Principles of Public Law

Andrew Le Sueur, LLB, Barrister
Reader in Laws, University College London
Javan Herberg, LLB, BCL, Barrister
Practising Barrister, Blackstone Chambers
Rosalind English, LLM, MA, Barrister

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PRIVACY

23.1 Introduction

Respect for privacy operates on two levels: political and personal. In Chapter 19, it was argued that one of the functions of constitutional rights in a democracy is to keep open the channels of dissent, so that governments may be made aware of public criticism and the strength of opposition views. A right to privacy prevents those in power from keeping too watchful an eye on their political opponents by taking advantage of the considerable power of the State to monitor dissent. State intrusions into people's privacy may take a number of forms; either in the course of criminal investigations, or by keeping a check on suspected terrorist communications in the interests of national security, or the use of personal information held by public authorities, such as the Inland Revenue, housing authorities, the police or family welfare authorities.

But privacy should not only protect us from these more obvious forms of intrusion. To comprehend how privacy interests may be injured in other ways, it is necessary to mark out the boundaries of the scope of privacy. In his book, *Principles of Political Economy* (1848), Mill defined privacy as:

> ... a circle around every individual human being which no government ought to be permitted to overstep [and] some space in human existence thus entrenched around and secured from authoritative intrusion.

This broad notion of privacy has come to be known as the 'right to be left alone'. A more modern definition sets it out as follows:

> ... a clearly defined realm [that] is set aside for that part of existence for which every language has a word equivalent to 'private', a zone of immunity to which we may fall back or retreat, a place where we may set aside arms and armour needed in the public place, relax, take our ease, and lie about unshielded by the ostentatious carapace worn for protection from the outside world. This is the place where the family thrives, the realm of domesticity; it is also a realm of secrecy [Duby, G, 'Foreword to a history of private life', quoted in Feldman, D, 'The developing scope of Art 8' (1997) 3 EHRLR 264].

'The right to be left alone' entails not only a negative obligation on the State – not to interfere with the private zone of its citizens – but a positive duty to prevent private parties from interfering with each other's privacy. This includes regulation of the press and also the activities of other private organisations which routinely carry out infringements of privacy rights, such as credit rating agencies, banks, employers and the medical profession.

Technological developments and global communications have made it easier than ever before to gather details of peoples' private affairs in the interests of commerce. In order to retrieve a right to privacy intact from the state of atrophy into which it has fallen for the past few decades, it may be necessary for the State to take positive steps to control the activities of private parties in this respect. For a forceful argument in support of the positive obligations on the State to protect privacy, see Markesinis, B, 'The right to be let alone versus freedom of speech' [1986] PL 67.

At a personal level, privacy can be defined as the guarantee of the freedom to make moral choices. Without a sphere of autonomy in which a person is free of interference or scrutiny by others, he or she cannot be said to be exercising true freedom of choice. The difficulty lies in determining where this sphere begins and ends; whilst it no doubt covers the home, does it protect the workplace? Does privacy depend on status – so that a celebrity's sexual activities belong in the public sphere in the way that those of a private individual do not? Does respect for this sphere of private autonomy present dangers for vulnerable members of society, like battered wives and children? And, if so, how is the State to balance the conflicting interests of these groups with the right to privacy within the family circle? For these reasons, privacy has not been accepted in all circles as an unqualified good. It has been pointed out, for example, that too much respect by the State accorded to the family circle leaves women open to domestic violence and children open to abuse (Lacey, N, 'Pornography and the public/private dichotomy' [1993] JLS 93).

There are other criticisms of the manner in which the notion of privacy has developed in law. Raymond Wacks believes that the ambit of privacy invading conduct should be confined to the transfer or communication of private information, so that privacy is a function of information or knowledge about the individual (see *Personal Information: Privacy and the Law*, 1993, OUP). The essence of his argument is that at the heart of the concern about privacy is the use and misuse of personal information. This excludes other areas which Wacks does not think are privacy questions, such as noise, odours, prohibition of abortion, contraception and 'unnatural sexual intercourse', inter alia. The key function of the law, in his view, is to define what amounts to 'personal information'. Whether information is personal relates both to the quality of the information (details about one's sexual history, for example) and the reasonable expectations of the individual concerning its use (you would not expect your doctor to reveal your medical records to a third party).

However, the following argument will demonstrate that the right to privacy has been held to cover a far wider range of issues than information. Article 8 of the ECHR, for example, is one of the most flexible of the rights in the Convention, applying to a range of issues from transsexualism to the relationship of parents to their children. It provides:

1 Everyone has the right to respect for his private and family life, his home and correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, 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.

This chapter will explore the extent to which the law achieves a satisfactory balance between these various interests.

23.2 Rights to privacy against the State

Clearly, most litigation concerning privacy interests involves the right of the individual not to be subject to unjustifiable surveillance by the State.

23.2.1 Secret surveillance by the police and security services

Covert surveillance techniques are invaluable in the process of investigating crime and potential threats to national security, terrorist or otherwise. However, the public order arguments in support of the use of this technology should always be weighed against the rights of the individual whose privacy is being infringed. This balancing exercise is relatively new to English law. In *Malone v Metropolitan Police Commissioner (No 2)* (1979), Malone, who had been acquitted of fraudulent trading, brought civil proceedings against the police, claiming a declaration that their interception of his telephone conversations had been unlawful on the grounds of trespass, breach of confidence and invasion of privacy. The High Court found that there had been no trespass, since the surveillance took place away from Malone's premises; there had been no breach of confidence, since there was no duty of confidence on those who took part in the conversation; and, finally, that there was no right to privacy in English common law. Therefore, nothing in law prohibited what the police had done; their actions could not be described as unlawful. This case would arguably have been decided differently had the Human Rights Act 1998 been in force; and, indeed, when Malone applied to European Court of Human Right, it upheld his claim that there had been a violation of his privacy rights. Article 8 allows for measures to be taken by the signatory States that may infringe privacy and family life in the interests of the detection of crime or the protection of national security, but the onus is on the respondent State to satisfy the Court that such measures are prescribed by law, that they are necessary in a democratic society and that they are proportional to the aim in question.

