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Media Freedom of Expression, Privacy and the Public Interest

" ... no public interest is anything other or nobler than a massed accumulation of private interests."
Mark Twain, *Address to AP annual dinner, Waldorf-Astoria, New York, Sept. 19th, 1906*

In a number of cases the Supreme Court has determined that an individual may invoke an unenumerated (or unspecified) right of privacy under Article 40.3.1° of *Bunreacht na hÉireann.* In one groundbreaking ruling the Court defined a right to marital privacy in *McGee v the Attorney General* [1974], where Mr. Justice Budd stated: “It is scarcely to be doubted in our society that the right to privacy is universally recognised and accepted with possibly the rarest of exceptions."
The history behind the right is an education in itself. I am not a constitutional scholar - this much I knew - but I was genuinely surprised to read that the right to privacy, which I had assumed to be explicitly referenced in the Constitution, was, as UCD philosophy professor Gerard Casey (2005) puts it, "discovered" or "invented if you adopt a conservative jurisprudential attitude to constitutional interpretation". Of particular interest to me, as an Irishman and, latterly, a U.S. citizen, are the parallels Casey draws between *Bunreacht na hÉireann* and the U.S. Constitution on which it is patterned. Casey's paper provides an engaging review of the Mr. Justice Kenny claim in *Ryan v Attorney General* [1965] that there are unenumerated rights in the Irish Constitution which are "not confined to those specified in Article 40 but include all those rights which result from the Christian and democratic nature of the State." Casey is not a fan of the Kenny decision, or those writers who defend it, as his pointed references to "innovative", "exciting" and "creative" clearly imply. He is also troubled by the Kenny assertion that the "task of discovering and enunciating these unenumerated rights is a function of the courts" and goes on to detail several difficulties that that assertion creates, not least of which is trying to "square the prospect of legislating judges with Article 15.2.1°" which invests the Oireachtas with the exclusive power of lawmaking. Casey's rhetorical question about the intent of the Constitution's framers, and the fact that they did not explicitly state a desire "to embed unenumerated rights in its text and give permission to the Courts to pronounce upon them", would find a sympathetic ear in Associate Justice Antonin

Scalia, an originalist on the U.S. Supreme Court. A particular Casey remark on "the exercise of hermeneutical somersaults" could have been written by Scalia.
Another of Casey's Irish Law Times papers (2004) posits a detailed critique of the textual argument advanced by Mr. Justice Kenny in 1965 in support of the doctrine of unenumerated rights and his ruling which laid the groundwork for a myriad of privacy - and other - decisions - which have followed in the 50 years since. Of some noteworthiness is a Kenny quote, from some 15 years after the original decision, which Casey references in his conclusion: "Judges have become legislators and have the advantage that they do not have to face an opposition".
Since I am in peril of getting lost in the minutiae of Irish legal history from which I am patently ill-qualified to extricate myself I will move on. Simply put the right to privacy has been determined to exist in Irish law.
The European Convention on Human Rights (henceforth ECHR) also guarantees a right to privacy. As of January 1st, 2004, the ECHR Act requires every Irish court to interpret all judgements and laws in a manner that is compatible with the ECHR provisions. Article 8 of the convention guarantees the right to privacy and this is effectively balanced by Article 10.

Article 10(1) of the European Human Rights Convention guarantees the right of freedom of speech by providing that: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas, without interference by public authority and regardless of frontiers." However this freedom is subjected by Article 10(2) to such restrictions "as are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary".
Bacik (2003), while noting that Article 10(2) imposes limiting conditions, suggests that "the language of Article 10(1) is infinitely more generous than that of its Irish equivalent."
Article 40.6.1° of the Irish Constitution says that the State guarantees the "right of the citizens to express freely their convictions and opinions." But this freedom of expression right is not an absolute one. In fact the right is qualified by the preceding phrase "subject to personal order and morality", and, as the Article goes on to say, "the State shall endeavour to ensure that organs of public opinion such as the radio, the press ... shall not be used to undermine public order or morality or the authority of

