk und Film nehmen ein berechtigtes Interesse wahr, wenn sie im Rahmen ihrer öffentlichen Aufgabe die Öffentlichkeit unterrichten oder Kritik üben. Auf Wahrnehmung eines berechtigten Interesses kann sich nicht berufen, wer eine ehrenrührige Behauptung tatsächlicher Art in Kenntnis ihrer Unwahrheit aufstellt oder verbreitet. Der Verletzte kann Beseitigung der Beeinträchtigung verlangen, sobald einer der Gründe wegfällt, aus denen er nach Satz 1 die Äusserung nicht verbieten konnte.

Hat jemand bei einer öffentlichen Veranstaltung eine nicht erweislich wahre ehrenrührige Behauptung tatsächlicher Art über einen anderen aufgestellt oder verbreitet, so kann dieser eine wahrheitsgetreue Berichterstattung hierüber nicht verbieten, wenn sie der angemessenen Wahrnehmung eines berechtigten öffentlichen oder privaten Interesses dient. Absatz 2 Satz 2 gilt entsprechend.

Ein tadelndes Urteil über eine Leistung oder über ein Verhalten eines anderen sowie eine erweislich wahre ehrenrührige Behauptung tatsächlicher Art, die jemand über einen anderen gegenüber einem Dritten aufstellt oder verbreitet, ist vorbehaltlich des § 15 eine widerrechtliche Verletzung im Sinne des § 12 nur, wenn die

Äusserung der Form oder den Umständen nach eine beleidigende Kundgabe von Missachtung darstellt oder wenn sie den anderen in einer gegen die guten Sitten verstossenden Weise in seiner Persönlichkeit verletzt.

### § 15

Eine widerrechtliche Verletzung im Sinne des § 12 liegt vor, wenn jemand unbefugt Behauptungen tatsächlicher Art über das Privat- oder Familienleben eines anderen öffentlich aufstellt oder verbreitet. Die Mitteilung ist zulässig, wenn sie der angemessenen Wahrnehmung eines berechtigten öffentlichen oder privaten Interesses dient.

Eine widerrechtliche Verletzung im Sinne des § 12 liegt vor, wenn jemand unbefugt den vertraulichen Inhalt von Briefen oder Aufzeichnungen persönlicher Art veröffentlicht. Die Veröffentlichung ist zulässig, wenn ihr der Verfasser, bei Briefen auch der Empfänger, zugestimmt haben, oder wenn sie der angemessenen Wahrnehmung eines berechtigten öffentlichen oder privaten Interesses dient.

§ 14 Abs. 2 Satz 2 gilt entsprechend.

### § 16

Eine widerrechtliche Verletzung im Sinne des § 12 liegt vor, wenn jemand das Recht zum Gebrauch eines Namens dem Berechtigten bestreitet oder unbefugt den gleichen Namen gebraucht.

### § 17

Eine widerrechtliche Verletzung im Sinne des § 12 liegt vor, wenn jemand unbefugt ein Bild eines anderen veröffentlicht.

Die Veröffentlichung ist zulässig, wenn es sich handelt um

1. Bilder aus dem Bereich der Zeitgeschichte;
2. Bilder von Ereignissen oder Örtlichkeiten, bei denen der Abgebildete nur als Nebenfigur erscheint;
3. Bilder von Versammlungen, Aufzügen oder ähnlichen öffentlichen Veranstaltungen;

4. Bilder, die nicht auf Bestellung des Abgebildeten angefertigt sind, sofern ein ernsthaftes Interesse der Kunst oder Wissenschaft die Veröffentlichung rechtfertigt.

Die Veröffentlichung ist auch unter den Voraussetzungen des Absatzes 2 unzulässig, wenn sie ein berechtigtes Interesse des Abgebildeten verletzt.

Eine widerrechtliche Verletzung im Sinne des § 12 liegt vor, wenn jemand abgesehen von den Fällen des Absatzes 2 Nr. 1 bis 3 ein Bild eines anderen gegen dessen erkennbaren Willen anfertigt oder durch die Anfertigung eines Bildes ein berechtigtes Interesse des Abgebildeten verletzt.