The requirement that a measure is 'prescribed by law' does not oblige all such measures to be written law. However, such unwritten law – in this case,

the existence of the prerogative powers of the Crown to intercept communications in order to prevent crime – should be adequately accessible. According to the European Court of Human Rights, 'a norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct'. The decision of the Home Secretary to issue a warrant for the police surveillance was not held by the European Court of Human Rights to meet the standards of accessibility and precision and, therefore, the interference with Malone's property could not be justified under Art 8(2) (*Malone v UK* (1984)).

In response to this ruling, the UK brought in the Interception of Communications Act 1985, which makes it illegal to intercept any communication over the public telephone system without a warrant from the Secretary of State. A warrant may only be obtained for certain purposes, limited to the grounds upon which States can legitimately derogate from the obligation to respect privacy under Art 8 of the ECHR.

The problem of telephone tapping, however, has not been solved by the Act, since the Tribunal set up to enforce its provisions has no powers to deal with unauthorised interceptions, which, in most cases, cannot be traced anyway. Therefore, there is no remedy under national law for bugging by individuals. On the face of it, incorporation of the Art 8 privacy right will not assist in cases where there is no public authority involved. However, since the obligations under the Human Rights Act 1998 extend to courts, which are themselves 'public authorities' (see above, 19.10.4), there may be pressure on the judiciary to develop existing torts, such as breach of confidence, to cover certain invasions of privacy, such as unauthorised intercepts by private individuals – provided that the interceptor can be traced and summonsed.

Before the Convention was incorporated, it was generally impossible to mount an action for breach of confidence where telephone conversations have been intercepted, because there is no relationship of confidence between the speaker and the interceptor. Indeed courts have taken the position in the past that committing one's communications to the public telephone network itself amounts to a waiver of confidence. Even in circumstances where privacy should be a reasonable expectation, for example in the workplace, there is very little regulation to protect such interests in English law. This lack of protection for employees has been criticised by the European Court of Human Rights. In *Halford v UK* (1997), Halford, an assistant chief constable who had brought discrimination proceedings against her employers, alleged that, as a result of these proceedings, the police authority had started a campaign against her which involved intercepting her private telephone conversations at work. The Home Office informed her that tapping by the police of their internal lines fell outside the Interception of Communications Act 1985 and, therefore, there was no requirement for a warrant. The European Court of Human Rights upheld her claim that the tapping of her calls was an invasion of her right to privacy under Art 8 and rejected the UK's justification under

Art 8(2). Since there was no legal basis for such interception, they said, it could not be said to be 'prescribed by law'. A similar complaint, this time involving the lack of regulation of closed circuit television surveillance, has been submitted to the Strasbourg authorities for scrutiny under Art 8 (*R v Brentwood Borough Council ex p Peck* (1997)).

The Interception of Communications Act 1985 has other limitations. It does not cover the use of bugging devices deployed by the police or anyone else. Although it is necessary for the police to obtain a warrant in order to place a surveillance device in private premises, the Act provides very wide grounds for the issue of such a warrant. The Chief Officer of the Police may authorise the issue of a warrant himself, on establishing that a serious offence is about to be committed. Since the definition of 'serious crime' under the Act is extremely broad, warrants could, theoretically, be issued for the bugging of anything from a Catholic confessional to a solicitor's office.

Members of MI5 are able to apply to the Secretary of State for a warrant to place surveillance devices on the premises of private individuals in the interests of national security (Security Services Act 1989, as amended by the Security Services Act 1996). The Intelligence Services Act 1994 permits the issue of warrants to MI6 for similar purposes. Tribunals have been set up under both Acts to investigate complaints; however, these provide limited protection since they may not inquire into whether the surveillance was objectively justified, only as to whether there were 'reasonable grounds' for the security services' actions – a lower threshold test. In addition to these statutory powers, the Special Branches of police forces are required by Home Office Guidelines to carry out intelligence gathering operations. Any complaints about their behaviour must be submitted to the Police Complaints Authority, although proceedings will only be taken by that authority if there has been some criminal or disciplinary offence. Since invasion of privacy is not a crime under English law, it is unlikely that redress can be sought via this avenue. It is possible, however, that breach of their statutory duty to observe individuals' right to privacy under the Human Rights Act may provide sufficient grounds for a disciplinary investigation.

23.2.2 The police and entry and search powers

Under English law, the police are permitted to invade the privacy of the person and home under certain circumstances; consent must be given, or they must hold a valid search warrant, or they must have reasonable grounds for suspecting that a person who is to be arrested is on the premises. Failure to satisfy any of these preconditions would provide valid grounds for a claim in trespass against the police, although it is particularly difficult to prove lack of consent, since it can be easily implied from most spontaneous actions of the property owner, such as stepping aside to let the police officer in. Most of the powers of entry and search are set out in the Police and Criminal Evidence Act

1984 (PACE) and its Code of Practice B, so the details will not be repeated here. The circumstances in which the police may exercise their search powers generally are discussed above, 21.2.

Entry without warrant

Police may enter premises in order to arrest someone for an arrestable offence or to recapture someone unlawfully at large or to prevent injury or damage to property. Police officers of a certain rank also have powers of entry without warrant under the prevention of terrorism legislation.

Search warrants

Search warrants are governed by PACE. Under PACE, magistrates may grant warrants to search premises if there are reasonable grounds for believing that a serious arrestable offence has been committed and where there are materials connected to the offence. The requirement of 'reasonable grounds' is discussed in more detail above, 21.2. The warrant itself must contain certain specifications, such as the number of people permitted to enter and the material which is sought.

Forcible entry

Forcible entry is permitted by PACE to make an arrest where the police have reasonable grounds for believing that the person they are seeking is on the premises. Powers of entry and search are conditional on compliance with certain procedures, such as an explanation to the property owner of his or her rights and the use of reasonable force only for entry

Seizure of goods

Under PACE, when the police are searching premises following arrest, they can seize evidence of certain offences besides that for which the arrest is made. When they are searching premises under a search warrant (that is, where no arrest has yet been made), they are entitled to seize anything connected with the offence which they are there to investigate and any other offence.

