Written submission to the Legco Home Affairs Panel

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The Limits of Privacy

Upon reading the Law Reform Commission Sub-committee's comments on intrusion it seemed to me that a fundamental problem had been overlooked. In its many years of work on various aspects of privacy the committee seemed to have lost sight of the possibility that there might be some limits to a sensible right to privacy. These might require more profound consideration than a perfunctory survey of the claims of the rights which might be supposed to conflict with privacy. This submission represents a hasty exploration of what might be called the proper limits of privacy rights.

Some human rights are absolute. They do not conflict with each other and there are no circumstances in which we would wish to see them denied. Examples are the right to life or the right not to be tortured. Other rights are not absolute. They involve potential conflicts with other rights, or with other desirable social objectives, and resolving these conflicts requires judgements and balance. Examples are the right to join a trade union or to emigrate. Clearly free speech is in the second category. Sophisticated human rights instruments recognise that some limitations on free speech are necessary, and try to state what limits are permissible, thereby also implying that others are not.

Privacy is clearly not an absolute right. Even its most enthusiastic admirers accept that there must be limits. Yet there is little agreement on what those limits are. Most drafters of legislation will try to exclude trivial cases. Most writers also accept that there must be some limits on the privacy rights of people who are already public figures, although there is a good deal of disagreement about who those people are. Apart from these observations there seems to be almost no limit to the right to privacy. This leads to some anomalous, even scandalous results, as we shall see.

How has this extreme view of the domain of privacy come about? While we may all agree that we would like our privacy respected, violations of it would not in the last analysis be regarded as among the worst things which could happen to us. Violation of privacy does not appear in Hamlet's famous list of "the heartache and the thousand natural shocks that flesh is heir to". It was not one of the legendary plagues visited on Egypt and there is no mention of it among the numerous and highly creative punishments inflicted in Dante's "Inferno". Nor does it feature in the ordeals of Job. Indeed it is an odd sort of suffering. No bones are broken, no pain is incurred, no money is lost and the victim is not generally prevented from doing anything that he or she could do before.

The legal theorists generally do not trouble themselves with the question of why privacy should be protected. They elaborate at great length on what the right consists of - the Nordic Conference of Jurists on the Right to Respect for Privacy, possibly leading the field in this proliferation, dissects it into ten sub-rights and 12 possible violations of them. The point shared by the legal formulations is that privacy is a right which attaches to individuals (variously described by different authorities as "one", "a person" or "the plaintiff") as opposed to groups or companies, and that it is a right against or from "society" or "the community". The existence of individuals as separate entities from society, with the right to participate in it as much or as little as they choose, is regarded as self-evident. Indeed this view has a long history. In the thought of Hobbes and Rousseau the individual in the "state of nature" or at the "noble savage" stage has no social life. He creates it by voluntary interaction with other individuals. Locke has a similar arrangement although it is less clear in his case that he considered this an actual historical account rather than a statement of the pattern of obligations between the individual and the state. In Thoreau's view the individual also had the right to withdraw from his community as much as he wished, so that membership was not only voluntary but subject to cancellation. This way of thinking about human life and society has been enormously fruitful and may be regarded as fundamental to the western legal and constitutional tradition. It is probably indispensable to legal theory because the law does not readily recognise groups, and when it does so it usually treats them as an exotic kind of individual. Still, it is a fundamental error to suppose that this convenient intellectual construction is necessarily an accurate description of reality. It is a useful way of explaining the law, but should not be regarded as an argument for a particular law or set of laws.

In fact there has always been an alternative view held in different forms by, for example, Burke, Kropotkin and Margaret Meade. They held that that to consider the individual in isolation from society was meaningless, that man was a social creature and that individualism was itself a social construction, in some accounts arising as late as the 19th century. Happily this ancient controversy is no longer a matter in which we must rely on speculation or personal preferences. The question has now become amenable to scientific study and we can make some points about it with confidence. We shall now take a necessarily cursory look at the emerging facts.

