

**ON THE ORIGINS AND CONTENT OF ARTICLE 9 OF
THE CIVIL CODE ON THE RIGHT TO PRIVACY**

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Privacy in an open society / Respect de la vie privée et liberté d'expression

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In 1858 , 10 years after *Prince Albert v Strange*² was decided, the Paris civil court had to decide the following case: a famous actress, Mme Rachel, had died. Her sister, who had assisted her, expressly stipulated, upon asking two persons to take a photograph of her face on her deathbed, that the photographs should remain her own property and that these persons were forbidden to communicate a copy of them to anyone. Some time later a drawing made from such a photograph was on sale. It could have been done only after the print of one of the photographs. The sister brought an action against both the author of the drawing and the photographers. The court ordered the seizure and the destruction of the drawing and the 25 prints of the photographs. It based its decision on the following reasoning:

“No one may, without the express consent of the family, copy and publish the face of a person on his deathbed, irrespective of the celebrity of the person and the degree of publicity that was attached to the acts of his life. The right to forbid such a reproduction is an absolute one. Its

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² (1848) 2 De G.& Sm.652.

principle lies in the respect owed to the distress of the families. To infringe it will consist in hurting the most intimate and respectable feelings of nature and domestic piety.”³

This judgment can be taken as the ancestor, or one of the ancestors of the modern French law on the right to privacy. Ten years later, in 1868, a statute created a minor offence consisting in “the publication in the press of a fact relating to private life”⁴. It was enforced at least once⁵ before its abolition in 1881.

The right to privacy in French law is based on Article 9 of the Civil Code, enacted in 1970 and on the case law relating to it, which Judge Bonnal shall comment later on this morning. The aim of this paper is a two-fold one. I shall first comment on the *judicial* affirmation of this right before 1970 (I). I shall then analyse why and how this new case law was codified by Parliament in 1970 (II)..

I. The judicial affirmation of the right to privacy

From the mid 1950s on the Paris civil court began to affirm a right to privacy. I shall give some illustrations of the new case law (1) before trying to sum up its main characteristics (2) and comment on its origins (3).

I.1. The new case law: Illustrations

In 1950 a weekly, France-Dimanche, published a series of three articles the title of which was “My life, by Marlene Dietrich”. The newspaper announced that these were the ” unpublished memoirs of Marlene Dietrich. She just told the journalist Kurt Riess the memories of her

³ Paris civil court, 16 June 1858, *Félix c O’Connell*, D. 1858.3.62. In 1898, when Bismarck died , an attendant informed two photographers, who broke into the room and took several photographs of him. A publisher bought them for 30 000 marks, the equivalent of to-day’s 300 000 \$. The Bismarck family, upon hearing of it, brought an action before a court which ordered the seizure of the photographs and forbade their use. The two photographers spent 8 and 5 months in jail (Le Monde, 26 April 2008).

⁴ Statute of 11 May 1868, article 11.

⁵ In 1874 the cour de cassation held that the protection of private life extends not only to acts taking place in the peoples’ home (“ *au sein du domicile des citoyens*”) but also to acts which, although made public outside it if they relate to what is deep down in their heart (“ *s’ils sont du domaine du for intérieur*”) and if they concern freedom of conscience”. It upheld a judgment of the Dijon court of appeal sentencing a journalist who had published the names of 16 persons what had participated to a pilgrimage. The decision notes that these persons had behaved with considerable discretion and without any publicity, leaving home early in the morning and returning late at night. The journalist’s position was that it had published the information in order to satisfy the “legitimate curiosity of his readers” and that the pilgrimage was a public event: Cour de cassation, 28 Feb. 1874, *Verdot c Ligeret et consorts*, D. 1874.1.273, with the Dijon court of appeal judgment and extracts of the report of the rapporteur of the Cour de cassation.

brilliant career. Our readers shall find in this unpublished story the most engaging anecdotes which cast a new light on Marlene". Mrs Dietrich brought an action against the newspaper. In 1952 the Paris civil court ordered it to pay her damages. She found them insufficient and appealed the judgment. So did the newspaper. In 1955 the Paris court of appeal decided the case. Its ruling, a landmark one, may be summed as follows:

