

Privacy as Personal Resistance: Exploring Legal Narratology and the Need for a Legal Architecture for Personal Privacy Rights

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Abstract

Different cultures produce different privacies – both architecturally and legally speaking – as well as in their different legal architectures. The ‘*Simms* principle’ can be harnessed to produce semi-constitutional privacy protection through statute; building on the work already done in ‘bringing rights home’ through the Human Rights Act 1998. This article attempts to set out a notion of semi-entrenched legal rights, which will help to better portray the case for architectural, constitutional privacy, following an examination of the problems with a legal narrative for privacy rights as they currently exist. I will use parallel ideas from the works of W.B. Yeats and Costas Douzinas to explore and critique these assumptions and arguments. The ultimate object of this piece is an argument for the creation of a legal instrument, namely an Act of Parliament, in the United Kingdom; the purpose of which is to protect certain notions of personal privacy from politically-motivated erosion and intrusion.

Key Words

Privacy, resistance, narratology, architecture, culture, constitutions

Introduction

This article may be overly ambitious, as it touches on a good number of themes, but the ultimate object of this piece is an argument for the creation of a legal instrument, namely an Act of Parliament, in the United Kingdom; the purpose of

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which is to protect certain notions of personal privacy from politically-motivated erosion and intrusion. The ambition motivating this article arises from the need to explore ideas and concepts of (chiefly) legal narratology, legal architecture, human rights, the nature of legal rules and constitutional instruments, cultural variations of the expression of personal privacy, and the proffered definitions of personal privacy themselves. The challenge of this exploration of ideas is the envisaging of a switch from a legal narrative epistemology of laws to an architectural epistemology of laws: the shape of privacy law becoming not a succession of narratives but the creation of an edifice of privacy law.

A Flawed Notion of ‘Legalised’ Rights?

First, I would like to set out a notion of ‘legalised’ rights which will help, in turn, to better portray the case for architectural, constitutional privacy following an examination of the problems with a legal narrative for privacy rights as currently exists.

There can be said to be “will-rights” and “legal rights.” “Will-rights are universal and sweeping as they stem from personhood and rational autonomy.

This is autonomy as *boundless* self-governance – it does not *work*, empirically, in the world of politics, or in the common law, even where legal realism can be observed and accepted. Rights as an expression of autonomy or self-governance are too ambitious.¹ These autonomy or rationality-based rights are notoriously hard to apply or define for jurists and judges alike.

There are continuous, derisive popular and academic calls that concepts of rights are too wide-reaching or are too often “engaged” as rights can be described as overlapping, not just abutting. As Schofield describes: “In an age where there seems

¹ See e.g. Paul Roberts, *Privacy, Autonomy, and Criminal Justice Rights: Philosophical Preliminaries*, in PERSONAL AUTONOMY, THE PRIVATE SPHERE AND CRIMINAL LAW: A COMPARATIVE STUDY 77 (Peter Alldridge & Chrisje H. Brants, eds. 2001).

to be a ‘right’ to almost anything, asserting a claim of right is less helpful than it once was, because the basis for evaluating the importance of a particular right has become lost in the chorus of competing rights”²

So the legal formalist is pleased to note that many expressions of legal rights are of course instrumental – they are document or constitution-based; as in the case of each of the human rights articulated in the UK, between the European Convention on Human Rights (ECHR)³ and the Human Rights Act of 1998 (HRA).⁴

These instrumental human rights (legal rights) leave us, as individuals, with different spheres or avenues of liberty. These can be conceived of as realms of *hurma*, or “sanctity,” to borrow an Arabic phrase.⁵ The courts rigorously examine the width of these avenues – in defining the scope of our rights, through such mechanisms as measuring the engagement of different articles of the ECHR.

The “sanctities” we are granted by our legislature through legal instruments include, in the UK, a “right to private and family life” due to the operation of Art. 8 of the ECHR and of the HRA. We are given discretion to exercise our “decisional privacy.”⁶ Many authors have suggested that the recognition of ‘decisional privacy’ through the enforcement of Article 8 rights is, at least in the UK, a recognition of personal autonomy. For example, autonomy is a theme that emerges from the discussion of informational privacy by the UK Court of Appeal in *Wood v Commissioner of the Police of the Metropolis* [2009] EWCA Civ 414. The truth is something similar, but not quite. Legal rights granted by legal instruments leave us with discretion in self-determination, rather than true autonomy. I would suggest that “decisional privacy” is most accurately equated to this notion of self-determination as opposed to autonomy or self-governance.

²G.R. SCHOFIELD, *Privacy (or Liberty) and Assisted Suicide*, 6 J. PAIN & SYMPTOM MGM’T. 5, 280 (1991).

³<http://www.hri.org/docs/ECHR50.html>.

⁴<http://www.legislation.gov.uk/ukpga/1998/42/contents>.

⁵ See FADWA EL GUINDI, VEIL: MODESTY, PRIVACY AND RESISTANCE 84-85 (1999) (The notion of a *hurma* or ‘sanctity’ can be conceptually linked to that of something, which is *haram* or ‘forbidden.’ El Guindi describes “traditional notions of Arab privacy” including the “right to see whom,” the “right not to be seen by whom,” and the notion of “who chooses not to see whom.”).

⁶ See DANIEL SOLOVE, ET AL., PRIVACY, INFORMATION, AND TECHNOLOGY 1 (2006) for a brief explanation of decisional privacy.

However, a porous constitutional arrangement, i.e. a fair and distinct separation of powers, allows for judicial mavericks to make landmark decisions or commentaries within the boundaries, at least, of the constitutional limitations placed upon them. Once appointed judges, these individuals, often deciding cases as part of an appellate collective, have far greater personal autonomy in decision-making than the rest of us. This is of course the central tenet or principle of the legal realist position.⁷ We can observe the potential cascading effect these more radical decision-makers in the judiciary have upon their peers when we examine the language of opinions such as that given by Baroness Hale of Richmond, in the *Campbell* case.⁸

Most of the time, however, it is the legal instrumentalists and legal formalists in the judiciary that have their way, out of deference of judges to the doctrine of parliamentary sovereignty as a flawed expression of popular democracy.

Parliamentary sovereignty is 'our' concept in the UK; though it will be mirrored broadly in some jurisdictions globally. The application and defence of privacy rights in the UK courts is, as a result, portrayed as overly-instrumental and formalist by decisions in the European Court of Human Rights (ECtHR). The ECtHR has recently been a better defender of 'British' privacy than our own courts. Cases, such as *R (On the application of L) v Commissioner of the Police of the Metropolis*, have seen substantive retreats back down avenues of decisional privacy.⁹ However, there is a notion that 'legalising' privacy is a much-maligned British/UK legal obsession, as Sir Thomas Bingham has identified in a scholarly

⁷ See <http://law.jrank.org/pages/8160/Legal-Realism-Persuasion-Characteristics-Individual-Judges.html> See <http://law.jrank.org/pages/8160/Legal-Realism-Persuasion-Characteristics-Individual-Judges.html>

⁸ *Campbell v. MGN Ltd.*, [2004] UKHL 22.

⁹ *R. (On the application of L) v. Comm'r of the Police of the Metropolis* [2009] UKSC 3 (where L was held to be lawfully denied employment working with children despite an error in her job application revealing that her child, X, had once been taken into social care at L's own behest).

article,¹⁰ and as he highlighted in a speech to the civil liberties campaigners Liberty in 2009.¹¹ In this speech, Bingham has given us an important view of how and why we must define the role and protection of ‘rights’ in our society.

Sir Thomas said:

The rights protected by the [ECHR] and the [HRA] deserve to be protected because they are, as I would suggest, the basic and fundamental rights which everyone in this country ought to enjoy simply by virtue of their existence as a human being. Let me briefly remind you of the protected rights, some of which I have already mentioned. The right to life. The right not to be tortured or subjected to inhuman or degrading treatment or punishment. The right not to be enslaved. The right to liberty and security of the person. The right to a fair trial. The right not to be retrospectively penalised. The right to respect for private and family life. Freedom of thought, conscience and religion. Freedom of expression. Freedom of assembly and association. The right to marry. The right not to be discriminated against in the enjoyment of those rights. The right not to have our property taken away except in the public interest and with compensation. The right of fair access to the country’s educational system. The right to free elections.

