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the case for an aggiornamento

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At the heart of a shifting reality, the person has seen his place and aspirations reformulated, while the line between public and private, constitutive of contemporary societies, has been blurred. And yet, at the same time, the legal system has continued to implement concepts, some of which probably merit a second reading. The concept of "right to respect for private life" (1) is one of these. Born and considered in the field of sociology, "private" no longer seems to lend itself as easily to its implementation in the legal sphere. Although French law remains committed to the "right to respect for private life", there is a great deal of confusion between "privacy", "private life" and "*l'intimité*" (literally, "intimacy") or personal privacy (2). Privacy generates as much self-determination on the part of the individual as it does reserve; and, while privacy is always involved, two different wishes are expressed: one facing inwards and the other outwards.

So why not provide litigants with a more operational tool by promoting a right to personal privacy which would cover only one of the rights that fall within the category of "right to respect for private life"? This would not cover the individual's wish for self-determination, i.e. the guarantee of his existential choices, but an additional element, indicating his control over information concerning his own person: the right of every person that elements relating to his or her personal life remain undisclosed; elements which are, by their nature, unknown to third parties and over which each person must consequently have control. Similar but not to be confused with the "right to secrecy of private life", the reference to the right to personal privacy would appear to be more accurate and effective.

More exactly, it takes better account of case law: the French courts and tribunals do not protect private life as a whole, but only part of it, corresponding to the right to personal privacy as defined here. This is more effective, on the one hand, insofar as developments in terms of technology and behaviour invite the legal system to cast off the shackles of a distinction between public and private which, in space, loses its substance; secondly, because the "right to respect for private life", as it is currently implemented, often dissipates into mere procedural guarantees.

The right to personal privacy does not purport to address all issues but offers a different direction which serves to set aside recurring conceptual problems. Firstly, it demolishes the spatial criterion: the vain distinction between private and public life is repelled and when the individual leaves his home, "privacy follows". Next, this right sets aside the reserve of absolute jurisdiction held by the ordinary courts: the administrative courts may thus establish their jurisdiction without controversy and without, for all that, the intervention of the ordinary courts being excluded or proving problematic (3). Finally, whereas currently the constitutional court cannot handle a fundamental

right that has substance, it could go further than a simple response to referrals, having a complementary and reinvigorated conception of personal freedom.

Therefore, if the protection of privacy should be rethought, it is particularly in order to shed light on the added value that the reference to the right to personal privacy can produce. An examination of the current state of the law, without masking the French legal order's restraint *vis-à-vis* the right to personal privacy, shows the benefit of identifying that right (section I), the better to protect a sphere of reserve around the person more effectively (section II).

I – The right to personal privacy: an identified law

In French law, the concept of *intimité* or personal privacy plays a marginal role. Before the Law of 17 July 1790 was passed (4), only Article 15, paragraph 2 of the Law of 29 July 1881 on press freedoms provided that proof of the truth of defamatory statements is prohibited in three cases, including "where the imputation concerns the person's privacy". In reality, the disregard for the right to personal privacy is the consequence, firstly, of a lack of differentiation with the right to respect for private life (section A); and, secondly, a failure to distinguish it from some "neighbouring" rights (section B).

A – The distinction between the right to respect for private life and the right to personal privacy

Efforts to define "privacy" have not been in vain. On the one hand, some authors understand the concept broadly so as to include the right to a normal family life, the "right to sexual life" (5), "respect for the appearance of personality", anonymity, and freedom of conscience and opinion (6). Thus, this conception may be likened to privacy (7) or private life as conceived by the European Court of Human Rights (8). On the other hand, part of the doctrine takes a stricter line and prefers to speak of "the right to keep the privacy of one's existence secret" (9) or the "right to personal privacy" (10). However, the preparatory work of the Law of 17 July 1970 (11) seemed to be clear and, within Article 9 of the Civil Code, paragraph 1 covers "private life" while paragraph 2 punishes "invasion[s] of personal privacy", which scenario alone authorises seizure and sequestration (12). However "*the delineation has become all the more difficult as privacy has sometimes ceased to be considered in relation to the necessary protection of a sphere of privacy for the person in relation to a certain right to be different*" (13).