### § 18

Eine widerrechtliche Verletzung im Sinne des § 12 liegt vor, wenn jemand unbefugt unter Anwendung technischer Mittel das gesprochene Wort eines anderen festhält oder unmittelbar oder unter Verwendung eines Tonträgers öffentlich wahrnehmbar macht. Das gesprochene Wort eines anderen darf festgehalten werden oder öffentlich wahrnehmbar gemacht werden, wenn es sich um die Wiedergabe von Versammlungen, Aufzügen oder ähnlichen öffentlichen Veranstaltungen handelt. Dies gilt nicht, wenn hierdurch ein berechtigtes Interesse des anderen verletzt wird.

### § 19

Eine widerrechtliche Verletzung im Sinne des § 12 liegt vor, wenn jemand sich unbefugt durch eine Abhörvorrichtung oder in ähnlicher Weise Kenntnis von nicht für ihn bestimmten Äußerungen eines anderen oder von Tatsachen oder Vorgängen aus dem Privat- oder Familienleben eines anderen verschafft.

### § 20

Wer öffentlich eine Behauptung tatsächlicher Art aufstellt oder verbreitet, welche geeignet ist, einen anderen in seiner Persönlichkeit zu verletzen, ist verpflichtet, unverzüglich eine Entgegnung des anderen auf dessen Verlangen in gleicher Weise wie die von ihm aufgestellte oder verbreitete Behauptung oder, wenn dies nicht

möglich oder tunlich ist, in sonst geeigneter Weise zu veröffentlichen. Die Entgegnung muss auf die Darstellung des Sachverhalts beschränkt und nach Inhalt und Umfang angemessen sein. Wer sich gleichzeitig zu der Entgegnung äussert, muss sich auf tatsächliche Angaben beschränken.

Der Anspruch besteht nicht,

1. wenn die Entgegnung offensichtlich unwahr ist oder wenn aus einem anderen Grund an ihrer Veröffentlichung kein berechtigtes Interesse besteht;
2. wenn die Behauptung in einem gerichtlichen Verfahren aufgestellt oder verbreitet worden ist;
3. wenn es sich um die Äusserung eines Abgeordneten einer gesetzgebenden Körperschaft oder um einen Bericht über eine Sitzung einer gesetzgebenden Körperschaft handelt und nach besonderer Vorschrift eine Verantwortlichkeit für die Äusserung oder den Bericht ausgeschlossen ist.

Der Berechtigte verliert den Anspruch, wenn er die Veröffentlichung der Entgegnung nicht innerhalb eines Monats nach Kenntnis der Tatsache, dass die Behauptung öffentlich aufgestellt oder verbreitet worden ist, spätestens aber innerhalb von drei Monaten nach der öffentlichen Mitteilung verlangt.

Die Veröffentlichung kann im Verfahren der einstweiligen Verfügung angeordnet werden. Die einstweilige Verfügung soll nicht ohne mündliche Verhandlung ergehen; eine Gefährdung des Anspruchs braucht nicht glaubhaft gemacht zu werden. § 926 der Zivilprozessordnung ist nicht anzuwenden.

Hat der nach Absatz 1 zur Veröffentlichung Verpflichtete die Entgegnung veröffentlicht, so kann er unbeschadet sonstiger Ansprüche von dem anderen den Ersatz der hierdurch entstandenen notwendigen Aufwendungen verlangen, wenn der Inhalt der Entgegnung sich im wesentlichen als unwahr erweist. War die Behauptung durch Presse, Rundfunk oder Film aufgestellt oder verbreitet worden, so besteht der Anspruch nur, wenn und soweit aus besonderen Gründen ein Ersatz der Aufwendungen angemessen ist, jedoch nicht über den Schaden hinaus, der dem zur Veröffentlichung Verpflichteten durch diese entstanden ist.