Breach of the peace

Under both common law precedents and PACE, if a police officer reasonably believes that a breach of the peace is about to occur in a private dwelling place, he has the power to enter that place to prevent it (the concept of 'breach of the peace' is given detailed attention in Chapter 25 since it usually arises in relation to public meetings). This power's compatibility with Art 8 has been considered on several occasions by the European Court of Human Rights, notably, in *McLeod v UK* (1999). Here, a claim was made under this Article by a woman whose estranged husband had arrived with the police to collect his property from the former matrimonial home. The applicant was not present at the property when the police decided to enter to prevent a breach of the peace. When the applicant took an action against the police in trespass, the English

court stated that it was satisfied that PACE preserved the common law power of the police to enter premises to prevent a breach of the peace as a form of preventive justice. The European Court of Human Rights agreed that that the statutory authorisation under PACE as well as the common law precedents provided adequate legal basis for the infringement of her privacy rights in the interests of preventing disorder. Therefore, it found that the power of the police to enter private premises without a warrant to prevent a breach of the peace was defined with sufficient precision for the interference to 'be in accordance with the law'. However, the failure of the police to verify whether the husband was in fact entitled to enter the home (which he was not), and their decision to enter the home even though they had been informed that the applicant was not present, suggested that their action was disproportionate to the legitimate aim of preventing a breach of the peace. Thus, closer judicial scrutiny will be applied to the use of this power in future cases, although the existence of the power to enter to prevent breach of the peace has been declared compatible with the Convention.

23.2.3 The European Commission

Because Art 8 is justiciable before the European Court of Justice, it has often been raised in the context of the European Commission's extensive powers of search and seizure in the implementation of EC competition rules. On the whole, challenges to these powers do not meet with success. In Case C-136/79 *National Panasonic v Commission* (1980), the applicant company complained that the unannounced arrival of Commission officials at its offices to investigate the company books as part of competition proceedings violated its right to privacy under Art 8. The Court of Justice held that the Commission's action was justified under the exception in Art 8(2), which permits action in the interests of the economic well being of the country. The power of the Commission to carry out investigations without prior notification was considered to be justified by the need to avoid a distortion in competition. Indeed, nine years after the decision in *Panasonic*, the Court further restricted the scope of Art 8 in the area of competition proceedings by ruling that the protective scope of Art 8 did not extend to business premises at all (Case C-46/87 *Hoechst v Commission* (1989)). This ruling should now be reconsidered in the light of the European Court of Human Rights' judgment in *Halford v UK* (see above, 23.2.1).

23.2.4 Search orders

Orders may be granted by the court in the course of civil proceedings, giving the claimant and his or her solicitors a limited right to enter and search the defendant's premises in order to take possession of documents and other evidence which are crucial to the claimant's case. Search orders (previously

known as known as Anton Piller orders, but see, now, Part 25 of the Civil Procedure Rules 1999) are typically obtained in business secrets cases or claims against the bootleg record industry, to prevent the defendant concealing or destroying important evidence. Although the purpose of the order is to protect the claimant's rights, its execution, which usually involves the claimant's solicitors and a team of assistants arriving without warning at the defendant's premises demanding entry, has raised serious concerns about breach of privacy rights, particularly in view of the fact that none of the safeguards available in criminal proceedings apply here. The order may be obtained from a judge in the absence of a defendant, and the defendant will be in contempt of court if he or she does not comply within a reasonable time with the request to allow the claimant onto his premises. In practice, many of these search orders have been exercised in conjunction with the police executing a search warrant for some related criminal offence (*Chappel v UK* (1990)) with the result that the property owner has no idea who is exercising what powers and what remedies he has against any of them. In *Chappel*, the applicant argued that, in those particular circumstances, his Art 8 rights had been breached. The European Court of Human Rights considered that the availability of Anton Piller orders *in general* were compatible with the ECHR and, although it criticised the manner in which the order had been obtained and executed in this particular case, it did not agree with the applicant that the exercise of the power was disproportionate to the aim of protecting the rights and interests of others. The power to enter, search and seize under search orders has now been put on a statutory footing in s 7 of the Civil Procedure Act 1997.

23.2.5 Private information held by public authorities

The right to respect for personal information is relevant to the right to respect for privacy generally, and this is closely related to access to private information, since, in some cases, it is only by virtue of knowing what data is held by the State about oneself as an individual that one can operate true freedom of choice. One feature of the modern State is the requirement that information be disclosed to a range of institutions such as the Inland Revenue, the Benefits Agency, the Home Office, hospitals and banks, to name but a few.

Access to information

The Access to Personal Files Act 1987 gives a right of access in respect of files containing personal information, if held by a local authority (see above, 2.9.1) in relation to its housing or social services functions. This enables those in the care of local authorities social services departments to find out certain details about their treatment, subject to the decision of the authority not to release the information on grounds of confidentiality. The relevance of this to privacy was made out in a case decided by the European Court of Human Rights in *Gaskin*

v UK (1989). Gaskin had been denied access to some of his files which he wanted to rely on in order to support his case that he had been ill treated whilst in the care of the local authority. Access was denied on the basis of confidentiality. The European Court of Human Rights held that his claim did raise a privacy issue under Art 8 and ruled that the lack of any independent authority to determine the justifiability of the confidentiality claim amounted to an infringement of that right.

In response to this judgment, the Government passed the Access to Personal Files (Social Services) Regulations in 1989, under which social services departments are obliged to provide information to individuals unless the contributor of that information does not consent to the access. In addition to these provisions, the Access to Medical Reports Act 1988 and the Access to Health Records Act 1990 allow access to medical information held on an individual by that individual if he or she is identifiable from the information provided that the information would not harm the physical or mental health of the patient or anyone else.

The position taken by the European Court of Human Rights in *Gaskin* does not mean that Art 8 will provide grounds for access to information in all circumstances. The court's scrutiny of the justification depends upon the nature of the information which is secretly compiled. In *Leander v Sweden* (1987), the use of information kept in a secret police register when assessing a person's suitability for employment on a post of importance for national security was not considered by the court to carry with it a positive obligation to give the applicant an opportunity to see the content of the files held about him:

> When the implementation of the law consists of secret measures, not open to scrutiny by the individuals concerned or by the public at large, the *law itself* rather than the accompanying administrative practice, must indicate the scope of any discretion conferred on the competent authority with sufficient clarity to give the individual adequate protection against arbitrary interference.

In this case, the court found that Swedish law gave citizens an adequate indication as to the scope and manner of the exercise of discretion conferred on the responsible authorities to record information under the personnel control system.