the State". The article further provides that "publication or utterance of blasphemous, seditious, or indecent matter" is a punishable offence. Curiously a definition of the contentious concept of blasphemy which might be deemed acceptable to the courts was not provided until the Defamation Act of 2009. As TCD law professor Dr. Eoin O'Dell notes in a blog post (cearta.ie, 2007), leave to prosecute in the *Corway v Independent Newspapers* [1999] case was denied by Mr. Justice Barrington who "held that the common law crime of blasphemous libel" was "uncertain".
Bacik (2003) states that only "grudging protection" is provided to freedom of expression which is "significantly restricted; more severely, indeed, than most other constitutional freedoms guaranteed in ... the 'Fundamental Rights' provisions of the constitution." As noted by Moriarty & Massa (2012), the Constitution imposes additional restrictions, both implicit and explicit, on the right including the language of Article 40.3 which guarantees that the State shall "vindicate the life, person, good name, and property rights of every citizen." As an aside Casey (2004) reverts to the Irish language text of this guarantee to ascertain intended meaning in his analysis of Justice Kenny's 1965 *Ryan* decision. Moriarty & Massa (2012) mention that the unenumerated right to privacy guaranteed by Article 40.3 also limits the right to freedom of expression. They state that the freedom of expression guarantee "applies equally to the media and individuals".

As someone with no legal background I found the tension between freedom of expression and privacy, and the intersection with the public interest, easiest understood when viewed through the lens of proposed privacy legislation and the stated positions of various politicians, journalists and academics. That lens also provided diverse views of what constitutes the "public interest".

In an extract from a chapter he contributed to the book "After Leveson: The future for British journalism", Tom Felle (2013) essentially makes the case that the Irish Press Council, established in 2007 to deliberately forestall the introduction of suggested privacy legislation, and that council's code of practice - intended to ensure accuracy of reporting, prevent harassment, and respect a person's privacy - is the "right fit for Ireland". While noting the occasional "nefarious" activity by Irish newspapers, including a specific reference to the large libel damages awarded in *Leech v Independent Newspapers* [2009], Felle feels their behaviour compares more than favourably with that of their British counterparts. Justice minister Alan Shatter's 2012 proposal to revisit the notion of a privacy law, following publication of partially nude photographs of the Duchess of Cambridge in the Irish Daily Star, is then discussed.

Felle appears to agree with the prevailing newspaper argument that privacy laws, well-intentioned though they might well be, don't end up favouring ordinary citizens but rather those who can obtain gagging orders through the employment of expensive lawyers which in turn prevents reporting on entirely legitimate public interest issues.

Felle finds an echo in an Irish Times (2012) editorial, "A discredited Bill", which also takes issue with Shatter's intention to resurrect the 2006 Privacy Bill, suggesting political grandstanding and citing the legal maxim that "hard cases make bad law" in labelling the proposed legislation as a "serious attack on the the freedom of the press" and news gathering practice. The implication is that the introduction of the 2006 bill was a trade-off for the press-sought reform of the defamation laws, but the suggestion is that that reform coupled with the Press Council and Ombudsman obviates any need for revisiting privacy protections. The article suggests that the proposed law simply provides for stifling of the press by special interests; that the definition of privacy is too vague; that the publication of photographs would be exponentially more difficult; and that prior restraint - defined as censorship imposed on expression before the expression actually takes place - provisions would allow for UK-like super-injunctions, potentially blocking publication of public interest investigations.

Eoin O'Dell, in a 2006 Irish Independent article, "Why McDowell needs to look again at this privacy bill", (Independent.ie, 2006), and a later 2012 Irish Examiner article, "Flawed privacy bill offers us no protection", (Irishexaminer.com, 2012), makes several cogent criticisms of both the original privacy bill and its later reincarnation. In the 2006 article he notes, as the Irish Times did, that privacy reform was regarded as the price to be paid for overdue reform of archaic defamation laws (the Defamation Act was ultimately passed in 2009) but that the privacy proposals were imperfect and hastily introduced. O'Dell feels the bill is overly obsessed with the press and not sufficiently with other key privacy concerns but it is just his observations in respect of the press that interest me here. He feels that the two key protections, or defences, for journalists - that of reasonable publication, or publication in good faith, and the act of news-gathering are too narrowly defined and need to be stated in broader terms. In addition court actions - possibly held in private - including temporary injunctions preventing press publication, would simply replace one gagging mechanism with another and create something of a catch-22 for a journalist, specifically that in trying to rely on a defence of reasonable publication by contacting the subject of a proposed article they would open themselves up to a possible privacy action from that same subject.