Human beings are primates and like all primates are naturally social. They will form social organisations without prompting if not supplied with an existing one1. The human brain is an adapted computational2 organ equipped with routines to support such important social qualities as fairness3, language4, gossip5 and perhaps warfare.6 In order to save processing work, routines which have worked well in the past become easier (i.e they are memorised7) and acquire emotional associations8, as of course in the opposite sense do unpleasant experiences. In evolutionary terms language and communication are not primarily "for" the exchange of practical information. They evolved for exchanges of personal information, and these were needed for the internal administration of large social groupings. Most of that information comprises what we would now loosely call gossip. It is relevant to the relative status and fitness

for reproduction of other people. This situation favours the evolution of two competing abilities: the ability to conceal information about oneself and the ability to see through the concealments erected by other people. Both these traits reinforce each other. The better people become at concealment, the more valuable become the rewards of successful curiosity, and vice versa. The origin of the individual meanwhile seems to be discernible at about the dawn of recorded history, some 3,000 years ago.9 So we have mankind as an essentially social animal with two hereditary traits, both equally natural and indeed respectable, which we may call neutrally curiosity and concealment. One of these is known to its admirers as "the people's right to know" and the other to its admirers as "the right to privacy". Less flattering labels are also available. We can call inquisitiveness "prurient curiosity" and brand the idea that people seek to conceal true facts about themselves "dishonesty". But whether we approve or disapprove, these are in essence two sides of the same coin. Where we are offered derogatory language about one instinct and a flattering label for the other we must suppose that rhetoric is replacing thought.
Unfortunately it is almost inevitable that a sub-committee on privacy should take a one-sided view of this situation. They are invited to look at privacy, not at the virtues of publicity. Even so, the sub-committee could be considered to have taken a rather extreme view of the matter. The sub-committee's statement of why privacy is needed is contained in one quoted paragraph. This is a summary of the fuller account which occupies a whole chapter of the sub-committee's report on privacy as a tort. The summary paragraph goes:

Supporters of 'privacy', on the other hand, rely almost exclusively on rights-based arguments. Thus, in his classic exposition, Alan Westin suggests that a right of privacy is essential to protect personal autonomy, allowing us to be free from manipulation or domination by others, to permit emotional release, to afford an opportunity for self-evaluation, and to allow limited and protected communication to share confidences and to set the boundaries of mental disturbance.

Difficulties emerge at once.

They do indeed. The classic exposition may be further summarised as follows: if deprived of privacy we:
* Lose our personal autonomy
* Become subject to manipulation by others
* Lack emotional release
* Lack opportunities for self-evaluation
* Cannot share confidences and
* Go mad.

This is a formidable array of difficulties but they seem to owe a great deal to the imagination. People do in fact manage to live in circumstances of very limited privacy: in warships, hospitals, prisons, prisoner-of-war camps, boarding schools and

monastic institutions run by the more ascetic religious orders. Many Hong Kong people endure what Mr Westin would probably consider disastrously low levels of privacy, living in single-room flats with two or three generations of the family, and the front door left open onto a communal corridor for ventilation purposes. Yet this does not produce the pathological responses predicted. Or to put it another way those countries which offer many of their citizens high levels of physical privacy do not seem to enjoy the conspicuous advantages in emotional and mental health which you might expect from the summary above. Even if it should be shown that chronic and extreme loss of privacy did produce the effects claimed above, this would be a long way from proving that lesser ill-effects were experienced from less dramatic or long-lasting episodes of deprivation, like the transient episodes of media intrusion cited in the sub-committee's report. It is common for things which are fatal in large doses to be indifferent, or even beneficial, in their effects in small ones. I notice that in not one of the sub-committee's examples of media intrusion is there the slightest suggestion that the alleged victim was harmed, still less that he or she complained. The harm is assumed to be self-evident. Is it?

Historically human beings appear to have been able to adjust themselves to considerable variations in the amount of privacy in their living arrangements. Privacy has in most societies been a "positional good", meaning that it was enjoyed by the rich, the high status and the male, while being accorded little if at all to the poor, the lower-class or to women. So at one extreme we have emperors who could lead lives of unbridled depravity while being worshipped as gods by many of their subjects, and on the other very large numbers of people with no discernible privacy rights at all. Most people most of the time were peasants sharing accommodation with large numbers of family members, in villages where everyone knew everyone else's business. Indeed in the 19th century there was a popular theory among academics that people moving from the intensely social and integrated community environment of the rural village to an isolated existence in big cities would become "neurasthenic". It is easy to underestimate the adaptability of people. It seems that if there is a minimum standard of privacy below which human beings experience psychic harm then that standard would have to be set quite low - certainly much lower than it is set by contemporary privacy enthusiasts.

