

REGULATORY

Exploring the right to privacy

5 July 2023 5 min read

Where does the right to privacy begin? Where does it end? Consider this in the context of a recent decision of the European Court of Human Rights (ECHR) in which Turkey was condemned for failing to protect the private life of a prominent Turkish actor who had been secretly filmed kissing another celebrity at her home in footage broadcast on television.^[1]

The matter has its genesis in 2010 when Ms. Birsen Berrak Tüzünataç (**Ms. T**) filed a domestic suit against the parent company of a Turkish television channel that had filmed her kissing another Turkish actor on a terrace at her home. Ms. T argued that she had been filmed without her knowledge and in breach of her right to privacy.

In 2013, the Istanbul Regional Court dismissed her claim because she had been filmed from the street and there had been no intrusion into her home. Ms. T subsequently approached the Court of Cassation who also dismissed her claim.

Ms. T proceeded to approach the Turkish Constitutional Court in 2017 which held that there had been no breach of her right to privacy as she had been filmed from the street – a public area. It was further held that the images in question had not contained any elements liable to cause an unacceptable degree of embarrassment to her and that Ms. T had not taken adequate precautions or assumed sufficient responsibility for protecting her privacy.

The ECHR held in 2018 that despite a person's fame, a person's love life is in principle of a strictly private nature and that the video in question seems to have had the sole purpose of satisfying the curiosity of a certain audience.

The ECHR further held that the reporting in question failed to adhere to the standards of responsible journalism and that the domestic courts in Turkey should have shown greater rigour when weighing the various interests involved. The ECHR concluded that Turkey violated article 8 of the European Convention on Human Rights, which enshrines respect for a person's private life.

The findings of the ECHR are interesting because it begs the question of whether a person really has and enjoys a right to privacy. This is an important question in light of rapid technological progress which has created a situation of severe tension and incompatibility between the right to privacy and the extensive digitisation on which the digital economy is based.

The findings of the domestic courts of Turkey are seemingly reminiscent of the approach adopted by our Constitutional Court^[2] where it held that –

"[67] Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."

The concept of privacy is an amorphous and elusive one.^[3] The scope of privacy has been closely related to the concept of identity and it has been stated that:

"rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's own autonomous identity".^[4]

Public interest considerations are also relevant. We say this because the right to privacy can be limited, and somewhat contentious, when this right is weighed against the duty to disclose in the public interest. Like the right to privacy, public interest is difficult to quantify. In *Tshabalala-Msimang and Another v Makhanya and Others (Tshabalala-Msimang case)*,^[5] the court held that –

"[37] Public interest it must be noted is a mysterious concept. Like a battered piece of string charged with elasticity, impossible to measure or weigh. The concept changes with the dawn of each new day, tempered by the facts of each case. Public interest will naturally depend on the nature of the information conveyed and on the situation of the parties involved..."

Nevertheless, in the *Tshabalala-Msimang* case, the court held that in certain circumstances public interest considerations require the disclosure of medical information when the information in question relates to a public official and there is a need for the truth. To this end, the court noted that the "overwhelming public interest points in the direction of informing the public about the contents incorporated in the medical records".^[6]

Ultimately, privacy is characterised by seclusion from the public and publicity,^[7] and the extent to which you enjoy the right is dependent on the extent to which you take steps to protect your privacy from the public and publicity. Privacy exists, but it is your responsibility to protect it.

Footnotes

[1] See *Tüzünataç v. Türkiye* (application no. 14852/18).

[2] *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton* (CCT108/17) [2018] ZACC 30 at paragraph 67.

[3] *Bernstein and Others v Bester NO and Others* (CCT23/95) [1996] ZACC 2 at paragraph 65.

[4] See: Rainer Frost "How not to speak about identity: the concept of the person in a theory of justice." in *Philosophy and Social Criticism* 1992 Vol 18 No1.

[5] (18656/07) [2007] ZAGPHC 161.

[6] See paragraph 50 of the judgement.

[7] *Bernstein and Others v Bester NO and Others* (CCT23/95) [1996] ZACC 2 at paragraph 68.



Ahmore Burger-Smidt

Head of Regulatory

[View Profile](#)