Mrs Dietrich did not authorize the newspaper to publish her so-called memoirs. The same applied to the journalist mentioned. The newspaper presented the memoirs as told by her, thus creating an illusion for its readers. The court then held that " the memoirs relating to the private life of each individual are part of his *patrimoine*. No one has the right to publish them, even without a malevolent intention, without an explicit and non equivocal permission of the person whose life is told. It the added the following:" Of course the public life of an individual is governed by different rules. Otherwise the historian's work would be impossible. But anecdotes and stories relating to private life, especially those relating to " *vie intime* " may be written only with the person's consent". "Art stars, the court went on, are protected by the same principles and there should not be an exception for them under the pretext that they are searching for a publicity which is indispensable for their career."

In this case two elements were established: the memoirs relating to her private life had been published without her permission. In addition, through a clever presentation of them, the public was led to think that she was telling them.

On the material and moral loss suffered by Mrs Dietrich, the court mentioned the violation of the principles mentioned above. In addition, since Mrs Dietrich planned to write herself her memoirs, there was a risk for this project to be, if not seriously jeopardized, at least considerably postponed. Conclusion: the amount of damages awarded was multiplied by 24 (1.2 million francs instead of 50 000).⁶

In 1963 the Paris civil court ordered in interlocutory proceedings, in view of the urgency of the situation and in order to reduce the extent of the loss, the withdrawal from circulation of a book a passage of which infringed without any doubt the *personality* of the petitioner. The book could be distributed again only after its suppression⁷. Another case was decided in 1966 by the cour de cassation. On Sunday March 7, 1965, several photographers entered the room of the hospital where the son of Gérard Philipe, the famous actor, aged 9, was being treated. A weekly published his photograph in his bed, his face partly hidden, accompanied by several photographs of his parents and an article on his illness. In addition newsstands received

⁶ Paris court of appeal, 16 March 1955, *Marlène Dietrich c. Société France-Dimanche*, D. 1955. 295.

⁷ Paris, civil court (référé), 8 July 1965, *Rothschild c Peyrefitte et Editions Flammarion*, JCP.1965.II. 14443.

posters, to be displayed in order to promote sales, announcing the publication. Mrs Philipe, the actor's widow, brought an action in her own capacity and as the child's tutor, and asked the Paris civil court, in interlocutory proceedings, the immediate seizure of all copies of the newspaper and that of the posters. She won and the judgment was upheld by the court of appeal. The ruling was confirmed by the cour de cassation: the reproduction, in a purely commercial aim, of unauthorized photographs and the publication of details on the boy's illness and on the medical treatment he received was an intolerable invasion into the private life of the Philipe family. In such circumstances the lower courts were empowered to limit their loss as far as possible.⁸

Another case deserves a mention because it was decided in the Spring of 1970, when the Government Bill containing the future article 9 of the Civil Code was pending in Parliament and also in view of the facts of the case. In 1968 a weekly published the real names of a famous singer and of his wife, also a singer, their address near Paris and that of their country house in South West France, together with their telephone number. They brought an action for invasion of privacy. The lower civil court found for them, awarded damages and ordered the publication of the judgment in two dailies, to be paid by the newspaper. The court of appeal upheld the first judgment in the following terms:

“The right to freedom of expression exists but is not without limitations. It may be exercised on the condition not to infringe the right to respect for privacy, that is' the right for an individual to be free to live as he intends to, with the minimum of external interference'. Hence the need to protect particularly against any infringement “the right to one's name, image, voice, intimacy, honour and reputation, to be forgotten and to one's own biography’.⁹ Freedom of the press and the right of the public to be informed, which derives from it, cannot justify, even in order to satisfy a public more and more avid of sensational information or for financial aims, more and more frequent infringements of everyone's right to peace and tranquillity”.

