Towards a practical approach of privacy

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Abstract – This paper contains a dogmatic and historical categorisation of the right to privacy to afterwards provide with a generic definition of the right to privacy.

Keywords – approaches to privacy, right in rem, personality right, subjective right, negative right, public privacy.

Introduction

States have the duty to investigate crimes, but the power to police is not only limited by national legal provisions, there are also fundamental-, universal-, or human rights which need to be safeguarded.

In this paper one of these rights, the right to privacy, will be elaborated on. First a dogmatic and historical categorisation of the right to privacy will be made, to afterwards conclude with a generic definition of the right to privacy.

A categorisation of the right to privacy

Some define (the right to) privacy as the right to be let alone, others see it as a basis to create and sustain inter-personal relations, some others see it as a defensive right against any (outside) interference, yet others see the right to privacy as a way for an individual to present itself to the world at large, some people equate privacy with (sexual) autonomy and yet others would like to take all rights and freedoms (including public freedoms) and see them as a part of the right to 'privacy freedoms'.

The list of ten definitions of privacy,[1] made by a group of experts in Stockholm more than 40 years ago, was just as little exhaustive, and by now this list has only expanded. Up to now the efforts of scientists and researchers seems to have rather aided in the abstruseness of the notion of privacy than to clarify or order the existing conceptual chaos. For, most lawyers nowadays are very keen to not regard law as an abstract system of rules, regulations, and concepts, but rather as a practical means to realise specific values and ideals.

This more pragmatic approach has caused a decrease in interest in the systematic analysis of law and the system of classification of these concepts. Nevertheless the overall benefits and usefulness of classification within legal science has been neglected in recent times. It is widely accepted that the right to privacy has four characteristics,[2] in the sense that the right to privacy is a;

1. *personality right;*
2. *right in rem;*
3. *subjective right; and a*
4. *"negative right".*

Despite the fact that these four characteristics are largely uncontested, they are seldom used to clarify what the meaning of the right to privacy *is*. In the following sections each of these characteristics will be elaborated on to that purpose clarify what the right to privacy is, and why its meaning differs in different countries. At the end of each section an (expanding) generic definition of privacy will be provided.

I. Personality rights

One of the authors which had the biggest influence on the way personality rights are regarded and protected within continental Europe was Hegel. In his *Grundlinien*[3] he claims that ownership is an aspect of personal freedom and that consequently a violation of one's ownership constitutes a violation of one's personal freedom.

More than a century earlier though, in his *Two treaties*, [4] Locke postulated the exact opposite namely that a violation of one's personal freedom constitutes a violation of one's property right.

As stated Hegel's philosophy has had a profound effect on the ideas surrounding personality rights in continental Europe. Locke's philosophy has had a similar effect in the United States and the Commonwealth of Nations. The right to privacy for example, has been closely linked to property rights in the United States for many years. This link is amongst others exemplified by the specific formulation and wording of Amendment IV to Constitution of the United States;

> *The right of the people to be secure in their persons, **houses**, **papers**, and **effects**, against unreasonable searches and seizures, shall not be violated […]*

Even though personality rights and property rights are closely linked, they are for instance both rights *in rem*, there are two fundamental differences between these two kinds of rights. In the following sub-sections, next to highlighting each of these differences, it will be made clear why the right to privacy can be qualified as a personality right. This distinction is relevant because property rights are *not* fundamental rights, and some personality rights *are*. The following two fundamental differences exist between personality rights and property rights;

- Personality rights are inalienable;
- Personality right are not valuable in monetary terms;

Inalienable nature of personality rights

Alienability of a right sees to the severing of the relationship between the bearer of a right and a good, meaning that the relationship between the bearer and the good ceases to exist. Property rights, economic rights, and restricted rights can be transferred by the physical handing over of the object, by the transfer of the entitlement, or by the act of gifting. Personality rights can however not be transferred, it is for instance not possible to transfer one's copyright to a third party, whereas this is not the case with a property right. Quite the opposite, it would significantly decrease the (monetary) value of a property right if a property right would *not* be transferable. Similar to ones personality, one cannot transfer ones right to personality or personality right to another person.

Invaluableness of personality rights

In difference to property rights, personality rights have no value in economic terms, or as Blok puts it *[t]he personality [right] is not deemed to have been granted with the objective of corporeal benefits.*[5] Despite the fact that Blok talks about personality and not about personality rights and a slightly unfortunate wording, this, in combination with the aforementioned inalienable nature of personality rights, shows that personality rights are not economic commodities.

The invaluable nature of personality rights not only means that a personality right cannot be sold, lent out or for instance gifted, but also that it cannot be subject to seizure or similar actions by a creditor. As said, Blok's wording in the aforementioned quote is slightly

unfortunate. By using the phrase […]*not deemed to have been granted with the objective of corporeal benefits* he leaves unnecessary room for interpretation. For even though the personality rights are not deemed to have been granted with the *objective* of "corporeal benefits" these kind of benefits *are* possible based on Blok's description, which is incorrect. Appealing to a personality right might, in some very specific circumstances, lead to corporeal benefits but this is in no way a characteristic of personality rights.