Which of these rights, I ask, would we wish to discard? Are any of them trivial, superfluous, unnecessary? Are any them un-British? There may be those who would like to live in a country where these rights are not protected, but I am not of their number. Human rights are not, however, protected for the likes of people like me – or most of you. They are protected for the benefit above all of society’s outcasts, those who need legal protection because

¹⁰ See generally T. Bingham, *Should There Be a Law to Protect Rights of Personal Privacy?*, 5 E.H.R.L.R. 450, 455-462 (1996).

¹¹ Lord Bingham, Speech to the organisation Liberty (Jun. 6, 2009) available at <http://www.liberty-human-rights.org.uk/media/articles/pdfs/lord-bingham-speech-final.pdf>.

they have no other voice – the prisoners, the mentally ill, the gypsies, the homosexuals, the immigrants, the asylum-seekers, those who are at any time the subject of public obloquy.¹²

W. J. Waluchow created the fictional linguistic minority of the Venusians, inhabitants of the fabled land of Demos, to make this same point as Bingham: within a democracy (be it the UK or Waluchow's fictional Demos) broken into however many constituencies (such as Waluchow's exemplar Athenia), there may be such small minorities or even individuals whose needs and concerns are so specific that there must be an entrenched system of rights to protect them, as democratic representation must otherwise become a tyranny of the majority. For this author, this clearly shows a concern in Waluchow's work.¹³

A Legal Framework of Privacy in the UK

The legal landscape of privacy in the UK is piecemeal and disparate – not a reflection of any joined-up thinking.¹⁴

In a monograph concerned with delimiting the law on confidentiality in the UK, Paul Stanley comments that a universal privacy principle, which the judiciary and policymakers could adhere and aspire to, would be preferable to what is actually the current state of affairs; namely, a fragmented body of various laws, rules and doctrines.¹⁵

Stanley has written that the best way to protect and entrench, as well as define, a doctrine like confidentiality, or even privacy is the

¹² *Id.*

¹³ W.J. WALUCHOW, A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE 97-106 (2007).

¹⁴ See generally R. THOMAS & M. WALPORT, DATA SHARING REVIEW REPORT, INFORMATION COMMISSIONER'S OFFICE (2008) (for a clear critique of the misunderstandings and misapprehensions that surround the everyday issues of personal privacy in information sharing through electronic governance), available at <http://www.justice.gov.uk/docs/data-sharing-review-report.pdf>.

¹⁵ P. STANLEY, THE LAW OF CONFIDENTIALITY: A RESTATEMENT V, 157-162 (2008). (Although a single set of doctrines has been applied to various cases involving privacy and confidentiality in English law, there has been no consistent or systematic treatment of the cases.).

English response, which is to adopt a single set of principles but apply them with some sensitivity to context [and], it is suggested, a defensible one. Alternatives, which would attempt to create specialised bodies of rules to address different situations, would not necessarily produce a more satisfactory overall result.¹⁶

Unfortunately, when it comes to approaching problems of privacy in a conceptual manner, Stanley could hardly be pleased. A brief comparison, as follows, of privacy-type rules in the law of the UK that relates to a single sphere of the private life presents a number of different judicial stances, political purposes and legal doctrines with no unifying principle or approach between them.

The common law doctrine of confidentiality has been hugely broadened since its inception. The notion of “*Campbell* privacy” is a formulation of personal, private life confidentiality that is far removed from commercial-type confidentiality.¹⁷ A great deal has been written about ‘*Campbell* privacy’ and the adjustment of the common law doctrine of confidentiality to provide a vehicle for the recognition of privacy-type claims involving a ‘reasonable expectation of privacy’ that should be honoured by the courts to protect a private or family life.¹⁸

But despite the doctrine of confidentiality being broadened at the common law, there exist certain policy-driven statutory provisions that affect personal privacy through inroads into confidentiality. Some of these mean that there are substantive *non-sequiturs* when it comes to privacy issues in governance. For example, the “data-sharing” principle of § 29 (Crime and Taxation) of the Data Protection Act 1998 ignores some issues of confidentiality in cases of sharing information to

¹⁶ *Id.* at 162 (2008).

¹⁷ See Arye Schrieber, *Confidence Crisis, Privacy Phobia: Why Invasion of Privacy Should be Independently Recognised in English Law*, 2 *Intel. Prop. Q.*, 2006, at 160-192; T. Aplin, *Commercial Confidences After the Human Rights Act*, *EUR. INTELL. PROP. REV.*, at 411-419 (2007); see also Hazel H. Carty, *An Analysis of the Action for Breach of Commercial Confidence*, *INTELL. PROP. Q.* 2008, at 416-455.

¹⁸ *Id.*

ensure “(a) the prevention or detection of crime, (b) the apprehension or prosecution of offenders, or (c) the assessment or collection of any tax or duty or of any imposition of a similar nature.”¹⁹

§ 251 National Health Service Act 2006, for example, sees patient information sometimes treated as less than strictly confidential in some circumstances where patient privacy is trumped by certain, “higher” ends of economic efficiency and privilege for medical researchers.²⁰ However, for the most part, public pressure and media exposure makes data-protection an important issue for National Health Service (NHS) organisations, along with concern for patient confidentiality, and consequently, patient satisfaction and well-being.

As evidence of this, Professor Dame Joan Higgins, formerly Chair of the Ethics and Confidentiality Committee (ECC) of the National Information Governance Board of the NHS has noted that it is difficult to balance the need for the most effective health and social care research with the need to respect the sensitivities of patient confidentiality. However, there can be circumstances where society’s need for effective research in the areas that impact upon public health outweighs notions of patient rights and confidentiality.

Higgins has outlined how:

In many ways, the greatest challenge for the ECC in the future is the same as the challenge which [the Patient Information Advisory Group] faced when it began work in 2001. That is how to support high quality health care research, using patient information, whilst protecting the interests of patients and ensuring that their confidentiality is not breached. It is about making sure that an appropriate balance is achieved between these two goals. However, there have been some more recent changes which create new pressures. (1) It is essential that trust between patients and health care professionals, in the NHS, is maintained. Patients need to feel that whatever information they share with professionals will be held in confidence. If this trust is lost then the whole basis of care is undermined. Recent losses of sensitive data and

¹⁹ Data Protection Act, 1998, c. 29, § 29 (Eng.).

²⁰ National Health Service Act, 2006, c. 41, § 251 (Eng.).

inappropriate sharing of, and access to, health records may be starting to weaken this sense of trust. (2) Increasingly, we are seeing requests from researchers to 'link' data for different data sets. This is essential for certain kinds of research but it also increases the risk of breaching confidentiality, not just where identifiable information is linked but also where anonymised information is linked but 'small numbers' (e.g. in specific geographical areas) may reveal patients' identities. There is no easy solution to this problem. (3) Finally, there is the problem of third party information in patients' records. Ensuring that the confidentiality of third parties is not breached, as well as that of patients, is also a particular challenge.²¹

As Roberto Lattanzi describes it, “the protection of individuals in the health care sector [has been extended] from *habeas corpus* to *habeas data*.”²² Lattanzi is highlighting the greater sensitivity with which patient data in the National Health Service and the private health sector is being treated – whilst the allied medical professions have typically always respected patient confidentiality and personal information out of respect for the ethical doctrine of non-maleficence: “Do no harm!”