As to the facts of the case, the court found the invasion of privacy a flagrant one, since both spouses led a quiet and discrete life. The amount of damages was however reduced by half.¹⁰

I.2. The main characteristics of the new case law

I shall discuss the following points:

⁸ Cour de cassation, 12 July 1966, *SARL France Editions et Publication c Veuve Gérard Philipe*, D.S.1967.181, note RL. See, for a parallel with English law in 1991, *Kaye v Robertson*,(1991) FSR 62, CA (Civ Div).

⁹ The judgment does not contain any reference for these quotations.

¹⁰ Paris court of appeal, 15 May 1970, *Société FEP c époux Tenenbaum*, DS. 1970. 466, with the conclusions of advocate general Cabannes and a note signed PA and HM.

- The legal basis of the new right to privacy and the courts' method
- Its content
- Remedies
- Defences and limits

I.2.1 The legal basis of the new right to privacy and the courts' method

When a new issue arises before a court the usual reaction is to look for, in the available toolbox, the instrument which can be used to order to adjudicate properly. Here the situation could be summed up as follows.

The law on the press could not be used: it was silent on privacy, with one exception relating to libel. Libel law could not. Truth and good faith are defences. The very definition of libel shows the difference with privacy. Some judgments affirmed that the memoirs of private life and private life in general belonged to an individual's "*patrimoine moral*"¹¹. Other judgments mentioned a fault¹². A 1965 ruling¹³ based the right to one's image on article 1382 of the Civil Code, one of the main bases of French tort law¹⁴. From the 1960s on the notion of the rights of personality was used¹⁵. Most judgments simply mentioned the right to the secrecy of one's private life and to its protection¹⁶, or the right to respect of one's private life¹⁷. As time passed the autonomous character of the new right to privacy became more and more obvious. The legal basis of the new right was, in my opinion, the notion of the rights of personality, which I shall comment in a moment.

I.2.2. Its content

The courts avoided two temptations: to give a definition of privacy and to provide a complete list of its components. The ruling of the Paris court of appeal quoted above was an attempt in this direction. On both issues the courts were right: this gave the subsequent

¹¹ *Marlène Dietrich*, quoted above n 1; Paris civil court, 23 June 1966, *Epoux Blier c Société anonyme "La France continue"*; id, 25 juin 1966, *Bernard Blier c Société France Edition et Publication*, JCP. 1966.II. 14875, note R.Lindon.

¹² Paris civil court, 24 Nov. 1965, *Dame Bardot c Société Beaverbrook*, JCP. 1966.II.14521, on the unauthorized publication of her photograph by the Daily Express; Paris court of appeal, 17 March 1966, *SA 'la France continue' et dame de Montfort c Trintignant*, D.S.1966. 749.

¹³ Paris court of appeal, 1 Dec. 1965, *Société Editions mondiales c époux Wolff et société Atlantic Press*, JCP.1966.II.14711, note R.L.

¹⁴ « Anyone who, through his act, causes damage to another by his fault shall be obliged to compensate the damage ».

¹⁵ Paris civil court 8 July 1965, *consorts de Rothschild c Peyrefitte et Editions Flammarion*, JCP. 1965.II.14443, note RL (« an incontestably grave infringement of his personality»; Paris court of appeal, 13 March 1965, *Dame Philipe c France Editions Publications*, JCP.1965.II. 14223 (« the protection of the rights of personality»)

¹⁶ Paris court of appeal, 17 March 1966, *SA 'La France continue' et dame de Montfort c Trintignant*, D.1966.749

¹⁷ Paris court of appeal, 15 May 1970, *Société FEP c Epoux Tenenbaum*, with the conclusions of Advocate general Cabannes, D.1970.466, note PA and HM.

case law the sufficient and necessary flexibility. Most cases related to family life, sexual relations and health and illness. Many cases included photographs.