As regards constitutional law, in order to enshrine the right to respect for private life, the suggestion was made that a paragraph 2 be added to Article 66 of the Constitution, stipulating that "*everyone has the right to respect for his private life and the dignity of his person*" (14). After much prevarication, in 1999, affirming that the freedom proclaimed by Article 2 of the Declaration of 1789 "implies respect for privacy" (15), the Constitutional Council established "respect for private life" as a "constitutionally guaranteed freedom" (16). However, it is unclear whether this right thereby gained any more autonomy because its juxtaposition to personal liberty breeds confusion. Nevertheless, although their respective normative sources are sometimes similar (17) how can these rights be confused? Admittedly some observers seem to suggest such an interpretation (18); however, nothing in the reading of constitutional case law confirms it. On the contrary, although it relates to an individual's private life, personal freedom enshrines protection for manifestations of personal liberty externalized on the social scene, i.e. a sphere of autonomy. It therefore complements the protection afforded by the right to personal privacy, but does not encompass it. Continuing the identification of the right to personal privacy, the clarification of the differences with a number of related concepts serves to confirm it.

B – The distinction between the right to personal privacy and "neighbouring" rights

Caution with regard to the right to personal privacy also emerges as a consequence of the choice made in national case law which, like its European counterpart (19), often intends to bring together the various legal instruments protecting private life under a single law. Civil law thus recognises that each person has the right to uphold his honour, i.e. the feeling that one has one's own dignity and the sense that others feel or experience it. Without denying that much of the harm done to individual reputations is caused by the invasion of a person's private sphere, it is possible to be more specific. On the one hand, the right to personal privacy aims to establish the individual's control over the disclosure of a number of aspects relating to his personal life, while the right to honour aims to protect the reputation of individuals against unlawful damage to reputation. Moreover, the scope of these rights is also quite distinct: the right to honour covers defamatory allegations relating to private life, but also those related to public activities.

As for image rights, traditionally ranked among personality rights, these were only recently "emancipated" from the right to respect for private life (20). The courts have increasingly found that it was not to be confused with the right to personal privacy and could be subject to infringements related to a person's public life (21). It covers the reproduction and representation of the human form in a visible and recognisable way (22), so that there are interferences that solely infringe image rights: these are little more than the capture, in places open to the public, of an image of a person subsequently published without his consent.

Lastly, in France, where the protection of personal data is involved, the guarantee established by the Law of 6 January 1978 (23) covers a wider sphere than that of the right to personal privacy. Indeed, in light of the protection of personal data, the nature of the information in question is irrelevant; it is sufficient that said information be directly or indirectly nominative, regardless of whether it is private or not. Furthermore, from the point of view of the legal system, the protection of personal data can be analysed first in terms of rights of information, access, correction and objection; then in terms of principles relating to data quality and the legal basis of the data collection concerned; and finally, in terms of the data controller's safety obligation, under the supervision of an independent authority (24). It is not absurd to consider that the protection of personal data relates more to a desire for self-determination in the social scene, rather than in a sphere of reserve (25).

Rather than being connected to the protection of personal data or personal freedom, privacy ought to refer to it. The inclusion of privacy and the protection of personal data within a wider personal freedom is the result of a reversal of perspectives. At the expense of its details, the advantage of using the right to personal privacy is highlighted; once identified, we can highlight the effectiveness of this right.

II – The right to personal privacy: an effective right

The effectiveness of the right to personal privacy requires, on the one hand, that it combine material content and formal guarantees (section A) and, on the other, that the relevant reasoning be freed from the distinction between public and private spaces (section B).

