Chapter 93
The Right to Anonymity in Political Activities:
A Comparative Look at the Notion of Political Surveillance

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ABSTRACT

The complexity of the right to privacy is particularly striking when the issues at stake are, ultimately, other political rights and freedoms such as the right to free speech and the right of association. The surveillance of individuals and groups by the state has strong political consequences: the surveillance of political activities re-defines what the private sphere is, and displaces its limits, in a context in which more information is becoming available to the public. Multiple recent developments, exemplified by the role of the right to privacy in movies, exacerbated the tensions between Europe and the United States over the notion of privacy. The future EU data protection laws will create a right to be forgotten, whose political value is still unknown.

INTRODUCTION

On June 30, 2012, a New York Criminal Court ordered Twitter to release three months of messages from one of its users, an Occupy Wall Street (OWS) protester. In its ruling, Judge Matthew A. Sciarrino Jr. wrote that people posting messages on Twitter had no expectation of privacy, comparing a post on Twitter to "a public cry." Therefore, the release of messages less than three month old can be ordered without a warrant. Twitter, said the ruling is the equivalent of the eyewitness of a street crime. The tweets are supposed to help the prosecution to determine whether or Malcolm Harris, arrested with about 700 other protesters, knew that the authorization to demonstrate the OWS movement had was confined to the pedestrian area of the Brooklyn Bridge (Buettner, 2012). There is much more at stake in this case than the criminal prosecution that triggered the ruling. The information that Twitter is about to transmit to the authorities will inform them

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about his network, his audience and his tastes, his political and non-political contacts, as well as his online and offline cultural habits. This very recent case (People of the State of New York v. Harris, 11-80152, Supreme Court of the State of New York) provides with a good illustration to the present chapter: it illustrates the consequences of the absence of sufficient legislative protection of privacy, resulting in the endangering to the right to free speech, and the free-association right. It shows how the flawed principle of "reasonable expectation" has failed to protect people from political surveillance, and how the evolution of the "chilling effect" doctrine deprived citizen of the necessary protection to the expression of their political rights. And despite the admirable will of Twitter Inc. to stand up to its users' rights, the participation of the private sector in political surveillance and massive surveillance schemes plays a major role in the insufficiency of the protection of privacy, as Twitter Inc.'s reaction is rare. This chapter reflects on these issues, from in the context of political surveillance, drawing on cases and examples from both sides of the Atlantic: United States, France, and the United Kingdom.

Political surveillance is the action from a government body, or a government affiliated organization or individual, aiming at monitoring political activities, gathering information on citizens' political activities or beliefs, or gathering or using information on citizens for political motives. This definition is broad and inclusive, and will necessarily encompass actions and activities that are not illegal, or that are accepted by the majority of the population as legitimate and justified to achieve the goals of society. However such a legitimacy should not be regarded as absolute, as actions from the government that were considered unacceptable some time ago can now appear to be illegitimate, or inversely.

The aim of this chapter is to assess the scope and the state of the law on political surveillance, in a comparative way: in the United States and Europe. This comparative view point in turns is following several objectives, mainly relating to the impact of the European Court of Human Rights and the European Union over the right to privacy as a human right, assessing the importance of historical and cultural factors in the protection of the right to privacy and its evolution from a legal perspective, as well as evaluating the transfer of policy and legislation from the US to Europe, and inversely.

The historical component to this comparison should not be taken too simplistically: it is not enough to affirm that the heritage of political mass surveillance, precipitating massive human rights violations through deportation and large-scale murder in Europe during World War II is explaining in any way today's discrepancies between privacy and surveillance policies between Europe and the US. First, because some part of Western Europe such as the United Kingdom were not subject to the massive surveillance that characterises relations between citizens and their governments during World War II. As the examples of this chapter will show, the United Kingdom is not spared today by the tensions around privacy, and the use of data by governments to achieve political goals. Then, one must recognize that political surveillance had its moments of glory in the US too, during the red scares and the McCarthyism, although the consequences in terms of human rights violations were far less reaching than during the war in Europe.

Political surveillance can take many forms. It can for instance be constituted by a government listing the political affiliations of its citizens, or the redaction of listings on other criterions such as race, religion, or sexual preference.

Behind the human rights perspective and dimension present here, the comparison of political surveillance on both sides of the Atlantic can in the end reveal elements of definition of political activities.

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