Privacy includes the right not only to have access to personal information but the right to demand that this information is not disclosed to others. Like other aspects of privacy, there are justifications for infringing this right. In *MS v Sweden* (1998), the applicant made a claim for compensation for work related back injury. In the course of the investigation, the Social Insurance Office ascertained that this back problem was not connected with her occupation at all and refused her claim. She then applied under the Convention, contending that the submission of her medical records to the Office constituted an unjustified interference with her right to respect for her private life under Art

8. The European Court of Human Rights held that the disclosure had involved an interference with that right because of the highly personal and sensitive data contained in the medical records in question. However, the interference served the legitimate aim of the protection of the economic well being of the country, as it was potentially decisive for the allocation of public funds.

Disclosure to third parties

Like all rights, the right to privacy of personal information is not limited to law abiding citizens. It extends to the least popular members of society, such as sex offenders. Under the Sex Offenders Act 1997, individuals who have been convicted of certain types of sexual offence are to be placed on a Sex Offenders Register. This includes those offenders who have completed their sentences. The Act requires offenders convicted or cautioned for a range of sex offences after this date to tell the police where they live and when they move. The case of *R v Chief Constable of the North Wales Police ex p Thorpe* (1998) is illustrative of the factors which a court will take into consideration when balancing the duty of confidence against the public interest. Two convicted paedophiles challenged the decision by the police to disclose details of their convictions to the site owner of a caravan park where they were living. The ordinary duty of confidence entails a balancing act between the confidence in the material itself and the duty of the recipient – in this case, the police – to disclose it in the public interest. The applicants claimed, first, that the police had breached confidentiality. The Divisional Court had decided in favour of the police on public interest grounds. However, the Court of Appeal reconsidered the merits of the police's action against the background of the Home Office policy guidance (Home Office Circular 39/1997), published in consequence of the coming into force of the Sex Offenders Act 1997, with its notification requirements for sex offenders. While this policy does not apply retrospectively to those in the position of the applicants in this case, the court had to take it into account in deciding the appeal. The Court of Appeal also referred to Art 8 of the ECHR (although it had not yet been incorporated). Rejecting the applicants' contention that the police had acted unfairly, the court observed:

> ... in order to accord with the Convention, a policy [the Home Office Circular] does not have to be incapable of improvement ... There can be a margin of appreciation as to the proper application of the Convention in different jurisdictions.

But, to 'accord with the law' under the ECHR, the policy which authorised a breach of the applicant's Art 8 rights in these circumstances should have been made available to the public, so that it could be predicted that the police would manage certain types of information in a certain way. Having said that, the Court of Appeal concluded that, as a matter of domestic law and under the ECHR, the police were entitled to use information about the applicants if

they reasonably concluded, having taken into account the interests of the applicants, that that was necessary in order to protect the public.

AIDS cases

The question of protecting private information arises frequently in relation to disclosure of evidence relating to HIV status. In *Z v Finland* (1998), the applicant complained that her rights under Art 8 had been breached when, in the trial of her husband for rape and attempted manslaughter, her doctors were compelled to testify as to her HIV status. The European Court of Human Rights held that the procedure had been adopted in pursuit of two legitimate aims under Art 8: the prevention of disorder or crime and protection of health and morals. But the court did uphold the applicant's claim in respect of the publication of the full judgment, which included references to this confidential medical data; the national court had had the discretion, which it should have used in favour of the claimant, not to publish its full reasoning but to put out an abridged version of the judgment which would have protected witnesses in the position of the applicant.

The European Court of Justice considered a similar claim in respect of the act of one of the Community institutions. When a staff member of the Commission complained that he had been submitted, against his will, to an AIDS test, his allegation that his privacy had been invaded was upheld (Case C-404/92P *X v Commission* (1994)).

23.2.6 Data Protection Act 1998

The Data Protection Act 1984 regulates, to a certain extent, the storage of information on computers and seeks to prevent certain types of disclosure or unauthorised access to it. No person or body can collect information on another individual unless they are registered with the Data Protection Registrar under the Act, which imposes strict compliance conditions to prevent abuse. Data held for the purpose of enforcing tax or criminal law is, however, exempted from this Act. The 1998 Data Protection Act, which is to implement the EC Directive on the matter, regulates the use not only of manually held information but also restricts the use which may be made of files held in private hands, such as private detectives (whose information gathered in breach of the data protection rules have hitherto been relied upon in litigation, for example, matrimonial finance disputes). The Act imposes a direct requirement to comply with its 'data protection principles' and is, therefore, not dependent on the data holder having registered first. This legislation may have the effect of restricting the ability of the press to collate information about the private lives of individuals since, under this legislation, the Data Protection Registrar has powers to demand access to files which have been 'unfairly' collected by the media. Under this Act, the Data Protection Registrar will have much wider enforcement powers than he held under the 1984 Act.

23.2.7 Immigration decisions

In refusing entry to a non-national who happens to be related to someone lawfully resident in this country, or by subjecting an applicant for residence to close interrogation to establish the veracity of their claims to family connections, Immigration Officers regularly infringe the privacy of individuals at ports of entry. Most immigration decisions, in fact, have succeeded before the European Court of Human Rights on the basis of the right to a 'family life', under Art 8. Until the Human Rights Act 1998, Art 8 did not have any formal role to play in national law in appeals against immigration decisions, although it was often raised by applicants whose spouses faced refusal of entry or deportation (*R v Secretary of State for the Home Department ex p Phansopkar* (1976)). However, for a time, Art 8 was included in Home Office Guidance Notes to immigration officers as a consideration to be taken into account when deciding applications for entry. As with other forms of 'soft law', these guidance notes were not binding and, therefore, even while the Human Rights Bill was completing its progress through Parliament, the alleged disregard by the Home Secretary of the right to a family life under Art 8 was not considered to be a basis for a ruling that his action was unlawful (*R v Secretary of State for the Home Department ex p Khan* (1998)). To what extent incorporation of Art 8 into national law will change this practice depends on how widely the courts will interpret the permissible infringement of the right in Art 8(2). Indeed, the case law of the European Court of Human Rights does not hold out much promise for would-be immigrants here. Challenges to immigration decisions have had mixed success, reflecting the Court's cautious approach to matters involving entry into signatory States. In *Berrehab v Netherlands* (1988), it was held that a parent could not be deported after marriage which gave right of abode ended, since the child-parent relationship is entitled to respect. In *Abdulaziz v UK* (1985), on the other hand, the court concluded that Art 8 did not impose an obligation on the State to accept non-national spouses for settlement. It is worth noting that,in the latter case, the applicants were successful on Art 14 sex discrimination grounds, since British immigration rules would have allowed wives of residents to have the right of abode, but not husbands. The UK reacted to the judgment by removing the right of all spouses and fiancées, male or female, to join their partners. Thus, a judgment which is favourable to the applicants in one case may backfire on future individuals in the same position.