The invaluable nature of personality rights sees more to the fact that they are not economic commodities. The value of a personality right, similar to that of bodily integrity or human dignity, sees more to the *moral* value of it, which is why violations of personality rights are most often regarded as violations of a person's human dignity with "damages" which are very difficult to express in monetary terms.

The qualification of the right to privacy as a personality right.

As shown, a personality right is inalienable, and it is invaluable in monetary terms. These characteristics are equally applicable to the right to privacy. The inalienability of the right to privacy becomes clear when one considers that the right to privacy cannot be inherited, but rather that the right ceases to exist after the death of the bearer. The value, or *in*valuableness, of the right to privacy is closely linked to the value of human integrity, and should be seen as a value in *moral* terms and not in economic terms. The fact that a relatively small group of people *have* affixed a monetary value to their right to a personal living space and commodified it, and that this possible is not because these rights do not have an invaluable character but because the right to privacy is a subjective right.

As such the right to privacy *does* have an invaluable character like other personality rights. Another reason why the right to privacy is a personality right is the fact that legal entities are not deemed to have this right. In sum the right to privacy can – for now – be defined as;

an invaluable inalienable personality right.

II. Rights *in rem*

In general the difference between rights *in rem* and rights *in personam* is not heavily debated. In private law, however, the distinction between rights *in rem* and rights *in personam* is one of the most important in legal science. The basis for the distinction between rights *in rem* and rights *in personam* goes back as far as Roman law and were defined by Gaius as;

Actio in personam

In personam actio est, qua agimus, quotiens litigamus cum aliquo, qui nobis uel ex contractu uel ex delicto obligatus est, id est, cum intendimus dare facere praestare oportere.	*A[n] [actio in personam]* is one which we bring against anyone who is liable to us under a contract, or on account of a fault; that is, that (what) we claim is that he is bound to give something, to do something, or to perform some service.

and

Actio in rem

In rem actio est, cum aut corporalem rem intendimus nostram esse aut ius aliquod nobis competere, […].	*A[n] [actio in rem]* is one in which we either claim some corporeal property to be ours, or that we are entitled to some particular right in the property[…].

Centuries later this distinction was implemented in law and the statutes of countries all over Europe as two categories of rights, the rights *in rem* and rights *in personam.* There are two distinct differences between these different rights, first of all rights *in rem* govern the relationship between a person and a good, and a right *in personam* governs an inter-personal relationship.

The second difference between a right *in rem* and a right *in personam* is the kind of obligation it creates. A right *in rem* can be upheld against any person, as such a right *in rem* creates a general, and universally applicable obligation which can be upheld against any person or group of persons and in any circumstance. A right *in personam* though is non-universal and specific, it can only be invoked in pre-defined situations or circumstances.

The qualification of the right to privacy as a right in rem

Warren and Brandeis are by many regarded as the 'founding fathers' of the right to privacy as a fundamental right in modern times through their seminal article in 1890.[6] Most importantly Warren and Brandeis characterised the notion of the right to privacy as a right *in rem*, or as they state it;

> *We must therefore conclude that the rights [to privacy],[…] are <u>not rights arising from contract</u> or from special trust, but are <u>rights as against the world</u> [...]*[7]

The fact that the right to privacy is a right *in rem* is no more than logic though, for if it *were* a right *in personam* the bearer could not utilise or invoke the right against parties with whom he did not have a contractual relation. As stated before rights *in rem* have two characteristics; the rights have a universally invocable character, and they govern the relation between a person and a good. Seeing that the right to privacy is a personality right, the right to privacy creates an obligation – to not interfere in the enjoyment of the good, privacy, by the bearer – on other parties.

It would be short sighted though to regard and/or define the right to privacy as an absence of interference. For by phrasing the right to privacy in a negative way – others are *not* allowed to interfere – the actual good it protects, privacy, is disregarded wholly. The right to privacy does not protect against interference by others but rather grants a right to an individual to enjoy his or her personal living space.[8]

The second characteristic, the universally invokable nature of rights *in rem* is also applicable to the right to privacy. The right to privacy can be invoked against all people to create an obligation to refrain from interfering in the enjoyment of the personal living space by the bearer of that right.

Based on this sub-section the definition of the right to privacy can be expanded to;

> *an invaluable inalienable personality right governing the relation between a person and a good which is invokable against the world.*

III. Subjective rights

A subjective right has two characteristics characteristics, first it serves to protect the interest of the bearer of that right, and second a subjective right grants the bearer of that right a justifiable say in the protection of that interest.

The interest theory of rights states that rights only serve the interests of the bearer and as such disregard the interests of others. The right might be (necessarily) limited by the justified needs of others but this is not a part of the right itself.

The fact that the bearer of the right has a justifiable say in the protection of his interest(s) means he can decide himself whether or not he wants to invoke the right to protect his interests. Objective law does not make the protection of this interest mandatory. Both of the aforementioned characteristics have to be fulfilled to be able to speak of a subjective right in a strict sense, if only one is fulfilled it might be possible to speak of a right (in a broad sense) but it is certainly not possible to qualify it as a subjective right.