But patient confidentiality and the sanctity of patient information, is a barrier to some types of healthcare research, particularly where research is being conducted into a condition from which relatively few people suffer. Typically, patient consent is sought where confidentiality must be circumvented by health researchers. Otherwise, large amounts of personal information can be used after they have been anonymised or pseudonymised. When patients will not give consent to their health records being used for research or the records must be used on a larger scale with ‘personal’ qualities still intact making patient information still ‘identifiable’ there exists a mechanism governed by §251 of the National Health Service Act 2006. Under this mechanism, the National Information Governance Board (NIGB) of the NHS sanctions “open” research without patient consent being necessary, on behalf of

²¹ J. Higgins, Private correspondence with the author (J. Grace), 14 September 2009.

²² See Roberto R. Lattanzi, *Protecting Health Care Data: From Medical Secrecy to Personal Data Protection. Solution Found?*, in *THE PROTECTION OF MEDICAL DATA: CHALLENGES OF THE 21ST CENTURY* (2008).

the Health Secretary.²³ The NIGB itself relies on the advice of its own Ethics and Confidentiality Committee (ECC) for guidance on § 251 applications from health care researchers.²⁴ This mechanism makes a mockery of patient consent for research as an important touchstone of the contrived notion of autonomy – in reality, patient self-determination (or “decisional privacy”) does not ultimately extend to true, accepted decision-making or informational privacy rights.

Legal Architecture: A Constitutional Supra-rule for Privacy?

It is difficult to determine a constitutional legal architecture, made up of supra-rules, rules and meta-rules, in the United Kingdom, but not impossible.

To this author, rules are specific legal principles, and meta-rules are procedural rules which determine how rules themselves are created. Supra-rules constrain or mandate which themes and rights created rules must express. Parliamentary sovereignty is the chief supra-rule in the UK – another is the rule of law itself.

What the UK lacks is a constitutional “super rule,” or “supra-rule,” relating to privacy (or indeed, any other right). Although the HRA has been described as constitutional law it is not truly constitutional in nature, as it only requires the judiciary to take action on rights, and only then *up to a point*, however far, and as such is only a *meta-rule* – essentially a rule about rulemaking, rather than a rule within and above all rules.²⁵ Parliamentary sovereignty might be said to be the only true supra-rule we have in the UK, depending on the definition that is accepted of the rule of law.

W. J. Waluchow has analysed the organic process by which the Canadian courts interpret the Canadian constitution in the light of new laws, and vice versa. Waluchow notes that the

²³ National Health Service Act, *supra* note 20.

²⁴ See the website for the NIGB available at <http://www.nigb.nhs.uk/>.

²⁵ For example, § 4 of the Human Rights Act 1998 outlines the ability of UK courts to make declarations to the effect that pieces of legislation are in their operation at odds with the rights outlined the 1998 Act itself, and yet these declarations do not suspend, repeal or amend the legislative provisions concerned

Canadian *Charter of Rights and Freedoms* is found within the Canadian Constitution Act 1982 – the latter of which happens to describe itself, incidentally, as “the supreme law of Canada.”²⁶

A constitutional law on privacy would require elements of the meta-rule and supra-rule. A meta-rule is, to the author of this piece, a rule about rules, affecting the process of law-making. A supra-rule, to this author, is a superior rule that affects the substantive intent and content within other rules.

It is arguable that a combination of statutory supra-rules and meta-rules might operate to place limitations on the intrusion into privacy enjoyed by individuals from the political machinations of sovereignty or the State. For example, a kind of rationalised balancing exercise, such as a statute, that seeks to put a threshold on personal privacy values in electronic governance.

The idea of a supra-rule with respect to personal privacy is that it is possible and indeed valuable to go beyond the “interpretive obligation” that Jack Beatson has described, § 3(1) of the HRA having laid down, without resorting to what amounts to a written, everlasting and impermeable constitutional instrument.²⁷ Such an instrument would, in turn, contravene the important “*Simms* principle” of Parliamentary sovereignty in the United Kingdom.

The contemporary ideal of Parliamentary sovereignty still ensures that where the wording of an Act of Parliament strips away rights from an individual, or some closely defined group in society, our courts are bound to follow that expression of supposedly-democratic will from Parliament²⁸. This *Simms* doctrine²⁹, or *Simms* principle³⁰, is the natural evolution of the Diceyan notion of the rule of law and Parliamentary

²⁶ WALUCHOW, *supra* note 13, at 1.

²⁷ See J. Beatson. *Interpretive Obligations in Constitutional Tools*, in 1 ADMINISTRATIVE LAW IN A CHANGING STATE (Perason, Harlow & Taggart eds, 2008) (This ‘interpretive obligation’ placed on the courts by § 3(1) of the HRA is that the courts should give effect to ECHR rights “so far as it is possible to do so.”).

²⁸ See D.J. Machin, *The Irrelevance of Democracy to the Public Justification of Political Authority*, *Res Publica* (2009) 15:103-120 for a discussion of underpinning ideas here.

²⁹ As per Hoffman LJ in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, at 131.

³⁰ As labelled by Lord Brown in *A, K & M v. HM Treasury* [2010] UKSC 2 at Para. 198.

supremacy, from an age where there were few if any notions of persona legal rights outside of personal property, to a postmodern age of human rights. The core values of ultimate respect for Parliamentary legislative intention are still there. This will result sometimes in the swift reversal of positive steps the courts may actually take in the direction of the promotion of the universalisation of rights.³¹

‘Foursquare’ Personal Privacy

A great deal is written about personal privacy rights— and it is convention amongst proponents and detractors of personal privacy concepts, at least in the English-language body of literature on the subject, to cite to two famous papers, one by Warren & Brandeis, and the other by Prosser.³²

It is plain from a survey of the literature that the trend in research into issues of personal privacy has been to look at issues of “transactional” privacy rights as much as anything – where issues such as reputation, confidentiality, image, and trade secrets all have the air of industry about them.³³

Floridi has suggested a valid framework for informational privacy, but specifically from an ontological view.³⁴ James H. Moor,³⁵ Herman T. Tavani,³⁶ and Raymond Wacks³⁷ have offered up other privacy frameworks. Recently, Nicole

³¹ The decision ruling ‘asset-freezing’ orders unlawful in *A, K & M v. HM Treasury* [2010] UKSC 2 was swiftly followed by the Terrorist Asset-Freezing (Temporary Provisions) Act 2010, for example, legitimising the same orders once more.

³² Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

³³ See generally *id.* (Warren & Brandeis were concerned with a kind of reputational privacy in examining the early and tentative steps of a common law doctrine of confidentiality; while Prosser was concerned with outlining tortious actionable privacy rights that drew from the commercial viability of the person.)

³⁴ Luciano Floridi, *Information, Ethics, Its Nature and Scope*, 36 SIGCAS COMPUTERS & SOCIETY 3, (Sep. 2006); Luciano Floridi, *Informational, Privacy and Its Ontological Interpretation* 36 SIGCAS COMPUTERS & SOCIETY 3, (Sept. 2006).

³⁵ James H. Moor, *Towards a Theory of Privacy in the Information Age*, COMPUTERS & SOCIETY, 27-32 (Sept. 1997).

³⁶ Herman T. Tavani, & James H. Moor, *Privacy Protection, Control of Information, and Privacy-Enhancing Technologies*, COMPUTERS & SOCIETY, at 6-11 (Mar. 2001).

³⁷ See generally Raymond Wacks, *The Protection of Privacy*, in MODERN LEGAL STUDIES (J.B.W.B. McAuslan, W.R. Cornish, T.C. Daintith, R.P. Grime, J.D. McClean, & C. Palley eds., 1980); RAYMOND WACKS, PERSONAL INFORMATION: PRIVACY AND THE LAW (1989).

Moreham has done sterling work in outlining what privacy effectively means with regard to our individual selves, both in the common law³⁸ and in European human rights jurisprudence.³⁹

Additionally, other authors on privacy have outlined notions of personal rights that account, in addition, for bodily privacy, spatial privacy, and decisional privacy.⁴⁰ Beate Rössler discusses “three dimensions of privacy” in her work *The Value of Privacy*, outlining “decisional privacy,” “informational privacy,” and “local privacy.”⁴¹ Kendall Thomas outlines another three dimensional privacy concept: “bodily privacy,” “spatial privacy,” and, like Rössler, “decisional privacy.”⁴² We can equate Rössler’s “local privacy” to both of Thomas’ “spatial” and “bodily” privacy aspects, while Raymond Wacks has written extensively on “informational privacy,” as have many others.⁴³

Even this extremely brief survey leaves us with a workable “dimension” model that is: (a) based on *action* (the preservation or use of self-determination under the law); and (b) split into four component parts that are contemporaneously linked: decisional privacy, bodily privacy, spatial privacy, and informational privacy. This is a privacy typology devised by the author of this piece.