In the 2012 Irish Examiner article about a proposed privacy bill redux, O'Dell, in addition to discussing non-media aspects of privacy such as the notion of expanding the role and resources of the data protection commissioner, restates some of his earlier criticisms, including that the bill hampers freedom of expression and valid investigative reporting, and that while news gathering in the public interest is not intended to represent an invasion of privacy, the associated definitions are so narrow and so conditional as to make reliance on that intent somewhat problematic. O'Dell does not ascribe political motivations to the bill's reintroduction but does set out why he believes ample and adequate remedies for invasion of privacy already exist and thus why a separate bill is unnecessary. He references several cases (cearta.ie, 2012) to back up this latter assertion: that of the GAA player in *Sinnott v Carlow Nationalist* [2008], decided as an invasion of Sinnott's privacy even though it was an apparently unintentional publication of a "wardrobe malfunction"; the nursing home case, *Cogley v RTÉ* [2005], which noted a clear public interest in spite of the use of concealed camera footage; and the priest's affair with a parishioner in *Herrity v Associated Newspapers* [2008] in which the court found that privacy can, albeit infrequently, trump freedom of expression i.e. that the freedom is not unqualified, and that the newspaper's claim of a public interest could simply not be upheld. I thought the public interest defence advanced by the newspaper in *Herrity* to be the height of hubris given that they had published extracts from transcripts of unlawfully tapped telephone conversations.
In addition O'Dell notes that the justice minister Alan Shatter felt that the version of the 2006 bill being introduced in the Seanad in 2012 needed additional attention to ensure the balance between freedom of expression and the public interest was appropriately weighted.

I chose to venture down the figurative rabbit hole by searching for transcripts of the Privacy Bill 2012 debates in the Seanad and found the Second Stage reading from March 2012 on Kildarestreet.com (2015). Senator Norris addresses privacy and the public interest in some detail in his remarks when moving the bill. He mentions the promise of a privacy bill introduction in return for the modernisation of defamation law. He also notes favourably the European Court ruling in the von Hannover case that "all persons are entitled to a personal sphere of privacy". He acknowledges that the public right to know is important but that is it is "not just what the people want to know". Asking rhetorically if a desire to know equates to a right to know, he takes a swipe at newspapers by stating that "public interest is deliberately confused by editors with public prurience." Norris goes on to quote Justice Hamilton from the

decision in *Kennedy and Arnold v Ireland* [1987]: "Though not specifically guaranteed by the Constitution, the right of privacy is one of the fundamental personal rights of the citizen". He closes by suggesting that the practices vilified in the Leveson inquiry are not unknown in Ireland, that the Press Council, being toothless, is a farce and that the press has "become a tyranny".

Minister Shatter, in his remarks rejecting the 2012 bill as premature, takes several broad swipes at journalists, mentions Leveson more than once, and suggests reporting standards have fallen in both print and broadcast media. In speaking to balancing the competing rights of freedom of expression and privacy he references the public interest in some detail. He states that "prurient revelations about individuals' private personal lives for financial gain by the media where the matters reported have no relevance to public affairs" cannot be tied to freedom of expression. He goes on to say that "such revelations turn on prurient interest and financial gain rather than public interest" or any possible claim of a "right to know". His opinion is that there is "no right to know about every aspect of every individual's personal life" and that any claim to same is really just "a claim to a licence to undermine individual freedom". Shatter then goes on to address his concerns with specific aspects of both the original 2006 privacy bill and the modified 2012 version introduced by the senators, much of which, frankly, I found very technical. He does circle back around to lecturing the media, cautioning them on invasion of privacy, especially in "cases where exposure of private behaviour" has no public interest justification but is rather about the "public's prurience".