II. Nach § 252 wird folgender § 252 a eingefügt:

#### § 252 a

Ist jemand in seiner Persönlichkeit dadurch verletzt worden, dass über ihn eine nicht erweislich wahre Behauptung der in § 14 Abs. 1 bezeichneten Art aufgestellt oder verbreitet worden ist, so wird vermutet, dass diese Beeinträchtigung Vermögensschäden zur Folge gehabt hat, wenn dies nach dem gewöhnlichen Lauf der Dinge oder nach den besonderen Umständen mit Wahrscheinlichkeit anzunehmen ist.

III. § 823 Abs. 1 erhält folgende Fassung:

#### § 823

Wer vorsätzlich oder fahrlässig einen anderen in seiner Persönlichkeit oder wer vorsätzlich oder fahrlässig das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist ihm zum Ersatz des daraus entstehenden Schadens verpflichtet.

IV. § 824 erhält folgende Fassung:

#### § 824

Wer vorsätzlich oder fahrlässig eine unwahre Behauptung tatsächlicher Art aufstellt oder verbreitet, die geeignet ist, den Kredit eines anderen zu gefährden oder sonstige Nachteile für dessen Erwerb oder Fortkommen herbeizuführen, hat dem anderen den daraus entstehenden Schaden zu ersetzen.

Die Schadensersatzpflicht entfällt, wenn die Mitteilung der angemessenen Wahrnehmung eines berechtigten öffentlichen oder privaten Interesses dient. § 14 Abs. 2 Satz 2 gilt entsprechend. Auf Wahrnehmung eines berechtigten Interesses kann sich nicht berufen, wer die Unwahrheit der Behauptung kennt.

V. § 825 wird aufgehoben.

VI. § 847 erhält folgende Fassung:

## § 847

Wer in seiner Persönlichkeit verletzt wird, kann auch wegen des Schadens, der nicht Vermögensschaden ist, eine angemessene Entschädigung in Geld einschliesslich einer Genugtuung für die erlittene Unbill verlangen; dies gilt nicht, soweit eine Herstellung im Sinne des § 249 möglich und genügend oder soweit dem Verletzten Genugtuung in anderer Weise als durch Geld geleistet ist; eine unerhebliche Verletzung bleibt ausser Betracht. Die Höhe der Entschädigung bestimmt sich nach den Umständen, insbesondere nach der Schwere der Verletzung und des Verschuldens.

Der Anspruch ist nicht übertragbar und geht nicht auf die Erben über, es sei denn, dass er durch Vertrag anerkannt oder dass er rechtshängig geworden ist.

Artikel 2 — *Änderung des Einführungsgesetzes  
zum Bürgerlichen Gesetzbuch*

Das Einführungsgesetz zum Bürgerlichen Gesetzbuch wird wie folgt geändert:

I. Nach Artikel 33 wird folgender Artikel 33 a eingefügt:

Artikel 33 a

Auf Tatbestände, die in den Urheberrechtsgesetzen geregelt sind, ist § 12 des Bürgerlichen Gesetzbuchs in der Fassung des Gesetzes zur Neuordnung des zivilrechtlichen Persönlichkeits- und Ehrenschutzes nicht anzuwenden, es sei denn, dass sich eine Verletzung im Sinne dieser Vorschrift aus besonderen, in den Urheberrechtsgesetzen nicht berücksichtigten Umständen ergibt.

II. Nach Artikel 55 wird folgender Artikel 55 a eingefügt:

Artikel 55 a

Die landesgesetzlichen Vorschriften, nach denen gegenüber einer öffentlich aufgestellten oder verbreiteten Behauptung ein im Zivilrechtswege verfolgbarer Anspruch auf Abdruck oder Verbreitung einer Entgegnung (Gegendarstellung, Berichtigung) besteht, sind vom ... (Inkrafttreten des Gesetzes) an insoweit nicht mehr an-



zuwenden, als es sich um Behauptungen der in § 20 des Bürgerlichen Gesetzbuches bezeichneten Art handelt.