So, we must turn to why these four key terms represent important ideas, why it is useful to address them, and indeed, conceive of them in a certain order, namely: (i) *bodily*, (ii) *spatial*, (iii) *decisional* and (iv) *informational* privacy. This

³⁸ Nicole Moreham *Privacy in English Common Law: A Doctrinal and Theoretical Analysis*, 121 L.Q. R. 628 (2005).

³⁹ Nicole Moreham, *The Right to Respect for Private Life in the European Convention on Human Rights: A Re-examination*, 1 EUR. HUM. RTS. L. REV. 44-79 (2008).

⁴⁰ See Jeffery L. Johnson, *A Theory of the Nature and Value of Privacy*, PUBLIC AFFAIRS QUARTERLY, Vol 6, No. 3, 271-88 (1992); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009); Helen Nissenbaum, *Privacy As Contextual Integrity*, 79 WASH. L. REV. 119, 120 (2004); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784-85(1989); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101 (2008); DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR AND PRIVACY ON THE INTERNET (2007) Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006); and Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992).

⁴¹ See generally BEATE RÖSSLER, THE VALUE OF PRIVACY, (ed., 2005).

⁴² See generally Thomas & Walport, *supra* note 14, at 31.

⁴³ See generally Wacks, *supra* note 37.

model of personal privacy might be termed 'foursquare' privacy.

It is easiest to think of bodily privacy as the inner shell in a layered structure of personal privacy, or rather, layered multiple personal privacies. Bodily privacy is for the author of this piece dependent on the idea of personal bodily sanctity and the integrity of the person as a vehicle for a rational actor.

Spatial privacy is the next layer of personal privacy in our layered privacy concept – of course it is to be acknowledged that spatial privacy is something that changes dependant on whether an individual is in a public or private space at any one particular time. Spatial privacy is a flexible and elastic concept that varies across the multitude of human cultures.

Decisional privacy is not to be confused with autonomy – it is submitted here that true personal autonomy cannot exist except in philosophical schools of thought. As lawyers, we must accept some control of legal systems over personal action taking and decision-making; voluntariness or involuntariness here is an irrelevance. If personal autonomy is about the non-existent ideal of self-governance; decisional privacy reflects for every person the concept of having legitimate choices to choose between regarding their own actions. Decisional privacy can be likened to a sense off-limited "self-determination" in this sense.

Informational privacy is the notion of a personal link for every individual between the information that describes that person's identity and their own decisional privacy. The nature of this link, and thus the extent of every individual's personal decisional privacy, is controlled by interventions and initiatives from the panoply of electronic governance administered by public authorities.

Finding privacy principles in the literature

Pieces of legislation across the globe --and in the UK too, of course--outline concepts of privacy. Some of them even touch upon or address directly issues of informational privacy; such as the Data Protection Act 1998 in the UK.

Examples of existing privacy principles in the literature (as opposed to legal instruments) include the set of principles or values put forward by Goodenough.⁴⁴

Goodenough's 'Restatement of the Right of Identity' asserts that "[e]very real person has a limited right to control the use and value of the attributes of his or her personality and identity."⁴⁵ The crux of any such principle is the deployment of the word "limited." Governments, in restricting and (lawfully or unlawfully) infringing our rights or civil liberties, are limiting their scope and use.

The legalities of personal privacy in the public domain when it comes to reputation and confidentiality have been the subject of disputes and emerging trends in the courts; but recounting this jurisprudential progress is not the purpose of this literature review, even though literature abounds on the subject in relation to the law in the UK.⁴⁶

Identity management and privacy are intrinsically linked.⁴⁷ As our concepts of personal identity are changing so to must our concepts of personal privacy, in particular informational privacy, as well as our notions of the value of the same.⁴⁸ At the same time, an information society with transformative, multiple, electronic personal identities for individuals necessitates a new politics, and not a liberal conservative new politics,⁴⁹ but a new platform of political technologies entirely, and a platform upon which our typical concepts of a social contract and communitarian philosophies may be tested.⁵⁰

⁴⁴ See generally Oliver R. Goodenough, *Rethorising Privacy and Publicity*, 1 I.P.Q. 37-70 (1997) (In this piece, Goodenough reviews the evolution of US privacy and publicity rights, with an eye to UK law at that time.).

⁴⁵ *Id.* at 63.

⁴⁶ See Craig Callery, *John Terry: Reflections on Public Image, Sponsorship and Employment*, 2 INT'L SPORTS L. REV., 48-52 (2010).

⁴⁷ See John Harrison & Pete Bramall, *New Approaches to Identity Management and Privacy: A Guide Prepared for the Information Commissioner*, INFORMATION COMMISSIONER'S OFFICE (Dec. 2007), available at http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/identity_hp_idm_paper_for_web.pdf.

⁴⁸ See generally IAN KERR, VALERIA STEEVES & CAROLE LUCOCK, *LESSONS FROM THE IDENTITY TRAIL: ANONYMITY, PRIVACY AND IDENTITY IN A NETWORKED SOCIETY* (2009).

⁴⁹ The United Kingdom currently has a nominally centrist coalition Government comprised of the Liberal Democrat and Conservative parties.

⁵⁰ Rolf H. Weber, & Romana Weber, *Social Contract for the Internet Community?: Historical and Philosophical Theories as Basis for the Inclusion of Civil Society in Internet Governance?* SCRIPTED 6(1) (Apr. 2009), available at <http://www.law.ed.ac.uk/ahrc/script-ed/vol6-1/weber.asp>.

Article 8 of the European Convention on Human Rights and the Analysis by Nicole Moreham

Article 8 of the European Convention on Human Rights is enforceable horizontally and vertically in the United Kingdom (that is to say, between two private legal persons, as well as between an individual and the state in judicial review mechanisms) through the effect of the Human Rights Act 1998.⁵¹ Individuals can assert that their “right to ... [a] private and family life” has been unlawfully infringed because it cannot be shown that the infringement of their right in this regard was legitimate given the law relevant to the exact infringement, or proportional to the aims of the organisation responsible for the infringement, or necessary as an infringement of this right, in a democratic society.⁵²

Article 8 reads:

1. Everyone has the right to respect for his private and family life, his home and his 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.⁵³

Nicole Moreham has analysed how this qualified right has been interpreted by the European Court of Human Rights in Strasbourg. Looking at Moreham’s work, it is possible to see that she has identified around 22 distinct facets to Article 8 case law based on the expression by claimants through their assertion of their Article 8 right.⁵⁴ Each of these facets fall clearly into particular elements of our ‘foursquare’ notion of personal privacy.

⁵¹ Human Rights Act 1998, § 1, art. 8, c. 42 (U.K.).

⁵² *Id.* at sch. 1.

⁵³ *Id.*

⁵⁴ N. Moreham, 1 EUR. HUM. RTS. L. REV., 44-79 (2008).

The facets of Article 8 we can extract from Moreham's work (22 of 24 of which are concerned with a 'private life') are as follows, and are amended from Moreham's analysis:

1. Physical assault and exposure
2. Search
3. Surveillance
4. Unwanted listening
5. Unwanted watching
6. Disseminating images
7. Collecting information
8. Storing information
9. Publishing information
10. Information about one's parent's and family development
11. Recognition of gender
12. Right to retain one's own name
13. Cultural identity/ Right to live as a gypsy
14. Sexual activities
15. Euthanasia
16. Homosexual activities
17. Access to medical procedures/ Forced medical procedures
18. Sadomasochism
19. Providing information about health risks
20. The right to maintain and to end familial and other relationships
21. The right to begin or to end pregnancy
22. The right to control and know about health and medical interventions
23. Protection of family life/ Development of relationships
24. Protection of personal correspondence

But while Article 8 of the European Convention on Human Rights offers up a broadly applicable right to a private life, as these facets shown by Moreham identify readily, Article 8 is constrained in that application by the vagaries of judicial narrative. UK courts must follow, by their own reasoning, the principle of comity – that is, respecting the decisions of UK public authorities wherever possible, given that the powers of UK public authorities tend to stem from statute, and carry the weight of parliamentary sovereignty.