A – A right combining material content and formal guarantees

The right to personal privacy has content whilst benefiting from formal guarantees. Its content covers two aspects. On the one hand, it is possible to identify elements the private nature of which

is established, this being the minimum amount of content that is likely to constitute a common denominator for all individuals. Furthermore, above or below that minimum level, nothing is anybody's business: the individual is free to agree to temporary restrictions on that minimum level or, conversely, to make it known that he expects a higher level.

On the basis of material content, we must first of all mention information relating to health. Doctor-patient confidentiality is one that maintains the "*closest ties with the protection of privacy*" (26) and the *Code de la santé publique* (Public Health Code) structures confidentiality as to health status (Art. L. 1110-4), also protected by the Penal Code (Arts. 226-13 and 226-14). There must also be a place for the human body, but physical intimacy or privacy ought not to be confused with the physical reality of the human body, and it must be considered in light of each society's respective customs. Moreover, the will of the individual also has its place: if a person does not wish to give information on or expose parts of his anatomy that are not usually seen, he is protected by the law. Lastly, information about his sexuality is also covered (27). This does not cover the freedom to establish and maintain sexual relations, the right to engage in defined sexual practices, or sexual orientation. The right cannot be reduced to mere procedural safeguards (28) and thus has real content whilst being supplemented by formal guarantees.

French law has developed a number of mechanisms, such as the right to confidentiality of communications and the right to the inviolability of the home, which appear as formal guarantees for the right to personal privacy. It is understood that with these rights, the legal system aims to implement a guarantee safeguarding a medium for privacy, i.e. a channel through which it is deemed to be deployed, rather than a space or an act that would, in essence, be private. The aim is to posit a presumption in order to protect the various forms that the private sphere can take or occupy. Thus the right to the inviolability of the home keeps third parties away from a space that is viewed geographically, as an area or a territory (29).

The guarantee of the inviolability of communications follows the same logic (30): the law establishes a presumption that all that is transmitted through the communication process (31) should remain undisclosed. Regardless of the material content of the communication (32), the mere fact of disclosing, intercepting or retaining the elements communicated is an infringement of that right. It is the interference of individuals who are not party to the communication (or in the home), quite aside from any consent from the interested parties, that constitutes the proper basis for analysis. Complementing its material content, these two elements form the measures specific to the right to personal privacy, which is not hampered by the distinction between public and private spaces (33).

B – A right granted to the distinction between public and private space

The distinction between public and private spheres, which is always difficult to establish, currently suffers from a profound relativisation. Moreover, subordinating the implementation of a fundamental right to the identification of a space called "private" acts as an impediment in a time of unspecific spheres. The right to personal privacy eliminates the spatial criterion by leaving room for subjectivity and individual will. Beyond the core elements discussed above, it is the meaning that the individual wishes to imprint on this or that act, and what such and such information reveals of his personality, which will prove decisive. The applicability of the law in circumstances where it is difficult to speak of "private life" is thus assured.

This observation is necessary, for example, in professional matters. In labour law, the "right to respect for private life" is difficult to invoke when it comes to examining the status of an employee's e-mail, or the opportunity to review the contents of the hard drive of a computer belonging to the employer. Moreover, the Court of Cassation recognises that "*the employee is entitled, even at the time and place of work, to personal privacy*" (34). The situation is quite similar in matters involving insurance law (35).