*Artikel 3 — Änderung des Kunsturheberrechtsgesetzes*

Das Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie vom 9. Januar 1907 (Reichsgesetzbl. S. 7), zuletzt geändert durch Gesetz vom 12. Mai 1940 (Reichsgesetzbl. I S. 758) wird wie folgt geändert:

I. Die §§ 22 und 23 werden aufgehoben.

II. § 24 erhält folgende Fassung:

§ 24

Für Zwecke der Rechtspflege und der öffentlichen Sicherheit dürfen von den Behörden Bildnisse ohne Einwilligung des Berechtigten vervielfältigt und verbreitet werden.

III. § 33 Abs. 1 Nr. 2 wird aufgehoben.

*Artikel 4 — Änderung der Strafprozessordnung*

§ 81 b der Strafprozessordnung erhält folgende Fassung:

§ 81 b

Soweit es für die Zwecke der Durchführung des Strafverfahrens oder für die Zwecke des Erkennungsdienstes notwendig ist, dürfen auch gegen den Willen des Beschuldigten Bilder von ihm hergestellt, vervielfältigt und verbreitet, Fingerabdrücke von ihm aufgenommen sowie Messungen und ähnliche Massnahmen an ihm vorgenommen werden.

*Artikel 5 — Zuständigkeit*

(1) Die Landesregierungen werden ermächtigt, durch Rechtsverordnung die zur Zuständigkeit des Landgerichts gehörenden Streitigkeiten über Ansprüche aus einer Veröffentlichung durch Presse, Rundfunk oder Film, die darauf gestützt werden, dass die Veröf-

fentlichung geeignet ist, einen anderen in seiner Persönlichkeit zu verletzen oder den Kredit eines anderen zu schädigen oder sonstige Nachteile für dessen Erwerb oder Fortkommen herbeizuführen, für die Bezirke mehrerer Landgerichte einem von ihnen zuzuweisen, wenn dies der Rechtspflege dienlich ist. Die Landesregierungen können diese Ermächtigung auf die Landesjustizverwaltungen übertragen.

(2) Vor einem Landgericht, dem nach Absatz 1 die Aufgaben aus den Bezirken mehrerer Landgerichte zugewiesen sind, können die Parteien sich auch durch Rechtsanwälte vertreten lassen, die bei dem Landgericht zugelassen sind, vor das die Sache ohne eine Regelung nach Absatz 1 gehören würde.

(3) In Streitigkeiten der in Absatz 1 bezeichneten Art wird die Zulässigkeit eines Rechtsmittels gegen eine Entscheidung eines Amtsgerichts nicht dadurch berührt, dass das Rechtsmittel bei demjenigen Landgericht eingelegt wird, welches ohne eine Regelung nach Absatz 1 zuständig wäre; die Sache wird von Amts wegen an das zuständige Landgericht abgegeben.

#### Artikel 6 — *Übergangsvorschriften*

Die Vorschriften dieses Gesetzes finden auf Handlungen oder Unterlassungen, die vor seinem Inkrafttreten begangen sind, keine Anwendung.

#### Artikel 7 — *Berlin-Klausel*

Dieses Gesetz gilt nach Massgabe des § 13 Abs. 1 des Dritten Überleitungsgesetzes vom 4. Januar 1952 (Bundesgesetzbl. I S. 1) auch im Land Berlin.

#### Artikel 8 — *Inkrafttreten*

Dieses Gesetz tritt am . . . in Kraft.

## APPENDIX IV

CONCLUSION OF THE NORDIC  
CONFERENCE  
THE RIGHT TO PRIVACY

*Preamble*

WHEREAS Article 12 of the Universal Declaration of Human Rights and Article 17 of the United Nations Covenant on Civil and Political Rights of December 1966 have provided that “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation” and that “everyone has the right to the protection of the law against such interference or attacks”.