This author would call this a set or fixed legal narrative, and failed claims in the UK judicial review system that are based upon an alleged unlawful infringement of Article 8 are failed fixed legal narratives of a sort. This author would offer up as evidence the kind of factual distinction that occurs between the case of *R (On the application of L) v Commissioner of the Police of the Metropolis* and the case of *R (A) v B* [2010] EWHC 2361.

In the former, the alleged unlawful sharing of sensitive personal information had occurred prior to the claim by L being made. In the latter case, A was able to make a claim for judicial review before the disclosure of his sensitive personal information, and won a declaration, as a kind of remedy, that any such disclosure would be unlawful.

The similarity of the facts of the two cases, thematically speaking, are both centred around what this author would call the criminalisation of innocence rather than strict guilt, and the notion of both personal privacy and of a fair trial. But the similarities of the facts end in relation to narrative; in *L*, comity is respected since the actions of information sharing, though they infringe privacy rights for L, are ratified by the UK Supreme Court in retrospect; but as the European Court of Human Rights has shown in case like *S & Marper v UK*, the Strasbourg court itself is no great respecter of comity between the UK courts and UK public policy.

In *R (A) v B*, comity is not an issue – the claim by A comes at a point in the narrative, before A's privacy rights are actually infringed, and so the High Court in that case has carte blanche to intervene with a declaration, an uncontroversial remedy of sorts.

What this author would suggest for reform, and tries to outline theoretically here in this article, is a constitutionalised protection of privacy rights from a damaging, fixed common-law legal narrative based on action, the intervention of comity and the unsuitability of retrospective remedies for human rights infringements.

Parliamentary Sovereignty as the Foundation of a Legal Architecture

Parliament in the United Kingdom can strip human rights away from individuals through the creation of clear and unambiguous legislative provisions. This variant of Parliamentary sovereignty is something that Costas Douzinas has described as a fetish,⁵⁵ but I feel it is something that can be harnessed to divert a narrative of intrusions into personal privacy by the State. We must distinguish between the

⁵⁵ See Costas Douzinas, *Athens Revolting: Three Meditations on Sovereignty and One On Its (Possible) Dismantlement*, LAW CRITIQUE (Jul. 24, 2010), available at <http://www.springerlink.com/content/qm4v850847223014/fulltext.pdf>.

pureness of Parliament and the Machiavellian ethos of the State. Žižek has noted that this separation occurs in many widespread political philosophies, including Chinese Legalism.⁵⁶ Parliamentary sovereignty in contemporary Britain is something that accords with what Costas Douzinas has written about. Douzinas refers to an amalgam of ‘violence/law’ as encompassing intrusion into rights (including privacy), as is explored below.

Lord Hoffmann in *R v. Secretary of State for the Home Department (Ex parte Simms)* said:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.⁵⁷

Subsequently, in *HMAHM Treasury v. Ahmed and Others*, Lord Brown deemed this the “*Simms* principle.”⁵⁸

⁵⁶ SLAVOJ ŽIŽEK, LIVING IN THE END TIMES 11-15 (2010).

⁵⁷ *R v. Secretary of State for the Home Department*, (2000) 2 A.C. 115 (H.L.) at 131.

⁵⁸ *HM Treasury v. Ahmed and Others*, [2010 UKSC 2 ¶ 193].

The failings of the UK approach in enforcing privacy are concerned with a lack of normative consistency in privacy-related UK jurisprudence, since the remedies method⁵⁹ depends on not only a successful action by a complainant, but also on an individual's ability to initiate that action with some chance of success, or initiate an action at all.

For example, when enforcing the right to a private or family life in the UK, courts depend upon the status of an individual as a "victim"⁶⁰ – but this is not possible when that individual is a victim of infringement, where the victim's rights are related to overriding "political questions."⁶¹ Ultimately, this barrier for victims is Parliamentary sovereignty rearing its noble head once more.⁶²

Informational Privacy, E-governance, and *S & Marper v. UK*

Roberto Lattanzi articulates actions to restore or protect individual informational privacy as following a principle of *habeas data*, as opposed to *habeas corpus*.⁶³ The European Court of Human Rights (Eur. Ct. H. R.) Article 8 case of *S & Marper v. UK*,⁶⁴ is possibly a guide for the increasing future recognition of informational privacy. The outcome of this case shows that jurisprudential inroads into governance in the name of privacy are possible even without a fully-developed concept of governance-model privacy in place.

⁵⁹ See Normann Witzleb *Justifying Gain-Based Remedies for Invasions of Privacy* 29(2) O.J.L.S. STUD 325 (2009) (exploring the "remedies" method as one where breach of confidence is relied upon against the wrongful publication of private information).

⁶⁰ Human Rights Act 1998, *supra* note 51.

⁶¹ Paul Daly, *Justiciability and the "Political Question" Doctrine*, PUB. L. 160-178, (Jan. 2010).

⁶² See Richard Buxton, *Private Life and the English Judges*, 29 J. OXFORD J. LEGAL STUD. 413 (2009) (pointing out that many of the inconsistencies in judgments of this sort are due to the personalities of the judges as well as their views of social priorities).

⁶³ See generally Roberto Lattanzi Garante, *Protecting Health Care Data: From Medical to Personal Data Protection. Solution Found?*, a chapter from Jean Herveg, *The Protection of Medical Data: Challenges of the 21st Century*, (Anthmis, ed., 1st ed. 2008).

⁶⁴ *S & Marper v. United Kingdom*, [2007] ECHR 110; See generally Kate Beattie, *S and Marper v. UK: Privacy DNAUK: Privacy DNA and Crime Prevention*, 1 EUR. HUM. RTS. L. REV. 229 (2009) (for an excellent overview of the issues in the case).

What the author of this piece suggests is that the UK currently lacks what Rössler identifies as “the sorts of democratically delegated, state control[s] that people (must be able to) rely upon for the protection of their informational privacy.”⁶⁵ *S & Marper* is an example of how personal privacy issues can affect potentially millions of individual citizens through the operation of flawed, illegitimate e-governance systems. These issues will continue to effect personal privacy rights despite supposed amelioratory legal reforms through the operation of a national criminal DNA database in the Crime and Security Act of 2010.⁶⁶

Legal Narratology

Posner⁶⁷ coined the term “legal narratology” and defined it as the study of legal narratives using literary and critical theories.⁶⁸ He noted that “Judicial opinions usually have a story element, the narration of the facts of the case that opens most opinions. “Some judges try to cast the whole opinion as the story of the parties’ dispute, using chronology rather than a logical or analytical structure to organize the opinion...”⁶⁹

I would like to proffer two examples here of Posner’s meaning. First, Lord Justice Ward in *Morgue* begins with a narrative that is couched in an almost mythic style:

This is a case about bats and badgers, Beeching and bus-ways. In 1969 Lord Beeching caused the closure of the 128 year old railway line between Fareham and Gosport in Hampshire. Since then it has become overgrown with trees, shrubs and other vegetation. Bats and badgers have moved in. Now Hampshire County Council has granted Transport for South Hampshire planning permission for a bus route along the old track. A local resident, Mrs Vivienne Morge, challenges that permission asserting that it will disturb the bats and badgers and have a serious adverse impact on the environment. His Honour

⁶⁵ Rössler, *supra* note 14, at 118.

⁶⁶ Crime and Security Act 2010, c. 17, §23 (U.K.).