The reference to privacy is in fact also useful in those scenarios that are "reactivated" by technological progress. We may think, for instance, of conflicts between the right to personal privacy and freedom of information: a trend in case law can be picked out which, in settling such conflicts, makes use of the expression "right to respect for private life", a concept that corresponds to the right to personal privacy: the court's discretion is guided by what the information disclosed will reveal about the person, quite aside from any consent, and where his actions were the manifestation of an implicit desire for reserve (36). Moreover, these solutions may be transposed to the reconciliation between safeguarding public order and the rights of individuals. Behind the subject of rights (the human being), it is the personality that emerges and room must be made for that which emanates from the individual's personality behind certain details which are not, in principle, disclosed. For this, consideration must be given to what exactly those details reveal about the individual himself (37). Faced with these developments, there is no reason to challenge the scientific interest of the concept of privacy. However, while talk of "respect for private life" remains correct, this concept, in the legal field, covers different realities. Its uncertainty, so beneficial in the social sphere, increasingly rules it out from a legal standpoint. Without denying or disparaging it, action must be taken and, in order to establish a sphere of reserve around the individual, preference must be given to the right to personal privacy.

Notes:

- (1) P. Kayser, *La protection de la vie privée. Protection du secret de la vie privée*, Paris, Economica-PUAM, 3^{ème} éd., 1995.
- (2) M.-T. Meulders-Klein, « Vie privée, vie familiale et droits de l'homme », *RIDC*, 1992, p. 767.
- (3) A. Pena, « Liberté d'aller et venir », in D. CHAGNOLLAUD et G. DRAGO, *Dictionnaire des droits fondamentaux*, Paris, Dalloz, 2006, p. 1.
- (4) R. Lindon, « Les dispositions de la loi du 17 juillet 1970 relatives à la protection de la vie privée », *JCP*, I, 2357.
- (5) G. Lebreton, *Libertés publiques et droits de l'homme*, Paris, Armand Colin-Dalloz, 2003, 7^{ème} éd., p. 290 onwards.
- (6) F. Luchaire, *La protection constitutionnelle des droits et libertés*, Paris, Economica, 1987, p. 33 onwards.
- (7) S.D. Warren & L.D. Brandeis, *The right of privacy*, Harvard Law Review, 1890, Vol. IV, n° 5, p. 193.
- (8) F. Sudre, « Les aléas de la notion de "vie privée" dans la jurisprudence de la Cour européenne des droits de l'homme », in *Mélanges en hommage à Louis Edmond Pettiti*, Bruxelles, Bruylant, 1999, p. 687.
- (9) H. & L. Mazeaud, J. Mazeaud & F. Chabas, *Leçons de droit civil. Les personnes*, Paris, Montchrestien, 1997, Tome I, 2^{ème} vol., 8^{ème} éd., p. 394.
- (10) R. Nerson, « La protection de l'intimité », *Journal des tribunaux*, 1959, p. 713.
- (11) Art. 9, Civil Code; Cf. speech delivered by J. PLEVEN, Minister of Justice, *JORF, Débats*, A.N., 28

May 1970, p. 2068.