AND WHEREAS Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms has provided that “everyone has the right to respect for his private and family life, his home and his correspondence”

AND RECALLING that the International Commission of Jurists has at its first international Congress held at Athens in 1955 stressed that the Rule of Law requires that the private lives of individuals be inviolable

AND CONSIDERING that the increasing complexity of modern society makes it desirable to protect the Right to Privacy with greater particularity than hitherto,

THEREFORE the International Commission of Jurists decided to request this Nordic Conference of Jurists to examine the scope at the present day of the Right to Privacy and the particular problems relating thereto and to advise on the safeguards and remedies that should be made available to protect this Right,

AND NOW THEREFORE this Nordic Conference of Jurists from Denmark, Finland, Iceland, Norway and Sweden, attended by legal experts from Austria, Brazil, Ceylon, Ecuador, France,

Great Britain, India, Ireland, Japan, Netherlands and the United States and distinguished observers from the Council of Europe, the International Press Institute, the English Law Commission, the Press Council of Great Britain, the World Federation of United Nations Associations and the World Peace Through Law Center, having considered the issues involved in the Right to Privacy, adopts the Conclusions hereinafter set forth.

## CONCLUSIONS

### PART I: NATURE OF THE RIGHT TO PRIVACY

1. The Right to Privacy, being of paramount importance to human happiness, should be recognised as a fundamental right of mankind. It protects the individual against public authorities, the public in general and other individuals.
2. The Right to Privacy is the right to be let alone to live one's own life with the minimum degree of interference. In expanded form, this means:

The right of the individual to lead his own life protected against: (a) interference with his private, family and home life; (b) interference with his physical or mental integrity or his moral or intellectual freedom; (c) attacks on his honour and reputation; (d) being placed in a false light; (e) the disclosure of irrelevant embarrassing facts relating to his private life; (f) the use of his name, identity or likeness; (g) spying, watching and besetting; (h) interference with his correspondence; (i) misuse of his private communications, written or oral; (j) disclosure of information given or received by him in circumstances of professional confidence. (The limitations of this right are set forth in Part II.)

3. For practical purposes, the above definition is intended to cover (among other matters) the following:
  - (i) search of the person;
  - (ii) entry on and search of premises or other property;
  - (iii) medical examinations, psychological and physical tests;
  - (iv) untrue or irrelevant embarrassing statements about a person;
  - (v) interception of correspondence;
  - (vi) wire or telephone tapping;
  - (vii) use of electronic surveillance or other "bugging" devices;

- (viii) recording, photographing or filming;
- (ix) importuning by the press or by agents of other mass media;
- (x) public disclosure of private facts;
- (xi) disclosure of information given to, or received from, professional advisers or to public authorities bound to observe secrecy;
- (xii) harrassing a person (e.g. watching and besetting him or subjecting him to nuisance calls on the telephone).

## PART II: LIMITATIONS

4. In modern society, the Right to Privacy, as any other human right, can never be without limitation except in the sense that nothing can justify measures which are inconsistent with the physical, mental, intellectual or moral dignity of the human person. The limitations which are necessary to balance the interests of the individual with those of other individuals, groups and the State will vary according to the context in which it is sought to give effect to the Right to Privacy.

5. The public interest frequently requires the granting to public authorities of greater powers to interfere in the individual's private sphere than would be acceptable in the case of interference by private individuals or groups. Such powers should never be used except for the purpose for which they were granted.

6. The circumstances in which a public authority may be granted such powers have been laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms as those in which interference in the private sphere 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”.

7. It is essential that the cases in which interference is permitted be defined with precision. Legislation should ensure that powers which

may involve invasion of privacy should only be exercised by a specifically appointed person or agency upon the order of a judicial authority or some other public authority ultimately responsible to the Legislature. Such order should determine the period and place of the exercise of the powers concerned.

8. In relation to interference in the above-mentioned circumstances, the following considerations apply:

(a) *National Security, Public Safety and Emergency Situations*

State powers to interfere with the Right to Privacy must vary according to the situation facing a country and may not be exercised except in accordance with its international obligations.