The qualification of the right to privacy as a subjective right

Regarding the right to privacy as a subjective right is not a new concept, for almost all existing legal concepts and constructs are based on pre-existing notions within law. The legal tradition which culminated in the different notions of privacy has a long history. The 1789 *Staatsregeling voor het Bataafsche Volk*[9] already contains passages in objective law which guaranteed a category of subjective rights granting the subject the right to personal space. The right to privacy has historically been constructed as granting a person the power of self-determination regarding the protection of his or her personal living space. The fact that the right to privacy is a subjective right makes clear that it is very important to make a distinction between on the one hand privacy as a *value as such*, and on the other hand Privacy as the *value of self-determination*. Qualifying the right to privacy as a subjective right means that Privacy is an interest of the person entitled to the right to privacy. This also means that that person has a say in the protection of the right to privacy, and he or she can evaluate the importance of privacy in relation to other interests. In most liberal societies this say is put plainly in the hands of the individual but this is not necessary for the right to privacy to be present. Based on this and the previous sub-sections the right to privacy can be defined as;

an invaluable inalienable personality right governing the relation between a person and a good which is invokable against the world and grants an individual say in the protection of his or her interests.

IV "Negative rights"

What makes negative rights *negative* is made clear by either their formulation in statutes in a negative way or by the fact that the formulation contains a clause of absoluteness. An example of the former is for instance article 5 section 1 ECHR which – in short – states;

No one shall be deprived of his liberty save […] in accordance with [the] law

As such the underlying notion of negative freedom – all persons have the right to do or "be" without interference by other persons – is protected. An example of the latter, a clause of absoluteness, can be found in for instance article 3 ECHR. This article states;

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Making clear that States have to refrain completely from taking certain actions, as article 3 does not allow for any deviation. Grosso modo all fundamental rights granted through the ECHR are "negative rights" in the sense that they create a negative obligation for the State. This means that a State is obligated to *not* do certain things. Some negative rights require positive actions by the State to be protected though.

The qualification of the right to privacy as a negative right

Most fundamental rights granted, through for instance the constitution, contain both positive- and negative right aspects. The right to privacy is however one of the few rights which can be qualified as being strictly a negative right. The right to privacy is closely linked to the notion of negative freedom, in the sense that it creates an area in which someone can "be" without outside interference, and Privacy provides for a kind of defensive right against any invasion of that area. This right to privacy cannot be achieved through outside "interference" by for instance a State.

If a State – or any other third party – refrains from interfering the ideal situation i.e. Privacy can be achieved. The fact that Privacy is a negative right already follows indirectly from the different definitions mentioned at the start of section 1, each containing an element of non-interference.

V. Summary

Based on the previous four sections the following generic definition of the right to privacy can be constructed;

The right to privacy is an inalienable, invaluable personality right invokable against the world which grants an individual say in the protection of his or her interests and provides for an area within which that individual can act (or simply "be") without obstruction or hindrance by others.

This "definition" does not solve all the problems surrounding (the right to) Privacy but it does make a lot of the complications less problematic by making it for instance clear that the individual has a right to make an autonomous decision about the way in which the area of non-obstruction is protected. Similarly because the right to privacy is a right *in rem*, the notion of Privacy as such is context-independent, and the fact that the right to privacy is a personality right means it is invaluable and inalienable from the individual. As mentioned, this very generic definition will not solve many of the practical problems which come up in relation to the right to privacy but it can be helpful when comparing the different countries under research to pinpoint in which way their respective notion(s) of privacy differ from one another.

[1] Littman & Carter-Rusk (eds.), *Privacy and the Law, a report by the British section of the International Committee of Justice*, London: Stevens 1970, p. 45.

[2] P.H. Blok, *Het recht op privacy* (diss. Tilburg), p. 9, Tilburg: Boom Juridische Uitgeverij, 2002.

[3] G.W.F. Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse*, Frankfurt am Main:Ullstein, 1972. Freely accessible copies available at <http://www.zeno.org/nid/20009181148> (German) and <http://www.efm.bris.ac.uk/het/hegel/right.pdf> (English)

[4] J. Locke, *Two Treatises of Government Book II*, Whitmore and Fenn:London, 1821. Freely accessible copy available at < http://www.johnlocke.net/two-treatises-of-government-book-ii/>

[5] P.H. Blok, *Het recht op privacy* (diss. Tilburg), p. 27, Tilburg: Boom Juridische Uitgeverij, 2002. Translation by the author.

[6] S.D. Warren & L.D. Brand eis, 'The Right to Privacy', in *4 Harvard Law Review 193*, Gannett House:Cambridge (Massachusetts), 1890.

[7] Infra 6, p. 213, emphasis added.

[8] In that sense the wording of article 8 European Convention on Human Rights (ECHR), and in its wake article 10 of the Dutch Grondwet, is unfortunate. For it grants a right to *respect* for one's private and family life, one's home and one's correspondence, vis-à-vis *respect* for one's personal living space, but does not explicitly grant a right to *a personal living space.*

[9] *State regulation of the Batavian people,* the constitution of the Batavian state, the predecessor to the Dutch state.