

**BOOK REVIEW****PRIVACY REVISITED:  
A GLOBAL PERSPECTIVE ON THE RIGHT TO BE LEFT ALONE***Ronald J. Krotoszynski, Jr.*

New York: Oxford University Press, 2016. 292 pp. ISBN 9780199315215. £55.

What is privacy, and where do its limitations lie? Perhaps this is the most fascinating yet most complicated question for a privacy lawyer. The value of privacy is shared across cultures but the concept itself may carry entirely different, localised connotations. As a result, it is sometimes understandably convenient to draw upon such a notion for various purposes. It can be something that government officials and public figures may employ to shield themselves from the paparazzi; it can be something that the public may invoke to oppose governmental surveillance programmes or commercial online tracking. Privacy gains its bad name partly for the fluidity of its contents, and partly for constantly being cast as the rival of “competing values”<sup>1</sup> – such as freedom of speech, as Ronald J. Krotoszynski, Jr.’s *Privacy Revisited* highlights.

Krotoszynski’s project in this book is clearly outlined at an early stage: “[A] functioning democratic polity requires *both* freedom of speech and privacy to function” (p. 12). In order to productively explore the not entirely new topic regarding the tensions between privacy and expressive freedom, the author takes a comparative approach that focuses on five jurisdictions: the United States, Canada, the Republic of South Africa, the United Kingdom and the European Court of Human Rights (ECtHR). As a careful reader would notice, the five jurisdictions included in this book essentially offer a good combination that represents a wide range of legal traditions and privacy perceptions. The US and the ECtHR have embraced quite opposing approaches to demarcating the boundaries of privacy and free speech. While American courts often grant greater weight to freedom of speech over privacy, their European counterparts incline to provide a higher level of privacy, even to public figures. Canada does not simply take either of these two models for granted, but instead critically observes the developments across jurisdictions and charts its own third, “middle” way. South Africa is characterised by the particular constitutional emphasis on dignity, equality and freedom, as well as the interpretative mechanism that accommodates privacy in these values. The UK presents a unique example of what privacy can and cannot achieve in a legal culture where judicial restraint is so deeply entrenched.

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<sup>1</sup> See JE Cohen, “What Privacy Is For” (2013) 126 *Harvard Law Review* 1904-1933.

The US is the first jurisdiction that the author puts under careful scrutiny. It should not come as much of a surprise that US jurisprudence effectively upholds the imperative of freedom of speech. Following doctrinal thread originating from the 1964 case of *New York Times Co v Sullivan*, the US Supreme Court has consistently sided with freedom of expression where it conflicts with privacy. What a reader might be less familiar with is the constitutional and cultural drives of such a propensity, on which the author sheds much useful light. The First Amendment constitutes a major hurdle to a higher level of privacy protection when the claim of freedom of speech is triggered. The robust doctrine that speech should not be censored, including the disclosure of the private aspects of one's life, has its roots in political distrust of government. If government is believed to covet any chance to abuse its powers, allowing it to decide what kinds of speech are acceptable would only give it the opportunity to screen what it finds troublesome. This also explains why in contemporary US, privacy is more commonly considered a set of autonomy interests that run against the state.

The next chapter then moves on to Canada, where its highest court often squarely rejects the reasoning of US jurisprudence. The Supreme Court of Canada has developed its own theories to address privacy-related issues. As the author points out, the Canadian Constitution is seen as a "living tree" in the eyes of their Justices, which permits them to interpret the Constitution in a progressive way that would keep pace with social developments. Inspired by this creed, the Court has constantly given new meaning of the old text of law in creative ways. With a broad interpretation, for example, the Court justifies informational privacy with Section 8 of the Charter of Rights and Freedoms, which, on paper, only protects individuals against unreasonable search or seizure. The Court has remained so open to technological changes that they had little hesitation in applying reasonable expectation of privacy to, for instance, text messages. Despite its complicated and unstable position in protecting "private in public" – a concept readily accepted in Europe but largely rejected in the US – Canada represents a good example of how national law may provide effective protection to privacy, however protean the concept might be.

The chapter on South Africa is the one that I found most intriguing. The South African Constitution is characterised by its particular emphasis on the most important, non-derogable values of dignity, equality and freedom. There is a provision that explicitly protects privacy, which however covers merely unlawful search or seizure, and confidentiality of communications. Unlike the Canadian Supreme Court, the South African Constitutional Court has not relied on liberal interpretations of the privacy clause. Instead, the Court has drawn upon different parts of the Constitution regarding equality, human dignity, and freedom and security of the person so as to provide a full range of protection to what would be covered by "privacy" in other jurisdictions. The author conducts intensive analyses of a

series of prominent constitutional cases in which defamatory media coverage, parodic image sharing, a ban on prostitution, and rights of sexual minorities were handled. This all makes for a helpful narrative in establishing an overall picture of how the supremacy of dignity, equality and freedom operates in practice. I would, however, look forward to seeing further theoretical exploration of how the South African experience – in particular its commitment to equality – may contribute to the discussion surrounding privacy and eventually transform our imagination of this concept.