There does not appear to be a universally accepted definition of the term "public interest". Indeed, in the Seanad debates, Senator Ivana Bacik notes the troubling absence of a definition in the 2012 Privacy Bill and points to that contained in the preamble to the Press Council's code of practice. That preamble (Presscouncil.ie, 2015) states that it is up to the Ombudsman and the Press Council to define the public interest in each case and goes on to state that "the general principle is that the public interest is invoked in relation to a matter capable of affecting the people at large so that they may legitimately be interested in receiving and the press legitimately interested in providing information about it."

The legal test for what constitutes a valid public interest seems to have very recently evolved, especially in Ireland where there has been a paucity of test cases. In fact the acceptance of a public interest defence appears to only have been affirmed in Irish law with the Mr. Justice Charlton ruling in *Leech v Independent Newspapers* [2007], a case that seems as legally significant, if not more so, than the 2009 Leech case against the same newspaper group in which the plaintiff was awarded €1.87

million, the highest ever libel award at the time. Eoin O'Dell discusses the Charlton decision in detail on his blog (cearta.ie, 2007). He notes that the news value of the high profile libel loss was secondary to the Charlton ruling. That ruling builds on a couple of prominent UK House of Lords decisions, most notably that in *Reynolds v Times Newspapers Ltd* [1999], where Lord Nicholls (Bailii.org, 2015) listed ten criteria for determining "whether the matter was in the public interest and whether the journalist had acted responsibly" but also that in *Jameel v Wall Street Journal Europe* [2006]. I cannot be the only one who sees more than a little irony in an action brought by an Irish Taoiseach significantly impacting on UK law before being subsequently being absorbed back into an Irish decision. Simon McAleese Solicitors, in the Legal Review section of their website (Simonmcaleese.com, 2015), list the factors outlined by Nicholls in language accessible to the layman: the seriousness of the allegation; the nature, to include the public interest aspect, and source of the information; the verification steps undertaken; the matter's urgency; whether plaintiff's response was sought and subsequently included in the article; and the tone and circumstances of publication.

Mr Justice Charlton in *Leech* ultimately decided that the defendant did not satisfy the three-part test he had defined - that a public interest be clearly established, that "the steps taken to gather and publish the information" be "responsible and fair", and that in determining the appropriateness of conduct there be regard paid to "the practical realities of news gathering" (cearta.ie, 2007) - and so decided that the public interest defence could not be put to the jury. The case was in any event later decided in favour of Independent Newspapers. What is of more import is that a public interest defence was held to exist under Irish law.

A cursory glance at Section 26 of the 2009 Defamation Act (Irishstatutebook.ie, 2015), which defines the "defence of fair and reasonable publication", suggests to this author that the 2007 Charlton ruling was legally on point. Furthermore the case law I have reviewed, albeit limited, suggests that the Irish courts have been careful to try and strike the appropriate balance between the media's right to freedom of expression and the public's right to privacy.

Whether a bill outlining a new tort of violation of privacy - and thereby putting the privacy rights of the individual on a definitive statutory footing - will ever make it into Irish law is unclear. The political will in this instance seems to ebb and flow. I tend to agree with the Irish Times (2012) editorial referenced earlier that the resurrection of the 2006 bill by Minister Shatter was little more than a populist reaction to the publication of topless pictures of a British royal. This is what makes the moralising of

Shatter, Norris and others in the Seanad debates so turgid and self-serving. Equally disingenuous, and more than a little cynical, are the arguments against any privacy bill advanced in press editorials, blogs and elsewhere. The media - and some academics - clearly favour the status quo. In the Defamation Act of 2009 they gained the reform and protections they were seeking, including a codification of a public interest defence, and they persist in their stated belief that the Press Council is adequate protection against their worst excesses.

Do they unnecessarily intrude on privacy? Of course they do. But honesty compels the admission that they have willing accomplices in the general public insofar as that public is an avid consumer of the most salacious and immoderate of published material, both written and graphic, material whose news value and tie to the public interest is tenuous at best. But political winds shift, often on a whim, and the press may well find that in order to preempt privacy legislation in the future they will have to cede changes to the Press Council as presently constituted, specifically allowing for increased independence and statutory powers to investigate and levy fines similar to what has been proposed by Leveson.

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