I.2.3. Remedies

The courts affirmed that judges were empowered to order them even in interlocutory proceedings (*référé*). They could include an order to

- * impound a book¹⁸
- * seize the edition of a newspaper when the matter was both an urgent one and constituted an intolerable infringement of privacy. This was the case in two examples relating to minors: the *Philippe* case, mentioned above and the *Gall* one, concerning a newspaper who had published an article on the affair of a minor girl¹⁹. In other decisions courts refused to issue such an order. In a decision concerning a book on Picasso's life the court held that "the seizure of an 'oeuvre de l'esprit', a particularly grave step susceptible to infringe the right to freedom of expression or of information, must be envisaged with the greatest caution". It may be ordered "only when the outrage presents an intolerable character demanding that an end should very urgently be put to it"²⁰
- * withdraw a book from sale until a passage has been deleted²¹
- * publish the judgment in one or several newspapers.

In addition the courts could of course award damages. The earliest judgment, *Marlène Dietrich*, mentions both material and moral loss, the latter arising from the very violation of the principle affirmed by the judgment. This can be seen as the first affirmation that compensation of invasion of privacy arises from the violation of the right to privacy and not on establishing a loss and a causality link between a fault and the loss, as is the rule in liability cases.

I.2.4. Defences and limits

Truth was excluded²² and the public interest was not mentioned. The courts held that absence of protest or action of the plaintiff against previous publications could not be regarded as the equivalent of an authorization to publish the article complained of. In a case concerning the actress Brigitte Bardot the Paris civil court insisted on this point: Irrespective of the professional publicity surrounding a public character as an actor, the general rule is still

¹⁸ Cass.civ. 2, 27 Nov. 1963, *Dame Riefenstahl c Alexandrov et Librairie Plon*, JCP.1965.II.14443, note RL

¹⁹ Cour de cassation, Civ 2, 25 Nov. 1966, *Société 'la France continue c Gall*, Bull. n° 929.

²⁰ Paris court of appeal, 6 July 1965, *Gaz. Pal.* 1966.1.37. See also same court, 21 Dec. 1970, JCP.

1971.II.16653, concerning the singer Antoine; 15 nov. 1966, D.1967.182, note Mimin, concerning G.Sachs.

²¹ Paris civil court, 8 July 1965, *Consorts de Rothschild c Peyrefitte et Editions Flammarion*, JCP.1965.II.14443, note R.L.

²² The law on the press (art. 35) forbids the defendant to establish truth in libel cases when the allegation relates to the private life of the plaintiff.

is that an authorization is necessary for the publication of scenes of private life. The fact that Mrs Bardot, before or after the facts of the case, has done nothing against the publication of photographs showing her in her private life did not authorize anyone to publish her image without her consent²³.

Two cases where the action was rejected may be taken as apt illustrations of the proper limits of the right to privacy. The first one related to *Picasso* and concerned the memoirs of Françoise Gilot, who had lived with him. Picasso asked the court to order the seizure of all the copies of the book. After a general statement on the exceptional character of such an order, the Paris court of appeal held:

“On the scope of the notion of private life, there is a difference, for such a step, between the case of an ordinary person (*un individu quelconque*) and that of a world-famous artist who, like Picasso, has not only been the subject, in all countries, of publications of all kinds on his life and his work, but also has never feared it, assuming that he has not been seeking it, to face the indiscrete and imperious demands of current events and of broadcasting”.

On the book itself the court added: “If in ‘Vivre avec Picasso’ Françoise Gilot has disclosed, all the same, some unknown aspects of the painter’s personality, it is essential to note that these are not indiscretions coming from a third party, totally unrelated to the life of the depicted character, but of memories collected after sharing during ten years the intimate life of a great artist. The secrets the divulgence of which is reproached to Françoise Gilot are hers in part; even if the book’s interest for the reader rests only in the staging of the incomparable personality of Picasso, it is extremely difficult for the book’s author, because the closeness of her life with Picasso, to make a strict distinction between the memories that remained exclusively hers and those which were to be reserved to the painter “.