- (i) *In peace-time* national security may require invasions of privacy for very special and limited purposes. In order to ensure that such invasions are made only in cases of genuine threats to national security, and that powers granted by law in the interests of national security are not misused for political purposes, it is desirable that some form of independent supervision or control be instituted.
  - (ii) *In time of war or other public emergency* threatening the life of the nation, any additional powers to interfere with the right to privacy of the individual in the interests of public safety should be restricted to those strictly required by the exigencies of the situation and should be limited in time to the period of war or public emergency. For this purpose, they should be subject to periodic review and renewal by Parliament.
  - (iii) *In cases of natural disaster* public safety may necessitate invasions of privacy to enable measures to be taken to deal with such disasters or other calamities endangering the life of the people. The measures taken should be strictly proportionate to the threat involved.
- (b) *The economic well-being of a country* is not a concept which is capable of being precisely and narrowly defined. Therefore, it should not be relied upon except when absolutely necessary.

- (c) *The prevention of disorder or crime* may justify measures taken in the sphere of criminal law:
- (i) for the investigation of criminal offences and the detection of offenders
  - (ii) for the prosecution and punishment of offenders;
  - (iii) to prevent the commission of a criminal offence or the outbreak of disorder which there are compelling grounds to believe is imminent

This presupposes that the criminal law does not make it an offence to exercise any of the fundamental human rights and freedoms. It further presupposes that legal provisions define in detail the powers of the police and criminal investigation authorities, set out the offences in relation to which they can be used and lay down precise limits to their use. These limits should, in particular, ensure that measures involving an invasion of privacy are in all cases reasonably necessary having regard to the gravity of the offence involved and that there should be a reasonable proportion between the measures taken and the magnitude of the offence. In addition, there must be reasonable grounds for suspecting that the person concerned is guilty of or is about to commit a criminal offence.

- (d) *The protection of health* may justify reasonable measures taken in order to combat or to prevent the outbreak of an epidemic, or the spread of communicable diseases. Measures taken for *the protection of morals* (otherwise than within the ordinary framework of criminal law) should be limited to those necessary for the protection of children and young persons.

#### 9. *The Administration of Civil Justice*

The extent to which the Right to Privacy requires to be limited for the purposes of the administration of civil justice must be clearly defined in the laws relating to procedure and evidence in civil cases.

#### 10. *Freedom of Expression, Information and Debate*

The exercise of these freedoms is obviously in the public interest and it is inevitable that in some cases there should be a conflict between the interest of society in their exercise and the interest of the individual to live his private life unmolested. The line of demarcation between these interests is very difficult to draw. Cer-



tainly it cannot be drawn in the simple terms of the axiom that where public life begins private life must end. The private life of public figures is entitled to immunity save where it can be shown to impinge upon a course of public events. Even less acceptable is the axiom that "being in the news" of itself justifies intrusion on private life. It would be undesirable and indeed impossible to provide for all cases by legislation; but it may be insufficient to rely exclusively upon the self-discipline of the press and other mass media or upon rules of conduct laid down by the professional organisations concerned.

The subject-matter is so full of problems and the checks and balances must be so many and so delicate that a combination of all these methods, the formulation of rules of conduct, the establishment of professional disciplinary tribunals and appropriate legislation may be required for dealing satisfactorily with this aspect of the Right to Privacy.

It should be emphasized however that, because freedom of expression is one of the great freedoms on which so many others depend, it ought not to be curbed by special legislation designed to protect privacy against invasion by the press or other mass media, unless the self-discipline of the press and other mass media and the rules of conduct laid down by professional organisations have been shown to fail. This does not imply that the press or other mass media are exempt from general legislation protecting the Right to Privacy including legal provisions which apply to improper methods of obtaining information.

### PART III: PROTECTION

#### 11. *Protection under existing rules*

There are in most countries legal rules in other fields which provide civil remedies or criminal sanctions against certain forms of invasion of privacy. Some of these remedies or sanctions have not the protection of privacy as their primary object and it may therefore be necessary to strengthen or modify the provisions in question in order to secure the more effective protection of privacy

aspects involved. An institution which can give valuable assistance in the protection of privacy against invasion by public authorities is the Ombudsman.