The rehabilitation of gossip

I now propose to assemble a brief look at what might be called the other side of the privacy coin: the equally natural urge to seek information, to pry if you like, and to gossip. The sub-committee confines itself to a cursory examination of the arguments for freedom of the press, and in consequence comes to the conclusion that almost any coverage can be restricted except the reporting of politics and court cases. This is taking an unduly restrictive view of the human need for information, communication and exchange.

This topic has been the subject of a good deal of research which has not yet

filtered through to legal circles. For example, the general area which we might stigmatise as "gossip" is the staple subject of conversation in all places and classes:

"Our results consistently yield the same pattern: about two-thirds of conversation time is devoted to social topics. These include discussion of personal relationships, personal likes and dislikes, personal experiences, the bahaviour of other people, and similar topics. No other topic accounted for more than 10 per cent of conversation time, and most rated only two or three per cent. These included all the topics you might consider of great moment in our intellectual lives, namely politics, religion, ethics, culture and work. Even sport and leisure barely managed to rustle up a score of 10 per cent between them."10

Professor Dunbar goes on to cite similar research by Oxford psychologist Nicholas Emler,11 who came to a figure of 60-70 per cent of conversations devoted to social topics and noted that gossip "allows you to keep track of other people's reputations as well as your own." Dunbar concludes by discerning "strong support for the suggestion that language evolved to facilitate the bonding of social groups, and that it mainly achieves this aim by permitting the exchange of socially relevant information."

To this it may be objected that a level of exchange of socially relevant information which was harmless and indispensable in a Stone Age community of - say - 150 adults may be unconscionable in a modern community of 5 million. But if the modern community aspires to be a community then it must meet the instinctive expectations of one. Gossip, in fact, continues to serve social purposes when it takes the form of media content. Nobody suggests that this requires a complete absence of restrictions on the pursuit of private facts. But the comparison of different claims to protection and importance requires an honest assessment of the claims which can be made on both sides.

"It is not that a presumption in favour of individual privacy can only be defeated by showing in some specific case that invasion of this person's privacy serves a particular public interest. It is that a general norm of privacy is shaped and constrained, in the first instance and at a prior level, by an opposing general norm of social interest in knowledge. The best way to appreciate this is by thinking of journalism as print gossip."12

Archard goes on to say that it would be a mistake to "dismiss gossip out of hand for the wrong reasons" and cites three advantages for it, drawn from the anthropological literature. Gossip, he says:

* Plays a role in defining a community and maintaining its unity
* Allows the community to express, discuss and apply the values which it shares
* Demystifies the pretensions of public status by exposing the ordinary failings of the rich and famous.

Clearly there is a case to be made for the social value of gossip and personal

information.13 I do not suggest that it is an overwhelming case but as the sub-committee has overlooked it entirely their conclusions are based on totally inadequate premises.

Defences for privacy

I do not suggest for a moment that the analysis outlined above leads to the conclusion that no legal defences for privacy are appropriate. Quite the contrary. But these need to start from the point of view that the object of the exercise is to preserve a historical balance between concealment and openness. This cannot be struck by an introspective examination of whether one would personally wish to be the star of a particular story in the Apple Daily. One's personal feelings include socially determined expectations which have no right to legal fortification. Also, we all have a legitimate interest in our own privacy, but that does not mean there is a social interest in us all enjoying as much privacy as we desire. The traditional way of ensuring privacy was to do private things in private places, so there is a strong argument for banning the use of technology which will subvert this purpose, like telescopic lenses, "bugs", long-distance microphones and laser gadgets which pick up sound vibrations from window panes. I would also reject the view that telephones have become so notoriously easy to eavesdrop that people should expect their conversations to be overheard. I believe that most of us assume subconsciously that if we can hear only one person on the line there is only one person listening. Surreptitious taping of telephone conversations should be banned. It also seems most unfair that people's rights to exclude people from their surroundings should depend on whether they are owners, tenants or licencees. The discrimination in favour of proprietors is an anachronism. All these reforms, if implemented, would apply to the press as they do to everyone else.

The dangers of excess

Legal reforms are subject, no less than other social improvements, to the law of unintended consequences. They may have effects which the drafters did not intend. The difficulty of suing newspapers for libel in the US has led to eager exploration of other possible means to deter coverage. This has led to some interesting and ominous cases, some of which I have culled from a recent book14 by Bruce Sanford, an eminent First Amendment specialist.