The court went on to add :” such a book, far from giving the impression of seeking a success based on scandal or of aiming at satisfying a feeling of resentment or of spite, reveals a man whose inner life, intensely rich and complex; in spite of some strange aspects , is indissolubly associated with artistic creation, which it conditions and explains and whose image, left in the mind of the reader , is not that of a bland official portrait and remains extremely engaging.”²⁴, which seems to be an obiter

The second case was different and concerned a movie which told the life of Landru, a famous serial killer of women, who was executed after WW1. The film mentioned, by her

²³ Paris civil court, 24 Nov. 1965, JCP.1966.II.14521, upheld in appeal, Paris court of appeal, 23 Feb. 1967, D. 1967.450, note Foulon-Piganiol. See also Paris civil court, 23 June 1966, *Epoux Blier c Société anonyme ‘La France continue’*, JCP.1966.II.14874, note R.Lindon

²⁴ Paris court of appeal, 6 July 1965, Gazette du Palais, 1966.1.37 (refusal of seizure).

name, his mistress, Mrs Segret, without asking her permission to do so. She brought an action against the producer based on the unauthorized mention of her name and on the loss suffered by her by such a reminder of a dramatic and remote period of her private life. The lower court held the producer of the film responsible and ordered the company to pay her damages²⁵. Both parties appealed the judgment. The court of appeal ruling was as follows:

Any person is entitled to oppose the divulgation of facts relating to his private life. However the situation is a different one when such facts have been lawfully made public and when no fault is attached to the circumstances of the new publication. The first condition is met when the private life of a person has been part of a crime the prosecution of the author of which has led to a public debate in which the private life of this person has been revealed. In representing Mrs. S as Landru's mistress, the producer of the film has not infringed the secrecy which should protect private life and which, in her case, had been suppressed by judicial proceedings. Landru's trial, the court went on, had been one of the most sensational of the century. His crimes and his personality have led to the publication of many books and still to-day many of them mention the women whom he met. Among those who accepted to live with them, one, whom he seemed to have loved, was spared. Landru's affair with Mrs S has attracted a special attention because it revealed his complex personality and because her fate had been the exception.

By showing Landru's crimes and, among many other episodes linked with them and are part of the film, the company did not extract from oblivion events and characters that did not fall into it. There was more to it: in 1963 Mrs S had asked several newspapers to publish her memoirs. This proves that she does not aspire to silence on that period of her life.

Consequently one may not reproach the Company to have troubled a serenity she is not seeking. Nevertheless, the court added, she could have established that the way such events had been shown have hurt her feelings or her sense of modesty and that a more discrete approach could have prevented this. This was not the case here: the scenes showing her with Landru before his arrest suggest their affair but with sobriety. Besides Mrs S had already revealed in her published memoirs her affair with him. Conclusion: There has been no fault. The lower court's judgment was quashed²⁶.

I.3. On the origins of the affirmation of the right to privacy: the rights of personality

²⁵ Paris civil court, 4 Oct. 1965, *Fernande Segret c Société Rome-Paris Film*, JCP.1966.II.14482.

²⁶ Paris court of appeal, 15 March 1967, *Société Rome-Paris Film c Dlle Segret*, JCP.1967.II.15107.

Why did the civil courts affirm this new right and on which legal basis? They affirmed it for a number of reasons: the increasing number of actions brought before them, the frequency and the extent of the invasions of privacy by the press, the awareness of a pressing social need, so to speak, was one of them²⁷. From a legal point of view other remedies seemed inadequate: libel law admits truth (except when the facts relate to the private life) and good faith as defences and the scope of the two domains is different. Under ordinary tort law, based on article 1382 of the Civil Code, the plaintiff must establish a fault, a loss and a causality link between them. The courts therefore felt progressively that they had to look elsewhere.

The notion of the rights of personality, which can be found in many rulings, was certainly not an improvisation. It had been mentioned much earlier, from the end of the XIXth century on. Commenting, in 1890, on the draft German Civil Code and in particular its article 704-2²⁸ a great French jurist, R. Saleilles wrote: “And the text adds that one will have to include, among absolute rights, not only patrimonial rights, but certain rights whose object is the human person in its essential elements”²⁹. The same year Warren and Brandeis, in their famous article, mentioned “the more general right of the individual to be let alone...the principle..of an inviolate personality”. In 1909 E.H. Perreau published an article on the rights of personality which is still quoted to-day³⁰. In 1939 R. Nerson’s doctoral dissertation on extra-patrimonial rights was published³¹. As early as 1952 the Committee in charge of the revision of the Civil Code proposed the recognition of a general right of personality by the following provision:

“Any illegal infringement of personality gives to its victim the right to ask that an end should be put to it, without prejudice of the liability of the author that may follow”³².