12. The following invasions would seem to fall within the category referred to in the preceding paragraph. Where provisions of the nature described do not already exist, their introduction is considered necessary as part of the adequate protection of the Right to Privacy.

(a) *Entry on and search of premises and other property*

Criminal provisions in this field may not provide an adequate protection of individual interests. Similarly, civil remedies designed primarily to protect ownership or possession may not extend protection to individuals who have the mere use of premises or other property without possession.

(b) *Search of the Person*

Where existing laws provide for the search of the person, they should ensure that the search is limited to the object for which it is authorised and conducted with due respect for the individual searched.

(c) *Compulsory medical examinations and other tests*

The circumstances and cases in which medical examinations or other tests can be ordered and carried out should be clearly defined.

(d) *Interception of correspondence and other communications*

Most countries have legislative provisions prohibiting the opening of correspondence and protecting the secrecy of telegrams. In some cases these provisions apply only to employees of the postal and telecommunications services and there would seem to be a need for more general provisions—criminal and civil—protecting correspondence and other communications from interference by other third parties.

(e) *Disclosure of information given to public authorities or professional advisers*

Such disclosures are normally covered by legal or disciplinary provisions against the disclosure of confidential information given to public authorities. In the case of communications to professional advisers, their unauthorised disclosure should be

made the subject of sanctions, which may be criminal, civil or disciplinary, or a combination of these, according to the circumstances of the case.

(f) *Defamation*

The law of defamation in most legal systems protects the individual against attacks on his honour and reputation. In some systems truth is an absolute defence; in others it is not. In the former types of system there is need for legal protection in relation to the publication of true but irrelevant embarrassing facts relating to the individual's private sphere.

13. *Protection under special Rules relating to Privacy*

There are forms of invasion of privacy, other than those mentioned in the preceding paragraph, infringing rights which cannot be adequately protected by straining the existing legal rules devised mainly to meet other problems in other fields. These naturally fall within a Law of Privacy and should be protected by such a Law. The following invasions are within this category:

(a) *Intrusion upon a person's solitude, seclusion or privacy*

An unreasonable intrusion upon a person's solitude, seclusion or privacy, which the intruder can foresee will cause serious annoyance, whether by the intruder's watching and besetting him, following him, prying on him or continually telephoning him or writing to him or by any other means, should be actionable at civil law; and the victim should be entitled to an order restraining the intruder. In aggravated cases, criminal sanctions may also be necessary.

(b) *Recording, photographing and filming*

The surreptitious recording, photographing or filming of a person in private surroundings or in embarrassing or intimate circumstances should be actionable at law. In aggravated cases, criminal sanctions may also be necessary.

(c) *Telephone-tapping and concealed microphones*

- (i) the intentional listening into private telephone conversations between other persons without consent should be actionable at law.

- (ii) The use of electronic equipment or other devices—such as concealed microphones—to overhear telephone or other conversations should be actionable both in civil and criminal law.
- (d) *The use of material obtained by unlawful intrusion*  
The use, by publication or otherwise, of information, photographs or recordings obtained by unlawful intrusion (paras. (a), (b) and (c) above) should be actionable in itself. The victim should be entitled to an order restraining the use of such information, photograph or recording, for the seizure thereof and for damages.
- (e) *The use of material not obtained by unlawful intrusion*
  - (i) The exploitation of the name, identity or likeness of a person without his consent is an interference with his right to privacy and should be actionable.
  - (ii) The publication of words or views falsely ascribed to a person, or the publication of his words, views, name or likeness in a context which places him in a “false light” should be actionable, and entitle the person concerned to the publication of a correction.
  - (iii) The unauthorised disclosure of intimate or embarrassing facts concerning the private life of a person, published where the public interest does not require it, should in principle be actionable.

#### 14. *Need for Specific Legal Rules*

Finally, this Conference recommends that all countries take appropriate measures to protect by legislation or other means the right to privacy in all its different aspects and to prescribe the civil remedies and criminal sanctions required for its protection.

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# ACTA

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