The relationship between privacy rights and immigration issues has also arisen in a Community law context. In Case C-249/86 *Commission v Germany* (1989), the Court of Justice upheld a challenge to German housing policy under Art 8, ruling that the State could not impose a minimum standard of accommodation as a precondition for the exercise of the right to residence by an EC national as a worker under the EC Treaty. Such administrative action violated the applicant's right to privacy and family life under Art 8 of the ECHR and was, thus, unlawful under Community law.

In its White Paper on immigration and asylum (*Fairer, Faster and Firmer – a Modern Approach to Immigration and Asylum*, Cm 4018, 1998), the Government has proposed tougher pre-entry controls on immigration to cut down on trafficking in illegal immigrants. Some of these measures have important implications for the right to privacy. For example, it is proposed to extend the use of closed circuit television in airports to develop the Home Office's intelligence system (see para 5.16). Joint operations between the Immigration Service and other agencies targeting benefit and housing fraud by illegal entrants have already been set in place; the Government is now proposing (see para 11.9) the extension of the enforcement powers of immigration officers to enter private property, search and seize items. A Europe-wide database for fingerprints of asylum seekers is also proposed (see para 11.31). The adoption of these measures appear to fall within the public interest exceptions to privacy; we have seen in the *MS v Sweden* case that the disclosure of personal information may be justified, for example, by the interests of the economic well being of the country. However, the approach by the European Court of Human Rights in *McLeod* suggests that the actual use of some of these proposed powers, such as search and entry, will be subject to strict scrutiny on proportionality grounds.

23.2.8 Family relationships

As we have seen, Art 8 of the ECHR requires States to respect individuals' right to a family life as well as their rights to privacy. This means, amongst other things, that any rule of national law that interferes with the relationship between parent and child will violate Art 8. The leading example of this is the European Court of Human Rights decision in a case concerning a Belgian law regulating the relationship between an unmarried mother and her child; such legislation, said the court, would only survive attack under Art 8 if it allowed those concerned to lead a normal family life. If domestic law discriminated against illegitimate children, then the State was obliged to adjust it to take into account the requirements of Art 8 (*Marckx v Belgium* (1979)). This ruling was followed in an Irish case in which the European Court of Human Rights took a cautious position with regard to Irish laws prohibiting divorce – these did not, in its view, interfere with private family life under Art 8(1), since nothing in Irish law prevented estranged couples from forming unions with other people. But the Irish law on illegitimacy, which subjected the child of those subsequent (extra-marital) unions to legal disadvantages compared with the children born in wedlock were held to be in breach of Art 8 (*Johnston and Others v Ireland* (1987)). On the other hand, where the matter involves an area where there is little consensus between individual signatory Sates, the Court, although prepared to concede that Art 8 rights may have been infringed, is willing to give a wide margin of discretion to the State concerned. In *X, Y and Z v UK*, the Court ruled that X, a female to male transsexual, could not rely on

Art 8 in order to require the Government to register him as the father of a child (Z), conceived by artificial insemination during his relationship with Y.

Many Art 8 claims in this context are made together with claims under Art 12. Article 12 grants individuals the right to marry and found a family. This right may provide a platform for challenges to a range of regulations, particularly those enforced by the Human Fertilisation and Embryology Authority, restricting the circumstances in which fertility treatment may be provided by clinics. Diane Blood, for example, may have been able to avail herself of Art 12 of the ECHR if the Human Rights Act had been in force when she challenged the Authority's decision to prevent her from having her dead husband's child because she could not obtain access to his frozen sperm without his consent (*R v Human Fertilisation and Embryology Authority ex p Blood* (1997)).

23.2.9 Sexual activity

The European Court of Human Rights has recognised that sexual relations are at the core of the sphere of autonomy protected by privacy. Most challenges under this heading have been made in respect of national laws criminalising certain types of sexual activity. An application made to challenge laws in Northern Ireland which criminalised homosexual acts between consenting adults was successful, even though the applicant himself had never been prosecuted (*Dudgeon v UK* (1982)). However, in the same case, the court ruled that the UK government could set a minimum age at which men could lawfully consent to homosexual activity. A minimum age of 21 (as opposed to 16, the legal age of consent for heterosexual acts) was within the State's margin of appreciation (see above, 19.5). The age was then lowered to 18, although the European Commission of Human Rights Commission subsequently admitted a claim that this breached the right to privacy (*Sutherland v UK* (1998)). A recent attempt to lower the age of consent for male homosexuals in the Crime and Disorder Bill was defeated twice by the House of Lords, in July 1998 and April 1999. The Government has announced its intention to use the Parliament Act 1911 in order to bypass the Lords to get this provision onto the statute book (see above, 6.5.1).

In a series of claims by transsexuals, alleging breaches of Art 8 the European Court of Human Rights has tended to accept signatory States' arguments that Art 8 does not require them to recognise, for legal purposes, the new sexual identity of individuals who have undergone sex change operations (see, in particular, *Rees v UK* (1986)). Again, the lack of common ground between signatory States on this issue gives each State a wide margin of appreciation under Art 8. The European Court of Human Rights has recently rejected an Art 8 challenge in respect of birth registration laws in this country which are based on the principle that sex is fixed immutably by conventional biological considerations as existing at the time of birth. In

Horsham v UK (1998), the court ruled that the applicant's privacy rights were not breached when, for legal purposes such as court appearances or obtaining insurance and contractual documents, transsexuals were forced to show certificates revealing their previous names and gender. Equally, the relationships of gays and lesbians do not, in the view of the Court, fall within the scope of the right to family life under Art 8, an approach which maintains the emphasis on the traditional heterosexual couple as the core of the notion of family life (see *Kerkhoven v the Netherlands* (1992), where the Commission held that Art 8 did not import a positive obligation on a State to grant parental rights to a woman who was living with the mother of a child).

When a group of homosexual men were prosecuted under the Offences Against the Person Act 1861 for engaging in sado-masochistic activities they claimed that their Art 8 rights had been infringed (*Laskey, Jaggard and Brown v UK* (1997)), the European Court of Human Rights agreed that the criminal law did indeed interfere with their privacy, but held that it was in pursuit of a legitimate aim under Art 8(2), namely, the protection of health and morals.