* CBS taped part of a search of the flat of a suspect who later pleaded guilty to credit card fraud. He sued the station for violation of privacy; the station settled out of court. The Secret Service, who organised both the search and the coverage, fought the case and lost.
* A couple sued for invasion of privacy newspapers and television reporters who visited their farm to photograph dead cattle, the subject of a police investigation. The couple lost.
* A New York judge ruled that a defendant could sue the police for taking him outside

the police station where he could be photographed by the media.

The case of Mark Robinson needs to be quoted at greater length:
"He has sued four Denver television stations, both daily newspapers and various reporters for trespassing into his private residence... Robinson enticed 22 teenaged girls, some as young as 13, to his home on the pretext of employing them in a cleaning service. He would then persuade the girls to pose nude. Police had invited media cameras to accompany them on Robinson's arrest in the hope that additional victims would recognise the residence and come forward with stories of Robinson's exploitation of them. The plan worked..."
Mr Robinson is now serving a prison sentence for sexual exploitation and abuse of children. His civil case for violation of the privacy of his home continues.

The point here is not that the proposed media council will lead inevitably to rules which can be abused to protect the guilty from publicity for their crimes. After all until somebody produces a code we shall not know what the rules are. What is beyond dispute, though, is that the guilty, and even some of the innocent, will seek to use any new legislation to serve their own desires for secrecy. I have to say that some of the sub-committee's estimates of what is or is not consistent with the continued legitimate operations of newspapers seem astonishingly ill-informed. Certainly if the council tried to frame a code which would bar all the stories which the sub-committee itself cites as examples of "media intrusion" then the consequence is inevitable: Hong Kong will move overnight from having the freest press in Asia to being a marginal improvement on Myanmar and Vietnam.

The need for generosity

I always feel queasy when freedom of expression is academically dissected and laid out on a slab, because this procedure is generally followed by attempts to throw some apparently inessential part of it away. Consideration of freedom of expression should not start with the theoretical musings of philosophers; it should start with the common sense observation, repeated times without number, that once this freedom has been curtailed others will soon follow. When considering the health of the Hong Kong press, we need to keep track of the overall climate as well as the details of particular restrictions and deficiencies. Already the most common complaint about Hong Kong newspapers is that they do not make full use of the freedoms available to them. This deficiency will not be remedied by the introduction of a whole new body of law with a special court to administer it. Of course if you have freedom it will be abused. But a mature and educated society ought to be able to recognise that the dangers of too much freedom are much less than the dangers of too little. Nobody can strike an exact and perfect balance between the requirements of free speech and those of reputation, justice, morality or privacy. Knowing that such perfection is not possible, we should try to err on the side of generosity.

We should consider also that the members of a community need to know what is

happening in that community, and that this necessary knowledge extends much wider than the bare practicalities of facts which directly affect them or their political choices. People want to know what is happening to other people, including the great human events of birth, love and death, not because they are idly curious but because, as the great poet Donne put it, "no man is an island, entire of itself; every man is a piece of the continent, a part of the main".15 Donne went on to say "never send to know for whom the bell tolls; it tolls for thee." We should not now seek to replace this with "never send to know for whom the bell tolls for it is none of thy business."

1 See Fukuyama "The Great Disruption"
2 See Pinker "How the Mind Works"
3 See Toomy and Cosmides "The Adapted Mind"
4 See Pinker "The Language Instinct"
5 See Dunbar "Grooming, Gossip and the Evolution and Language"
6 See Dennen and Falger (eds) "Sociobiology and conflict: Evolutionary perspectives on competition, cooperation, violence and warfare".
7 See Rose "The Making of Memory"
8 See Damassio "Descartes' Error"
9 See Jaynes "The origin of consciousness in the breakdown of the bicameral mind"
10 Dunbar, op cit, p 123.
11 See Emler: "The truth about gossip", in Social Psychology Newsletter, 27: 23-37.
12 Archard: "Privacy, the public interest and a prurient public" in Kieran, "Media Ethics" p 90.
13 See also several chapters in Goodman and Ben Ze'ev: "Good Gossip"; Gluckman: "Gossip and Scandal", in Current Anthropology 4/3 pp307-16; and Spacks: "Gossip".
14 Sanford: "Don't shoot the messenger"
15 John Donne: "Devotions" XVIII.