- (12) Cf. Also Art. 226-1, Penal Code, and Arts. 435 or 247, Civil Procedure Code, which cover the "intimacy of private life."
- (13) F. Terre & D. Fenouillet, *Droit civil. Les personnes. La famille .Les incapacités*, Paris, Dalloz, 6^{ème} éd., p. 92 ; B. Beignier, « La protection de la vie privée », in R. Cabrillac (ed.), *Libertés et droits fondamentaux*, Paris, Dalloz, 2014, 20^{ème} éd., p. 186.
- (14) *Comité consultatif pour la révision de la Constitution*, Rapport remis le 15 février 1993 au Président de la République (Consultative Committee for the Amendment of the Constitution: Report submitted to the President of the Republic, 15 February 1993)
- (15) Decision No. 99-416 DC of 23 July 1999, *Loi portant création d'une couverture maladie universelle*.
- (16) The "respect for private life" was protected by the reference to personal liberty (Decision no. 76-75 DC 12 Jan. 1977) and to personal liberty, freeing it from the former only for it to spend a period in the orbit of the latter (Dec. No. 88-244 DC of 20 July 1988; see also Decision No. 94-352 DC 18 January 1995).
- (17) The Constitutional Council indifferently covers Articles 2 and 4 of the 1789 Declaration in its Decision No. 484 of 20 November 2003 DC.
- (18) O. Dutheillet de Lamothe, in H. Roussillon & X. Bioy, *La liberté personnelle : une autre conception de la liberté ?*, Presses de l'Université de sciences sociales de Toulouse, 2006
- (19) F. Sidre (dir.), *Le droit au respect de la vie privée au sens de la CEDH*, Bruxelles, Bruylant, 2005.
- (20) Cass., 1st Civ., 10 May 2005, Dalloz 2005, *Infos Rapides*, p. 1380.
- (21) Cass. 1st Civ., 12 December 2000; 2nd Civ., 24 April 2003. "The violation of the respect due to private life and the infringement of the right of each person to his or her image are separate sources of harm".
- (22) J. Ravanas, *La protection des personnes contre la réalisation et la publication de leur image*, Paris, LGDJ, Bibliothèque de droit privé, 1978, p. 11.
- (23) *Loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés, modifiée par la loi du 6 août 2004, transposant la directive n° 95/46 du 24 octobre 1995* (Law n°78-17 of 6 January 1978 on computing, databases and freedoms, as amended by the Law of 6 August 2004 transposing Directive 95/46/EC of 24 October 1995).
- (24) Conseil d'Etat, *Le numérique et les droits fondamentaux*, Paris, La Documentation française, 2014.
- (25) Cf. H. ALCARAZ, « Le droit au respect de l'intimité face à internet », Rapport au VIII^{ème} Congrès mondial de l'association internationale de droit constitutionnel, Mexico, décembre 2010 ; A. PENA-SOLER, « A la recherche de la liberté personnelle désespérément... », in *Renouveau du droit constitutionnel. Mélanges en l'honneur de Louis Favoreu*, Paris, Dalloz, 2007, p. 1675.
- (26) P. Kayser, op. cit., p. 385.
- (27) For details, see H. Alcaraz, *Le droit au respect de l'intimité devant les juges constitutionnels français et espagnol*, PhD thesis, Aix-en-Provence, 2003, p. 251 and subs.
- (28) B. Mathieu and M. Verpeaux, *Contentieux constitutionnel des droits fondamentaux*, Paris, LGDJ, 2002, p. 546 and subs.
- (29) Cons. const., Decision No. 83-164 DC of 29 December 1983 *Loi de finances pour 1984*.
- (30) M.-P. Fenoll-Trousseau & G. Haas, *Internet et protection des données personnelles*, Paris, Litec, 2000, p. 62.
- (31) This is any process of transmitting messages between specific persons by any technical means.

- (32) Moreover, Art. 226–15 of the Penal Code makes no mention of the substantive nature of the content of the correspondence. As to the domicile, cf. the sanction for keeping a person within the confines of their home.
- (33) For details, H Alcaraz, *op. cit.*, p. 273 and s.
- (34) Cass. Soc., 2 October 2001, *Company Nikon France SA c / M Onof*, Bull. civ., V, No. 291. The Court had previously used the concept of “personal life”: Cass. Soc., 17 Apr 1991.
- (35) M. Cauchy & A. Dionisi-Peyrusse, « Le droit au secret médical et son application en matière d’assurance », *Dalloz*, 2005, Chronique, n° 5, p. 1313; for further examples, H. Alcaraz, « *El derecho a la intimidad en Francia en la época de la sociedad de información* », *Araucaria*, 2007, n° 18, p. 6.
- (36) Cf. Cass., 1st Civ., 23 April 2003 *Cogedipresse Company c / Mme Grimaldi*, Gaz.Pal., 31 July 2003, No 212, p. 2.
- (37) Cons. const., Decision No. 2004–492 DC of 2 March 2004, *Loi portant adaptation de la justice aux évolutions de la criminalité* ; cf. recital no. 65: as regards the sound system and fixing of images of certain places or vehicles, the court was asked to distinguish between images that are relevant to the prosecution of the offence and other images.