23.2.10 Children

The laws of signatory States for protecting children may infringe the rights of parents to a private family life, particularly by not allowing the parents sufficient involvement in decisions taken by public authorities in fostering arrangements, decisions to take children into care or decisions denying parents access to their offspring once in care. In *W, B v UK* (1987) and *R v UK* (1988), the European Court of Human Rights found a breach of Art 8 because parents were denied proper access to their children held in care and insufficient involvement in the local authority's decision making process. As a consequence of these adverse judgments, the UK enacted the Children Act 1989 which fortifies the role of parents in care proceedings. When the State intervenes by removing children into care, Art 8 requires that the natural parents be properly involved in the decision making process and that full account is taken of their views and wishes: *Johansen v Norway* (1996).

Sometimes, the parents' right to a family life under Art 8 can conflict directly with a child's right to privacy under the same provision. When a 14 year old girl ran away to live with her boyfriend, the authorities returned her to her parents. She petitioned the European Court of Human Rights under Art 8 but the Commission rejected her claim, finding that the action of the authorities came within the 'health and morals' exception to Art 8:

> As a general proposition ..., the obligation of children to reside with their parents and to be otherwise subjected to particular control is necessary for the protection of children's health and morals, although it might constitute, from a particular child's point of view, an interference with his or her private life [*Application No 6753/74*].

The issue of privacy has also arisen in relation to the matter of physical chastisement of children. In *Costello-Roberts v UK* (1995), a schoolboy attending a private school complained that the practice of 'slippering' – being struck three times with a soft-soled shoe – violated several provisions of the ECHR, in particular, his right to privacy under Art 8. The Court held that the punishment being complained of 'did not entail adverse effects for his physical or moral integrity sufficient to bring it within he scope of the prohibition contained in Art 8'.

More recently, in *A and B v UK* (1998), the European Court of Human Rights considered a challenge under Arts 3 and 8 to English criminal law, which provides a defence for the charge of assault on a child if the court is satisfied that the action qualified as 'reasonable chastisement'. The child in question had been beaten regularly by his stepfather with a garden cane. He was prosecuted but he relied successfully on this defence in the magistrate's court and was acquitted. The court held that Art 3 imposed a positive obligation on signatory States to take measures to ensure that private individuals did not subject others to torture or inhuman or degrading treatment. By allowing the stepfather in this case the defence of reasonable chastisement, English criminal law had not provided the child with adequate protection and, thus, Art 3 had been breached. Since the court was satisfied that the treatment had reached the higher threshold for Art 3, it did not consider the complaint under Art 8; however, it is probable that a less severe form of physical ill treatment would be successfully challenged under Art 8 and the same considerations about the State's obligations to protect private individuals from one another would apply.

Article 8 has also been invoked in a claim *protecting* a family's right to chastise their child. In *Application No 8811/79*, DR 29, Swedish parents claimed (unsuccessfully) that a statute prohibiting corporal punishment violated their right to family life under Art 8.

23.3 The right to privacy against private bodies: the news media

Although companies publishing newspapers and making radio and television programmes are not organs of the State and not liable under the Convention, Art 8 requires the State to 'respect' the right to privacy; it should, therefore, pass laws that prevent private bodies such as news media businesses interfering with the privacy rights of individuals (see above, 19.9, on the horizontal effect of the ECHR). In *X and Y v Netherlands* (1985), the European Court of Human Rights said:

> [Article 8] does not merely compel the State to abstain from ... interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life ... These

> obligations may involve the adoption of measures designed to secure respect for private life *even in the sphere of relations between individuals themselves* [emphasis added].

In the UK, any attempt, legislative or judicial, to restrain the coverage by the news media of intimate details of people's lives is usually trumped by claims to the public interest in a free press. Clearly, the role of investigative journalism is of great significance in a free democracy, since it is one of the first bastions against the development of tyrannical power. But it is debatable whether all forms of press coverage can lay claim to the respect accorded to serious political reporting. There is a long running debate over whether people in the public eye should be allowed some protection against media intrusion, both in respect of their methods of collecting the information and the eventual coverage of intimate details in the press or the broadcast media. Over a hundred years ago, two American jurists wrote a seminal article about the scope of privacy. Their observations have an uncanny prescience:

> The intensity and complexity of life, attending upon advancing civilisation, have rendered necessary some retreat from the world, and man, under the reigning influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury [Warren, SD and Brandies, LD, 'The right to privacy' (1890) 4 Harv L Rev 193].

Where the courts are satisfied that there has been some reprehensible behaviour in collecting the information, they are sometimes prepared to prohibit disclosure. In *Francome v Daily Mirror Group Newspapers Ltd* (1984), the claimants sought an interlocutory injunction to restrain a newspaper from publishing information obtained through the tapping of the claimant's telephone in breach of the Wireless Telegraphy Act 1949, the predecessor to the Interception of Communications Act 1985. The newspaper argued that, since the tapes revealed breaches of the rules of racing by the first defendant, a well known jockey, publication of the contents of the tapes was 'justifiable in the public interest'. Lord Denning MR rejected this argument in the strongest possible terms:

> I regard Mr Molly's [the defendant newspaper editor's] assertion as arrogant and wholly unacceptable. Parliamentary democracy as we know it is based upon the rule of law. That requires all citizens to obey the law, unless and until it can be changed by due process. There are no privileged classes to whom it does not apply. If Mr Molly and the Daily Mirror can assert this right to act on the basis that the public interest, as he sees it, justifies breaches of the criminal law, so can any other citizen. This has only to be stated for it to be obvious that the result would be anarchy.

In general, however, national courts have not been prepared to restrain the publication of details about the lives of people in the public eye. It was an important factor in the *Francome* case that the information had been collected unlawfully. Until the Human Rights Act 1998, there were very limited protections in English law against the intrusions by the press on the privacy of individuals. Under the Sexual Offences (Amendment) Act 1976, it is an offence to publish or broadcast the name of a rape victim, although victims of lesser types of sexual offence are not covered by this provision. The Rehabilitation of Offenders Act 1974 prohibits the disclosure of criminal records of a convicted criminal once a certain number of years have passed and his or her conviction is 'spent'. The wardship jurisdiction of the High Court has on occasion been relied upon to protect the anonymity of the children and family members involved in the proceedings, and a range of other cases involving sensitive family problems are conducted in private. But, in between these rather isolated instances, freedom of expression in the press has been allowed to prevail over the privacy rights of individuals.