⁶⁷ Richard A. Posner is currently a judge on the U.S. Court of Appeals for the Seventh Circuit and the author of over 40 books on jurisprudence, legal philosophy, and other topics.

⁶⁸ Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737 (1997).

⁶⁹ *Id.* at 739.

Judge Bidder Q.C., sitting as a Deputy High Court Judge of the Queen's Bench Division, dismissed her claim for judicial review but Sullivan L.J. has given her permission to appeal.⁷⁰

Ward LJ's tone here is slightly mocking, in an acknowledgement that this may not be a fascinating tale for those actors outside the conduct of the narrative, or case itself. But these scene-setting, mythic narratives from the judiciary can herald much more dramatic cases. Second, and well-known to some, is the passage by Lord Denning⁷¹ in *Hinz*,⁷² where he added drama to a sad incident that merited it:

It happened on April 19, 1964. It was bluebell time in Kent. Mr. and Mrs. Hinz had been married some 10 years, and they had four children, all aged nine and under. The youngest was one. Mrs. Hinz was a remarkable woman. In addition to her own four, she was foster-mother to four other children. To add to it, she was two months pregnant with her fifth child.

... On this day they drove out in a Bedford Dormobile van from Tonbridge to Canvey Island. They took all eight children with them. As they were coming back they turned into a lay-by at Thurnham to have a picnic tea. The husband, Mr. Hinz, was at the back of the Dormobile making the tea. Mrs. Hinz had taken Stephanie, her third child, aged three, across the road to pick bluebells on the opposite side. There came along a Jaguar car driven by Mr. Berry, out of control. A tyre had burst. The Jaguar rushed into this lay-by and crashed into Mr. Hinz and the children. Mr. Hinz was frightfully injured and died a little later. Nearly all the children were hurt. Blood was streaming from their heads. Mrs. Hinz, hearing the crash, turned round and saw this disaster. She ran across the road and did all she could. Her husband was beyond recall. But the children recovered.⁷³

⁷⁰ *Morge v. Hampshire County Council*, [2010] EWCA Civ 608.

⁷¹ Thanks go to my colleague Chris Poole for alerting me to the narrative from Denning in this case.

⁷² *Hinz v. Berry* [1970] 2 Q.B. 40. (UK).

⁷³ *Id.* at 42.

These legal narratives, as cases, need not end well for either claimant or defendant. Indeed, the adversarial nature of English common law ensures that there must be a winner and a loser in each narrative. It is easy to see how these mythic case narratives thus arise. Problems for our legal conscience necessarily arise when we observe the inequalities in the narratives that deal with the cases of individuals as claimants against the State, perhaps as judicial review cases in our body of common law. Political values will appear to trump the rights asserted by individuals (particularly in cases concerning privacy and other civil liberties) as the meta-narrative of law as sovereignty asserts itself in supremacy. The impossible task of combining legality with human rights is an attempt to assert a supra-narrative, and create a different story. The difficulties of this can be seen in the way Costas Douzinas outlines the relationship between State power and law, and *either* democracy, or resistance.⁷⁴

Privacy as Resistance to Intrusion given Law as Violence

In his book *Human Rights and Empire*, Costas Douzinas formulated seven “theses on the relationship between violence and normativity” that result in a concept of the “amalgam of violence/law.”⁷⁵

These read:

1. The conflict between violence and law is more apparent than real. It should be replaced with an examination of the amalgam violence/law, in which violence is placed at the service of law and creates law while law both uses and begets violence.
2. State violence protects dominant interests and the established balance of power, but it is always exercised in the name of ideal ends (even if highly abstract and general such as God, Nation, Law, Peace or Humanity). The violence sustaining the structure of domination is that of means towards high ends. This is the ideological process *par excellence*.

⁷⁴ See COSTAS DOUZINAS, *HUMAN RIGHTS AND EMPIRE* (2007).

⁷⁵ *Id.* at 268.

3. All force leads to counter-force, all violence to counter-violence, all systems of domination create resistances.
4. The job of ideology is to turn the violence of the dominant powers into an exercise of legitimate force and to present all resisting counter-force as violence, criminality, brutality. In the dialectic between violence and counter-violence, state action reverses the causal and chronological sequence and presents itself as countering or pre-empting an original (social, political) violence. Social or political violence is evil, it pre-dates and leads to the creation of state counter-violence in response.
5. The principle of state violence is pre-emptive action against evil violence in the service of higher normative ends.
6. Systems of domination are supported by an organisation of violence, which coerces, criminalises and disposes of those who resist it or are surplus to its requirements. State or 'objective' violence normatively justified triggers extreme forms of 'subjective' violence, which idealises hatred and attempts to cleanse self and society from all evidence of otherness . . .
7. The invocation of morality serves the perpetuation of systems of domination.

As long as there is domination, as long as violence is used to defend it, there will be resistance and counter-violence, Moralising, criminalising or outlawing counter-violence freezes the current balance of power and awards perpetual (moral as well as material) supremacy to the dominant forces.⁷⁶

These seven theses can be adapted into an 'amalgam' of 'intrusion/law' when it comes to examining the mechanisms of intrusion by the State into aspects of personal 'foursquare'

⁷⁶ *Id.*

privacy. The State controls the array of decisions available to individuals who assert those decisions, and can increase the array of private decisions available to them only through successful narratives of resistance.

Narratives of resistance, or legal claims that can triumph against comity, public policy considerations and political questions, require a system of legal architectures, as this author has already noted here, that would give “constitutionalised protection of privacy rights from a damaging, fixed common-law legal narrative based on action, the intervention of comity and the unsuitability of retrospective remedies for human rights infringements.”

The work of William B. Yeats shows dramatic narrative parallels with that of Costas Douzinas in *Human Rights and Empire*. We can examine themes of resistance and decision in three short overviews of some of Yeats’s most well-known pieces of work. I do not claim to be a Yeats scholar, but some conclusions about his work make themselves readily apparent.

One idea that leaps out from these two pieces of writing are that constitutionality and resistance are mutually dependent, in that with well-protected constitutional rights, individuals have little need for resistance, because the actions of government are constrained within fixed formalised limits based on constitutional supra-rules. What Yeats can be seen to do is highlight in his work the necessity of protection the individual actor from the machinations and cruelties of an unbound State, as well as protect him from the entropy of a politic in lethargy.

Yeats’ Poetry; and Decisional Privacy as Humility

W.B. Yeats wrote the poem *He Wishes For The Cloths Of Heaven*, in what appears perhaps to be the most bittersweet counterpoint to some of his more strident writing—it is a poem about trust, longing, and humility; and perhaps about love.⁷⁷ The lines of the poem read:

⁷⁷ WILLIAM B. YEATS, *He Wishes for the Cloths of Heaven*, in THE VARIORUM EDITION OF THE COLLECTED POEMS OF W.B. YEATS, 176 (Allt & Alspach, eds., Macmillan: London, 2d ed, 1978) (1968).

Had I the heavens' embroidered cloths,
 Enwrought with golden and silver light,
 The blue and the dim and the dark cloths
 Of night and light and the half-light,
 I would spread the cloths under your feet:
 But I, being poor, have only my dreams;
 I have spread my dreams under your feet;
 Tread softly because you tread on my dreams.⁷⁸

In more contemporary popular culture, this poem is referenced in the dialogue between two characters in the film *Equilibrium*.⁷⁹ Sean Bean's character, Errol Partridge, is a renegade law enforcer who quotes the lines to Christian Bale's character, John Preston. Preston shoots Partridge dead in an act of oppression—despite the humility and surrender offered in the above quoted lines by Yeats.

The two characters in the scene are superficially good friends and colleagues fulfilling a role of oppression and violence in a society where emotions, and all cultural expressions of emotions, have become repressed through force, and force of habit. The character Partridge is an active member of what passes for a resistance organisation because he is motivated to take action by the repressive excesses of those in power. People in this society are required, through the threat of force, to take drugs to blunt their emotional response to cultural stimuli. In the film, we see Leonardo Da Vinci's *Mona Lisa* being burnt because it throws up too many challenging emotions as are cognisable work of art from a previous, emotionally-imbued time.