If all the jurisdictions mentioned above show a greater or lesser extent of judicial activism in shaping up what privacy means, the United Kingdom represents a perfect contrast. The British legal system is characterised by the limited role of judicial review, as well as the permitted-unless-prohibited doctrine, both leading to the absence of a generalised right to privacy. Despite the fact that the *Campbell* court has developed what is known as misuse of private information today based on the old concept of breach of confidence,<sup>2</sup> British courts appear to remain reluctant to renew the English common law so as to allow infringement on privacy as a course of action. With the blessing of Parliament under the Human Rights Act 1998, British courts could in theory have brought common law principles in line with the European Convention on Human Rights (ECHR) and given horizontal effect to the ECHR in disputes between private entities. However, the doctrine of parliamentary sovereignty is so embedded in their judicial tradition that British judges seem to have constantly refrained from leading major changes in social policy. In general, this chapter demonstrates how the judicial culture in the UK has led to the failure to develop a general “right to privacy”.

In the last jurisdiction-specific chapter, the author highlights both the conflicts and commonalities existing in the jurisprudence between the ECtHR and the US. The contrast between the European and American approaches is quite stark: While balancing privacy and freedom of speech is performed under the principle of proportionality in Europe, this task is fulfilled by means of excluding certain types of “speech” from the scope of protection in the US; while protecting “private in public” is commonly accepted in Europe, American lawyers would find this idea problematic; while it is not rare for European courts to uphold privacy claims by those in public office, this is something “unthinkable” in the US. The list just goes on. In spite of these incompatibilities, however, the author still manages to identify certain common ground that is shared across the Atlantic: Expressive freedom forms an essential precondition for democratic self-governance and, hence, it sometimes prevails over privacy.

Such a finding is further elaborated in the book’s concluding chapter. To reconcile the seemingly intractable conflict between privacy and speech, the author turns to Meiklejohn’s

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<sup>2</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457.

theory of democracy and freedom of speech.<sup>3</sup> If the way Meiklejohn links free speech to self-government is not something difficult to make sense of, then a parallel linkage can be drawn between privacy and democracy. As Krotoszynski puts, a surveillance state can be anything but a democratic regime. Insofar as an effective form of democratic self-governance requires both free speech and privacy, these two values are actually complementary to each other. The author thus casts fresh light to the interplay between these ends that are often considered contradictory. The potentially supportive role of freedom of expression to privacy highlighted in this chapter also points to an unexplored area for future research.

The comparative study of the constitutional right to privacy and its relations to other fundamental rights thus has the merit of opening up an arena for competing arguments to shape and cross-examine each other in a productive manner. If democracy is the vocabulary shared by any progressive nation, the disagreement would not be about the *ends*, but rather the *means*. However, we should never be over-optimistic about the gaps being bridged. The cultural divergence among jurisdictions remain significant. Even though both sides of the Atlantic could come to the agreement that democracy is indeed something desirable, the debate would probably not stop over how human dignity should be counter-balanced. Perhaps the underlying issue comes down to *what kind* of democracy we should pursue. Whereas the US legal system is traditionally keen on safeguarding uncensored participation in democracy and thus minimising the scope of unprotected speech, in Europe, democracy is generally understood in a constructive fashion that would prioritise dignitarian interests over offensive, false, hurtful and valueless speech. In *Is Democracy Possible Here*, Ronald Dworkin has committed himself to a somewhat similar project to Krotoszynski's in *Privacy Revisited*: to discover the common ground – but in Dworkin's work, between the two campaigns in American politics.<sup>4</sup> Interestingly, one particular shared value Dworkin identifies is human dignity, which largely explains his anti-surveillance stance in his book. If privacy deserves a place in our democratic agenda, our investigation into privacy would inevitably entail a clear vision of what sort of democracy we should be devoted to.

In sum, Krotoszynski's *Privacy Revisited* is a highly readable book that would impress readers with its breadth of materials covered and its depth of philosophical inspiration. It offers a helpful perspective through which we might make sense of the conflicting values mirrored in latest developments, such as the implementation of the “right to be forgotten”.<sup>5</sup>

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<sup>3</sup> A Meiklejohn, *Free Speech and Its Relation to Self-government* (New York: Harper, 1948).

<sup>4</sup> R Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton: Princeton University Press, 2006).

<sup>5</sup> *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Case-131/12, [2014] OJ C 212/04.

To understand the complexity of today's privacy landscape, it is imperative that we are capable of some sort of big-picture thinking, which includes not just a wider horizon of how privacy is perceived and enforced across jurisdictions, but also a philosophical reflection on how privacy should interact with other social goals – human dignity, free speech, equality, democracy and so on. To such an extent, Krotoszynski's *Privacy Revisited* provides a valuable paradigm in the search of a better theoretical position for privacy, and beyond.

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