The common law provides equally unsatisfactory and patchy protection for individual privacy. A notorious example of this is *Kaye v Robertson* (1991). Here, the claimant tried to obtain an injunction to prevent the *Sunday Sport* from publishing photographs of him taken without his permission when he was seriously ill in hospital. It was necessary for his lawyers to sew together a complicated patchwork of ill fitting rules and precedents from the fabric of the common law, most of which proved inadequate in the end. They tried defamation, on the basis that the pictures would imply, damagingly, that Kaye had consented to be interviewed by the newspaper; but this failed because the courts are reluctant to impose prior restraint on the press should the allegation later turn out at trial to be substantiated; a claim in trespass to the person also failed because it was not held that photographing amounted to the common law tort of trespass. However, a claim in malicious falsehood did succeed, since the journalists must have known that the claimant had not given informed consent to the publication of the story, and the story had been published with the headline 'exclusive', falsely implying that such consent had been forthcoming. But this is a very narrow tort and it will only be established if the claimant shows that he or she stands to suffer financially from it; here, Kaye was said to have risked losing the exclusive right to sell his pictures elsewhere. The narrowness of the tort is matched by its remedy; *Kaye* was only a limited injunction to prevent the newspapers contriving to publish the offending pictures and comments, rather than a permanent injunction and damages he might have received under a fully fledged privacy right. The artificiality of the reasoning in this case demonstrates the difficulty of using the available common law to obtain a remedy for breach of privacy, even when the courts are sympathetic, as they were in this case.

It is questionable whether the incorporation of Art 8 into domestic law will greatly enhance the protection of privacy in English law, despite the pressure

it will bring to bear on the courts to develop existing torts to cover forms of privacy invasion in accordance with the Convention. The case law of the European Court of Human Rights, which will influence national courts in this area, generally gives considerable weight to press freedom under the exception listed in Art 8(2) for measures taken in the interests of the 'rights and freedoms of others'. There has been manifest reluctance by the European Commission and the Court of Human Rights to accept that Art 8 rights should provide a platform for press regulation. In *Earl Spencer and Countess Spencer v UK* (1998), the applicants claimed, inter alia, that the absence in English law of a legal remedy for intrusions by the popular press into their private lives amounted to a breach of the State's positive obligations under Art 8. The Commission declared the application inadmissible, since the Spencers had not exhausted their remedies under domestic law and, therefore, did not fulfil the 'victim' requirement under Art 26 (now 34) of the Convention (see above, 19.7). It took the view that an action for breach of confidentiality might have availed the applicants in this case, rejecting their argument that they could not have relied on this cause of action since the information was already in the public domain when they became aware of it. Because this application was stopped in its tracks, there has been no recent definitive ruling from the Court on the adequacy of the common law of confidence to protect privacy rights. However, the European Court of Human Rights has recently expressed its disapproval of the disclosure of private information by the press, even where, in the end, the judgment came down in favour of freedom of expression. In *De Haes and Gijsels v Belgium* (1998), the applicants were journalists who had published articles accusing four Belgian judges of bias in their handling of a controversial custody case. The articles contained strong personal attacks on the judges and journalists were convicted of defamation. The court observed that the penalty had been justified in respect of one of the aspects of the published articles, exposing the subject to opprobrium because of matters concerning a member of his family. As far as the other comments by the journalists were concerned, the court ruled that the convictions were disproportionate since it had not been established that these allegations had no basis in fact.

Despite the somewhat cautious approach by the European Court of Human Rights to privacy interests when freedom of the press is at stake, the press lobby fought a strong rearguard action in the passage of the Human Rights Bill through Parliament when they apprehended a possible threat to their freedom. They were quick to point out that the Act would catch the Press Complaints Commission (PCC), the newspapers' self-regulatory body which was set up to monitor compliance with its Code of Practice, since this qualifies as a 'public authority' for the purposes of s 6 of the Human Rights Act (see above, 19.10.4). Anyone challenging a decision by the PCC not to take action against some alleged breach of privacy by a particular newspaper, it was argued, could apply to an English court for judicial review of the PCC's

decision – arguing a violation of Art 8 – and, thus, privacy laws would be introduced 'by the back door'. In response to these anxieties, the government included a provision (s 12 of the Human Rights Act) which restricts parties' ability to obtain injunctions against newspapers on without notice applications. Section 12 also requires the courts to have particular regard to freedom of expression in any challenge to the press under Art 8. Since this is a countervailing interest listed in Art 8 anyway, it is hard to see what these provisos add to the Act, apart from the implication that there is some hierarchy of rights which was never intended by the draftsmen of the ECHR.

23.4 Assessment

Despite recent changes in the law in response to adverse rulings from Strasbourg, there are still considerable shortcomings in the available protections for individual privacy in the UK.

23.4.1 Rights of privacy against the State

As we have seen, the power of the Home Secretary to issue warrants for covert surveillance to the security services and the police, though limited by statute, may be triggered by the very broad aims of the prevention or the detection of 'serious crime'; complaints by citizens to the Tribunals set up under the Security Services Act 1989 and the Intelligence Services Act 1994 do not elicit any information as to why the surveillance was conducted and there is no obligation on the tribunal to direct the cessation of surveillance. The fact that the tribunals cannot even inquire into whether the surveillance was justified in the first place reduces the protection they offer to a mere formality. The introduction of a general right to privacy in the Human Rights Act may resolve this problem, although there is still a risk that judges, in the spirit of the *GCHQ* case (*Council of Civil Service Unions v Minister for the Civil Service* (1985)), will give a broad interpretation to the exceptions to this right, such as the interests of prevention of crime and national security.

23.4.2 Rights of privacy against private parties

Before the Human Rights Act 1998 was passed, there was no recognised right in English law to privacy, either in statute or in common law. Where the invasion of privacy violated other interests recognised by the law, such as private property or confidential information, the victim had a limited range of remedies, but, as the *Kaye* case demonstrated, these fell far short of the UK's obligation under Art 8 of the Convention. The common law on private nuisance was extended to cover the infringement of a woman's privacy in the form of constant phone calls to her parent's house (*Khorasandjian v Bush* (1993)), but that case has now been effectively overruled by a House of Lords

decision that private nuisance is a cause of action only available to property owners (*Hunter v Canary Wharf* (1997)). The insistence in the common law on some prior interest – particularly property interests – has stifled the growth of any useful tort of privacy,such as has developed in the US. The introduction of Art 8 will inevitably have an impact on the common law here, extending the scope of the available torts and removing some of the current obstacles to pursuing privacy actions in the courts.

