Chapter 1

PRIVACY AND THE PUBLIC SPHERE

The right to privacy has become one of the most fundamental rights of the individual within society, and it has been widely acknowledged—both among legal systems in liberal states and among theorists of rights—ever since 1890, when Louis Brandeis and Samuel Warren wrote their famous article "The Right to Privacy."[1] There, they laid down "one's right to be let alone" as an essential part of one's autonomy, and insisted that one's private life, habits, acts, relations, etc. should be respected and immunized against external invasion or interference. We think of this right as having a special role in modern life and assume that, as Greg Pence puts it, "some rights of non-interference and some liberties are necessary to the minimally smooth functioning of modern society as we know it."[2] Since 1890, it has increasingly become an important task for Human Rights activists and organizations to protect this right of the individual both from governmental invasion and (even more) from the curiosity of the press and the public.

However, like every other right, the right to privacy can sometimes be used (or may we say "misused" or "abused") for harmful or immoral purposes. In this chapter, I examine three different cases where an insistence upon the respect for an individual's right to be let alone may cause some distortions in the original positive intention which led to the establishment of this right, and may bring about undesirable consequences. I want to show that even though we should be careful with possible invasions into one's private sphere, we have to make sure not to *overprotect* one's privacy, and use this right as an excuse for malicious intentions.

[1] Brandeis Louis and Warren Samuel. "The Right to Privacy." In: *Harvard Law Review*, Vol. 4, No. 5, December 15, 1890.

[2] Pence Greg. "Virtue Theory." In: Singer Peter (ed.), *A Companion to Ethics.* Blackwell, Basil, 1993. p. 255.

The cases I deal with exemplify how values, rights, and liberties that have been gained after long struggles and sacrifices as a means for the emancipation of the individual, can become instruments for more oppression by the authorities.

CASE 1

The first example which I believe demonstrates the possibility of negative use of the right to privacy, is the case of the frequent demand to ban the public exposure of the identity of people who are under police arrest or criminal investigation, or who are suspected of being involved with crimes. Usually, it is the pressure of public figures, members of parliaments and other celebrities that supports this demand for privacy. In addition to the healthy instinct which leads the ordinary citizen to object to such demands for privacy when they are made in support of the famous and powerful members of society, there is also a sound and critical reason for freedom and democracy seekers to mistrust the intentions of those who want to hide the identities of people who are under suspicion of wrongdoing.

The main argument of those who want to promote this initiative for the preservation of secrecy is that the disclosure of the identity of a suspect may ruin his or her "good reputation," and this itself may have negative effects on the ongoing investigation. They support their demand for privacy by relying on everyone's right to privacy and confidentiality, which they assume to be something which overrides the "public's right to know," the public's morbid interest in such information and the freedom of press. In order to have a better understanding of this claim for privacy, particularly when it is claimed by certain groups within a specific context, we have to question the foundations of such a claim. The real danger and the possible harm involved in the loss of a good reputation will be caused to those suspects who will not be prosecuted at all at the end of the investigation. If they will be prosecuted, the principle of the publicity of the law and the demand for an explicit and due legal process, will lead to the disclosure of their identity in any case. In both cases (i.e. whether charged or not), these suspects have the right not to be harmed more than the due legal process requires. The real question here is whether or not this right overrides the public's right to know, which is so vital for the public's protection from the government's arbitrariness and tyranny, and the public's main instrument to defend itself against governmental corruption and bribery. After all, we have learnt from Thomas Nagel that "Freedom of the press and of public dissent protects everyone against abuse of power and official harm and neglect of all kinds."[3]

When we speak of ordinary people who are suspects, there is still formally a public interest in the case (since in the criminal law the prosecutor is still the state, as representative of its citizens), but, in fact, the general public is not particularly interested in the specific identity of the person who is suspected of committing

[3] Nagel Thomas. *Concealment and Exposure*. Oxford University Press, 2002, p. 42.