Issue | July 2015
No.2 | Special Issue: Privacy

Montesquieu Law Review

Editorial:
Privacy: a comparative perspective

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Honorary Member of the Constitutional Council

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Program supported by the ANR
n°ANR-10-IDEX-03-02

Forum Montesquieu
Faculté de droit et science politique

université de BORDEAUX

Editorial

Privacy: a comparative perspective

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Under the terms of Article 8 of the European Convention on Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and ratified by France pursuant to Law n° 73-1227 of 31 December 1973: "*Everyone has the right to respect for his private and family life, his home and his correspondence*".

The European Convention is at the root of the recognition of the right to respect for private life as a constitutional right in French law.

Indeed, this right features neither in the 1789 Declaration of the Rights of Man and of the Citizen, nor amongst those economic and social principles "being especially necessary to our times" in the Preamble to the 1946 Constitution. For a long time, the Constitutional Council saw therein a purely legislative right protected by Article 9 of the Civil Code, under the terms of which "*everyone has the right to respect for his private life*".

The Constitutional Council initially recognised the right to respect for private life as an aspect of individual freedom protected by Article 66 of the Constitution. The decision of 13 August 1993 on the Law on Immigration Controls enshrines a very broad conception of individual freedom within the meaning of Article 66 of the Constitution, which includes the freedom to come and go (recital 3), freedom to marry (recitals 3 and 107) and, lastly, the protection of personal data (recitals 121 and 133).

That decision was confirmed even more clearly by a decision of 18 January 1995, according to which "*ignorance of the law on respect for private life can be of such a nature as to restrict individual freedom*" (Decision n° 94-352 DC, 18 January 1995).

The Constitutional Council then detached the right to respect for private life from individual freedom, placed under the supervision of the judicial authority, to make it an element of personal freedom or freedoms of the individual, which arise from Article 2 of the 1789 Declaration of the Rights of Man and of the Citizen.

This is how the decision of 23 July 1999 on the Law establishing Universal Health Coverage enshrines the right to respect for private life as an element of personal freedom (Decision n° 99-416 DC, 23 July 1999, recital 45).

Ten years after the 1993 decision, the decision of 13 March 2003 on the Law on Internal Security enshrines a broad conception of personal freedom and its link with individual freedom: "*it is the task of the legislature to reconcile, on the one hand, the prevention of breaches of public order and the search for offenders, both necessary in order to safeguard constitutional rights and*

principles; and, on the other hand, the exercise of constitutionally guaranteed freedoms, which include the right to come and go and the right to respect for private life, protected by Articles 2 and 4 of the 1789 Declaration of the Rights of Man and of the Citizen, as well as individual freedom, which is placed under the supervision of the judicial authority by Article 66 of the Constitution" (Decision n° 2003-467 DC, 13 March 2003, recital 8).

The Constitutional Council gives the principle of respect for private life a particularly extensive field of application: the decision of 2 March 2004 on the Law on Adapting Justice to the Changing Face of Crime extends the concept of personal freedom to the inviolability of the home and to the confidentiality of correspondence.

It also gave the principle very broad scope:

- by requiring, in respect of the most serious infringements of respect for private life, intervention on the part of the judicial authority in relation to search and seizure and also in relation to telephone tapping and sound and film recordings of certain locations and vehicles (Decision n° 2004-492 DC, 2 March 2004);

- by deleting certain metafiles likely to infringe the freedoms of citizens: the Council thus ruled that the processing of personal data to be used in identifying consumer credit agreements entered into by natural persons, the household credit repayment incidents linked to those credit agreements, together with the information relative to excessive debt and compulsory liquidation, in order to prevent situations of excessive debt earlier and more effectively by furnishing financial establishments and bodies with elements allowing them, when granting a loan, to assess the solvency of natural persons applying for credit or standing as guarantor, infringes the right to respect for private life in such a way that it cannot be considered proportionate to the objective pursued "*having regard to the nature of the registered data, the scope of processing, the frequency of usage, the large number of people likely to have access to it and the inadequacy of guarantees relating to access to the register*" (Decision n° 2014-690 DC, 13 March 2014).

The expansion of respect for private life in France is part of a general trend across Europe:

- All European countries have acceded to the European Convention on Human Rights, which expressly recognises the right to respect for private life;

- The Charter of Fundamental Rights of the European Union also recognises the right to respect for private life in particularly clear-cut terms as, under Article 7: "*Everyone has the right to respect for his or her private and family life, home and communications*";

- Recent Constitutions such as Spain's Constitution expressly recognise this same right;

- Lastly, as an extension of France's *Informatique et libertés* Law n° 78-17 of 6 January 1978 on computer technology and freedoms, the European Union adopted the Data Protection Directive in 1995.

In this respect, the European situation is very different to that of the United States.

In the American Constitution, as in the French, there is no recognition of the right to respect for private life.

This right was recognised for the first time by the Supreme Court in its 1965 decision in *Griswold v Connecticut* (381 US 479), in which it held that "*[w]e deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred*".

The Supreme Court went a step further in the recognition of that right in its famous decision in *Roe v Wade* (419 US 113) on abortion, in which it stated that: "*[t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy*" and found that *"[w]e, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation*".

In practice, the scope of the respect for private life is limited in the United States, owing to two factors:

- On the one hand, its very liberal case law on freedom of speech, which excludes any restriction on that freedom, particularly as regards defamation or incitement to racial hatred: for Americans, nothing must restrict expression and the clash of ideas that must regulate themselves through their free interplay, like the market for goods and services.

- Through the doctrine of judicial deference to the Executive and the President in matters of national security: this explains the development of programmes that are highly intrusive in terms of individual freedoms, both within the United States and without, such as the National Security Agency's mass surveillance programme known as PRISM.