With regard to the (lawful) killing of individuals by the State who dare to collect and enjoy cultural material, the lethal violence employed by law enforcers in this society has passed beyond the point of being arbitrary and has become oppressive but also a *raison d'être*⁸⁰ for the State.

But just as Douzinas postulates that resistance must be created by violence (and presumably intrusions into privacy), perpetrated and condoned by the State, so we can see in a particular work by Yeats that when humility and passive

⁷⁸ *Id.*

⁷⁹ *EQUILIBRIUM* (Miramax Films 2002).

⁸⁰ French term meaning: reason for existence.

decisional privacies are exhausted, individuals living under the sovereignty of the State will take up violence or resistance (and perhaps legal action as resistance) to broaden and reinforce their decisional privacy once more.

Yeats' Drama; and Decisional Privacy as Resistance

Yeats could be said, through his poetry, to regard the law as a poor instrument in its naivety, noting the vulnerability of the legal system and the course of (even nationalist) staid politics to the certainty of expressive and forceful (nationalist) political action and protest. In his poem *Nineteen Hundred And Nineteen* he wrote:

[W]e too had many pretty toys when young:
A law indifferent to blame or praise,
To bribe or threat; habits that made old wrong
Melt down, as it were wax in the sun's rays;
Public opinion ripening for so long
We thought it would outlive all future days
O what fine thought we had because we thought
That the worst rogues and rascals had died out.⁸¹

Whilst much of Yeats' poetry shows wistful regard for emotions of love, nostalgia and peace, a famous piece of literary drama he co-wrote is an emblem of violent resistance and Irish nationalism. Moving, but forcefully so, the short play *Cathleen Ni Houlihan* (1902)⁸² asks us to empathise with the morals and aspirations of a resistance fighter and the oppressed in a country perceived to be lacking in national(ist) "self-determination".

Cathleen Ni Houlihan, the 'Old Woman' in the play, is the embodiment of Ireland itself, or rather, Irish nationalist longing for freedom from oppression—oppression caused by the British 'strangers in the house' that is Ireland.⁸³ The Old Woman tells us that "sometimes [her] feet are tired and [her] hands are quiet, but there is no quiet in [her] heart."⁸⁴ The play

⁸¹ W.B. YEATS, *Nineteen Hundred and Nineteen*, THE VARIORUM EDITION OF THE POEMS OF W.B. YEATS 428 (Allt & Alspach, eds., Macmillan 1968) in COLLECTED POEMS OF W.B. YEATS, 233 (Macmillan: London, 2d ed 1978) (1968).

⁸² See <http://cathleen-ni-houlihan.blogspot.com/> PLAYS OF W.B. YEATS 49-57 (Macmillan Co. 1953).

⁸³ *Id.* at 53.

⁸⁴ *Id.*

displays notions of agrarian-linked nationalism, as the Old Woman talks of land that was taken from her, and the little or nothing that has been done by supposed ‘friends’ of hers to return it to her.⁸⁵ The Old Woman says: “If anyone would give me help, he must give me himself, he must give me all.”⁸⁶ The Old Woman declares that her ‘friends’ are not to be frustrated in their longer resistance: “If they are put down to-day, they will get the upper hand to-morrow.”⁸⁷

By the end of the short play, after the Old Woman has convinced a young man to take up resistance on her behalf, we are told that she has been transformed from an Old Woman into a ‘young girl’ who has “the walk of a queen.”⁸⁸ In a link with critical theory, Žižek has noted that citizenry will exclaim as their sovereign in person passes them, since before them and their very eyes their ‘state is walking’⁸⁹ – the end of *Cathleen Ni Houlihan* shows us that nationalists and those resisting sovereign power may just be searching out one sovereign to put in place of another, thus dooming their narrative action.⁹⁰

Legal Architecture: avoiding the need for resistance and asserting ‘foursquare’ notions of privacy

This author wishes to place an emphasis on constructing legal architecture in building edifices of privacy rights rather than exposing claimants in privacy cases to the overwhelming narrative of the sovereign political interest is needed.

In some way this author is remaining with the notion that we could construct an edifice of supra- and meta-rules that give “constitutionalised protection of privacy rights from a damaging, fixed common-law legal narrative based on action, the intervention of comity and the unsuitability of retrospective remedies for human rights infringements”, as outlined above.

⁸⁵ *Id.* at 53-55.

⁸⁶ *Id.* at 55.

⁸⁷ *Id.*

⁸⁸ *Id.* at 57.

⁸⁹ SLAVOJ ŽIŽEK, IN DEFENSE OF LOST CAUSES, 133 (2008).

⁹⁰ See <http://cathleen-ni-houlihan.blogspot.com/> (for a reference in a play about the French coming to Ireland as the replacement of sovereigns).

Our first step in outlining how this edifice might be constructed is to accept that sovereignty is not often, or rarely cross-cultural—State sovereignty often recoils in its exercise of power as law from the notion of the spread of ideas. This leads to the conclusion that we must draw on cross-cultural notions of privacy in constructing an architectural epistemology of privacy laws.

Different societies have different concepts of privacy needs and values. This is evidenced in different physical architectural styles when it comes to building and construction. It has been suggested here that physical architectural models can be used to inspire legislative architectural models. This author would like to put forward a particular original thesis: the traditional architecture of the Arabic *Mashrabiyya* or Indian *Jali* can be seen as a model for potential universal privacy legislation that the UK is currently lacking—providing the substantive instrumental content for a move toward ‘constitutional privacy’ for better rights-observant electronic governance, for example, in health, social care and criminal justice.

As for the *mashrabiyya* or *jali*: these items of architecture are screenwalls that are robust yet porous to the light and wind passing through spaces. In such a way, constitutional privacy protection based on a screenwall type model would afford inviolable rights protected by constitutional supra-rules with respect to aspects of (informational) privacy, in this context.

It is suggested here that a “*Mashrabiyyaa* model” or a fully-developed *Jali-Mashrabiyya-Temenos* Model (“JMT Model”) of constitutional privacy might help the courts and legislators better understand and build upon the multi-faceted complicity of Article 8 ECHR and the “right to a private and family life.”⁹¹ In the words of Moreham, Article 8 ECHR strives to address “freedom from interference with physical and psychological integrity”, “the collection and disclosure of information”, the “protection of one’s living environment”, and personal “identity”, as well as a concept of “autonomy” (which I would supplant with the notion of “decisional privacy”).⁹²

⁹¹ See Moreham, *supra* note 39

⁹² *Id.* at 44, 49.

The Jali-Mashrabiyya-Temenos Model (JMT) of Architectural Cultural Privacy Law

The enforcement of privacy rights, or the protection of privacy “sanctities” is what Charles Fried calls the “concrete recognition of privacy.”⁹³

It will take a shift away from action-based, or will-based models of privacy to truly achieve this “concrete recognition”, since these models of privacy are vulnerable to the fixed narratives of comity and retrospective public policy considerations as discussed above.

This means we must try and disrupt or divert the narrative of intrusions into privacy by the State by building an architectural legal edifice of sorts that is capable of appropriately protecting personal privacy, as defined by our broad “foursquare” notion of that politically-limited ideal. Constitutional privacy, or governance-model privacy, looks at the notion of privacy protection as operating a “screenwall” between the individuals and intrusive aspects of the governance of the State.

In Arabic and Indian physical rather than legislative architecture;

such screenwalls include the Indian *jali* or the Arabic [*mashrabiyya*]. A *jali* is a perforated stone screen, while a *mashrabiyya* is a projecting bay window articulated by wood latticework. Visual connection from the interior to the exterior is provided, while visual penetration from the exterior to the interior is prevented, offering privacy to inhabitants. Such screens enable ventilation, provide shading and modulate the luminous environment of the interior.⁹⁴

⁹³ CHARLES FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE 144 (Harvard University Press 1970).