Less is to be expected from legislation. Although some types of press intrusion will be restricted by the Data Protection Act 1998, it is worth noting that the press managed to negotiate an important amendment in the parliamentary stages of the legislation, with the result that s 31 of the Act prevents them from having to disclose data if those data are being processed for a journalistic, literary or artistic purpose and if, 'having regard to the special importance of freedom of expression, publication would be in the public interest'. It is debatable whether the first three justifications would survive scrutiny under the ECHR, unless they fell within the rubric of the Art 8(2) aims of securing 'journalistic, literary or artistic' material which would require proper forensic justification on the part of the rights infringer.

The inadequacies of the law in this area are not limited to the lack of protection against press intrusions. Although private usage of surveillance devices is regulated to a certain extent under the Interception of Communications Act 1985, it can be argued that regulating such surveillance is virtually impossible, since, in most cases, it is impossible to trace the perpetrator. In addition, there is no regulation governing private use of cameras; private nuisance provides the only protection and that action is dependent on the 'victim' having a legal interest in the property where the intrusion takes place. Again, Art 8 and the relevant European Court of Human Rights case law on these issues will allow the courts to develop new torts to cover these forms of invasion.

PRIVACY

Privacy has a political function – it prevents authorities from stifling dissent by keeping too watchful an eye on their opponents' activities; and it has a non-political value in preserving, from the interference of the State, a sphere in which the individual can exercise his or her freedom. The difficulty is in striking the balance between privacy and legitimate invasions of it for the purposes of protecting others. Article 8 of the ECHR, which protects privacy and family life, contains a number of exceptions which operate to limit this protection in the interests of national security, the prevention of crime, etc (see Art 8(2)).

Secret surveillance by the police and security service

The Interception of Communications Act 1985 makes it illegal to intercept any communication without a warrant under the Act. The Police Act 1997, however, provides wide justifications for the issue of a warrant for bugging private property, and MI5 have equally wide powers under the Social Security Act 1987. Bugging is permissible 'in the interests of national security' or for 'the prevention of disorder or crime'. But such measures, in order to be upheld under Art 8(2), must be 'prescribed by law'. The law must not be so broad and permissive that the individual is at risk of having private communications intercepted for no legally recognisable reason.

Police: entry and search

The Police and Criminal Evidence Act 1984 grants wide powers to the police to enter and search private property for evidence or persons suspected of committing a criminal offence. The powers of police to enter private premises to prevent a breach of the peace have been held to be justified within Art 8.

Search orders

These are court orders issued to the legal advisers of a claimant in civil proceedings where there is a risk that the defendant will dispose of evidence essential to the trial. It permits the legal advisers to enter the defendant's private premises and remove property. Such orders may be obtained *ex parte* (in the absence of the defendant) – now called 'without notice'. Search orders have been held by the European Court of Human Rights to come within the

permitted exceptions to Art 8: the prevention of crime and the protection of the rights of others.

Private information held by public authorities

A number of statutes require disclosure of details held in files and on computer on application by the individual concerned; these Acts also regulate disclosure, so that unauthorised access is not permitted. There is, however, much information held by public bodies which, for various technical reasons, is not covered by any of this legislation,so it is still impossible in some circumstances for an individual to know what information is being held about him or her. The Sex Offenders Act 1997 requires those who have been convicted of certain types of sexual offence to tell the police where they live and when they move. Information on the Sex Offenders Register is available to local authorities. Legislation restricting the use that can be made of personal information held in computers or certain categories of manual records is also in place. The restrictions imposed extend to private data holders.

Immigration decisions

Immigration procedures often involve invasions of privacy when immigration officers seek to establish the genuineness of claims to entry. Until incorporation of the ECHR, the courts have not been sympathetic to Art 8 arguments in immigration decisions concerning the refusal of entry or deportation of family members of non-nationals lawfully resident in this country. The European Court of Human Rights has ruled moreover that Art 8 does not impose an obligation on signatory States to allow entry to non-nationals except where family ties with individuals lawfully resident in that State may be established. Recent proposals on immigration and asylum raise privacy concerns, for example, extensions of immigration officers' powers of search and seizure.

Family life

Any rule of national law that interferes with the relationship between parent and child will violate the right to family life under Art 8 of the ECHR. However, in the past, the European Court of Human Rights has taken a cautious approach to laws in signatory States relating to divorce or single sex relationships. So, whilst it may not be a violation of the Convention not to allow a separated couple to divorce each other and marry other people, the disadvantages faced by the children who emerge from the consequent extra-marital union do breach Art 8.

Sexual activity

Laws which criminalise homosexual activity have been found to be in breach of Art 8, but failure to recognise the new sexual identity of individuals who have undergone gender re-assignment operations is not. Article 8 has not been extended to protect the right to participate in sado-masochistic sexual activities. In these cases, the exceptions to Art 8, particularly measures taken in the interests of the 'health and morals of others', are broadly construed.

Children

The enthusiasm of the authorities to protect the rights of children at the cost of their parents' rights to family life has been tempered in a number of Strasbourg rulings that the right to due process under Art 6 requires that parents must be allowed proper participation in care proceedings. The right to privacy has been relied upon in a challenge to the law on corporal punishment; in this sense, privacy constitutes the right to physical integrity.

The press

Although the press is a non-State body and, therefore, in principle, not liable under the ECHR, Art 8 requires that States 'respect' the right to privacy. The State should, therefore, pass laws that prevent private bodies such as media organisations interfering with the privacy rights of individuals. There are a number of common law protections against press invasions of freedom; the press may be in breach of confidentiality by publishing information held in confidence, they may be liable in trespass in their attempts to get hold of information; their publication may be attacked as malicious falsehood or libel. Freedom of the press generally prevails over the right to privacy in common law and under the ECHR.

Privacy in Community law

Article 8 is one of the general principles of Community law. Although successful claims have been made in respect of Member States' breaches of privacy, the Court has been reluctant to rule against Community institutions, particularly in the area of competition where the Commission has taken allegedly intrusive investigation proceedings.