⁹⁴ Michael Hensel, *Performance-Oriented Design Precursors and Potentials*, 78 ARCHITECTURAL DESIGN 2, 48, 50 (2008).

A *Mashrabiyya* model of constitutional privacy would see a better protection of the individual's privacy from the State by virtue of enhancing not the right of an individual to move, think, and live unimpeded—autonomy—but the right not to be personally transgressed upon by the State itself. The *Mashrabiyya* sees greater respect for the personal “interior” but still allows for participation of the individual through sight of the “exterior.” State agencies and functions can be invited to transgress inside the “interior” through individual consent, but can do so without consent only with greater difficulty, and respect for the risk of harm that might befall the individual “inside.” We cannot be blind to the value of cross-cultural models of privacy rights if only because privacy has such cross-cultural value.

The ancient Greek *temenos* was a cleared, open and sacred space, reserved for private religious activities, and yet also a meeting place for citizens on a temple acropolis.⁹⁵

We can suggest that the concepts of the *Jali*, the *Mashrabiyya* and the *temenos* lend us the characteristics of the ‘hard-porous’ *Jali* protection of privacy, the soft-porous protection of privacy by the *Mashrabiyya*, and the ‘open but sensitive’ categorisation of certain aspects of the relationship between personal privacy and the sovereign State. (See Fig. 1)

⁹⁵ See generally BIRGITTA BERGQUIST, *THE ARCHAIC GREEK TEMENOS: A STUDY OF STRUCTURE AND FUNCTION* (1967).

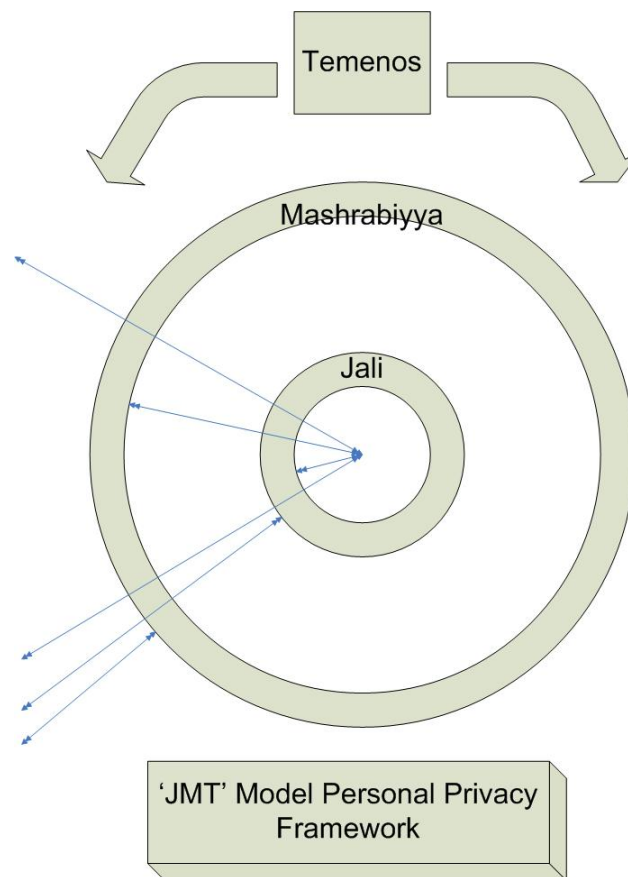


Fig. 1

The “JMT ” model of privacy protection (from State intrusions) gives us three levels of protection that afford a “core” protection from that intrusion and a “sanctity” of decisional privacies of the utmost importance.

Jali-protected decisional privacy might include the right to speak in one’s own defence in an aspect of a fair trial, for example, which would not be limited in any circumstances. *Jali*-protected informational privacy rights would never be qualified or limited, in law, in political constitution or in operation. An example of a core *jali*-protected, constitutionalised and unqualified privacy right, drawn from the Constitution of the Portuguese Republic revised most recently in 2005, might be, “Article 35(5): The allocation of a single national number to any citizen shall be prohibited.”⁹⁶

⁹⁶ See CONST. OF THE PORT. REP., art.35(5) (7th Rev.,2005), available at http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf.

Mashrabiyya-protected decisional privacy might protect, in turn, freedom of religion (limited by the caveat that the promotion of religious intolerance is intolerable). In relation to informational privacy, and to give an example from the same source as above, a qualified right to the protection of sensitive personal information of various kinds in the Portuguese Constitution runs:

Article 35(3): Computers shall not be used to treat data concerning philosophical or political convictions, party or trade union affiliations, religious beliefs, private life or ethnic origins, save with the express consent of the data subject, with authorisation provided for by law and with guarantees of non-discrimination, or for the purpose of processing statistical data that cannot be individually identified.⁹⁷

Temenos-protected decisional privacies would include the full array of socio-economic rights and decisions relevant to education, social welfare, and healthcare, that are susceptible to shifting political policy, and which are not as central to the ultimate protection of our core decisional privacies. They might not be politically sensitive enough, or central enough to human rights concepts founded on dignity to warrant full and express constitutional protection in our “JMT Model” edifice of privacy rights, and instead could be protected where appropriate through a balancing exercise undertaken by the courts, as they do with all privacy rights in the UK today.

The mechanisms of protection within a legislative supra-rule or single legal instrument in the form of an Act of Parliament in the UK would harness the highest constitutional principles of the legal system concerned with the notion in the UK that State sovereignty, through the *Simms* principle, would ensure that in the JMT statute there would be manifested a legal instrument that would require the categorisation of each intrusion into personal privacy into one of the three JMT strata. To set aside all three JMT strata would require the clear and direct amendment of the JMT statute, which would prove politically costly.

⁹⁷ *Id.* at art. 35(3).

Indeed, the political costs of undermining the architectural edifice of a JMT model privacy statute in the UK would be such a heavy cost that it would far outweigh the cost of the State as sovereign accepting greater protection for the citizenry of the UK from a particular intrusion sanctioned by the sovereign itself than might have been politically desirable by that sovereign entity, even if it were the Parliament as sovereign in the UK.

Conclusions

In this article this author has set out Parliamentary sovereignty as a flawed expression of legal sovereignty through democracy in the UK; but also outlined how the *Simms* principle mitigates these political flaws and corruptions. Furthermore, we can see that the *Simms* principle is a step towards a legal culture where both the judiciary and the legislature of the UK might create a semi-entrenched set of rights that build with more specificity on the extent of the Human Rights Act 1998 and Article 8 of the European Convention on Human Rights, with respect to privacy, or the right to a private life in its broader, applied sense.

From a critical legal perspective, this author has tried to suggest how legal narratology, while a valid method of interpreting the *mythos* of cases, is not beneficial when it comes to understanding how rights and social values like privacy may be protected from the worst aspects of a culture of political questions that force intrusions by lawmakers, State agents and the courts into our private lives. Better, this author feels that we build an artifice or edifice of some kind to undertake this protection, using the new (in the UK at least), more balanced *Simms* principle as a limit on Parliamentary sovereignty, thus mitigating the need for privacy to be longitudinally asserted as personal resistance. This author has been discussing the potential for a move from a narrative epistemology of laws to an architectural epistemology of laws.

The construction of an edifice of privacy rights that offers up ultimate protection of some aspects of personal privacy in UK society is not impossible, it simply depends upon whether we can conceive of the UK Parliament limiting itself using the *Simms* principle, and setting down a constitutionally entrenched statute that requires some higher threshold for repeal, amendment and revision. This privacy edifice would accord with the principles of law and architecture theory as

they are tentatively explored for the first time in this article only if it were constructed in a robust yet porous way along the lines of the “JMT Model”.

The process of constructing this edifice of privacy rights in the UK would not take much more legislative effort than the constructions of a flawed fixed narrative system of privacy rights protection has taken, and it would truly be more lasting, giving constitutionalised protection of privacy rights from a damaging, fixed common-law legal narrative based on action, the intervention of comity and the unsuitability of retrospective remedies for human rights infringements as described above.