From the late 1950s on the rights of personality and the right to privacy were the subject of a number of articles and essays by academics, practitioners and members of the judiciary. A

²⁷ This was not a new phenomenon. In their famous 1890 article Samuel D. Warren and Louis D. Brandeis, wrote: “The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as with effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the column of the daily papers.”, 4 Harv.L.Rev 193 (1890). 22 years earlier during the debate in the French Parliament on the 1868 statute creating a new offence of invasion of privacy, some members criticized the behaviour of the press: “Nowadays, too often, one enters the disastrous ways of indiscretion, irony and of the most unfair mockery... The feeling, the duty to respect private life seem extinct. One enters boldly the home, one does not fear to drag the scandal before of a curiosity one seeks to overexcite”, Duvergier. 1868.149, n.1.

²⁸ Under which « If anyone, through ill intentions or negligence, infringes, by an unlawful act, someone ‘else’ right...”

²⁹ R. Saleilles, *Essai d’une théorie générale de l’obligation d’après le Code civil allemand*, 1890. 343 ff, quoted by B. Beignier, *L’honneur et le droit*, LGDJ, 1995.45.

³⁰ E.H. Perreau, « Des droits de la personnalité », *Revue trimestrielle de droit civil*. 1909. 501.

³¹ R. Nerson, *Les droits extra-patrimoniaux*, LGDJ, 1939.

³² Commission de réforme du code civil, séances des 10 et 24 mai, travaux des années 1950-1951, Paris, 1952.58, quoted by Beignier, op.cit., 54.

1959 article mentioned the necessity to go beyond the general principle of liability contained in article 1382 of the Civil Code³³. In 1963 R.Nerson rightly remarked that the Civil Code was originally more about the law of property than about that of persons. Rather than linking the affirmation of the rights of personality to the defence of human rights in general he recommended “to make an inventory of the varied legal situations where it seems necessary to protect human *values*³⁴ attached to the personality and to describe the techniques used to ensure such a protection”³⁵. He also mentioned the notion of “*intimité*” this central recess that any person must conserve to escape the hold of others and the aggression of the outer world”³⁶. Nerson underlined the contribution of the case law³⁷, recognized that the category of the rights of personality was “in the process of formation”³⁸ and suggested the intervention of Parliament³⁹. Other articles followed⁴⁰.

In trying to assess the effects of such writings on the judicial decisions mentioned here, it is safe to suggest that the legal notion of the rights of personality and the conception of the right to privacy as one of its components were both part of the legal landscape. Besides, the structure of the law of torts made the exercise easier.⁴¹

II. Article 9 of the Civil Code

I shall comment on its origins and on its contents.

II.1. Origins

³³ L.Martin, “Le secret de la vie privée”, *Revue trimestrielle de droit civil*. 1959.227

³⁴ My emphasis.

³⁵ R.Nerson, “De la protection de la personnalité en droit français”, in *Travaux de l’association H.Capitant*, tome 13, 1963, p 60, at 65.

³⁶ Id.79

³⁷ Id. 83.

³⁸ Id. 86.

³⁹ Id. 87.

⁴⁰ P.Kayser, “Le secret de la vie privée et la jurisprudence civile”, *Mélanges Savatier*, Dalloz, 1965.405.

R.Lindon, then Advocate General at the Cour de cassation, in addition to his commentary of many judgments, wrote in 1965 a piece “La presse et la vie privée”, *JCP*.1965.1887. See also R.Badinter, “Le droit au respect de la vie privée”, id. 1968. 2136 ;R. Sarraute, « le respect de la vie privée et les servitudes de la gloire », *Gazette du palais*, 14 Jan. 1968.1.12 ;J.Malherbe, *La vie privée et le droit moderne*, Librairie du Journal des notaires, 1968.

⁴¹ See Walter van Gerven, Jeremy Lever and Pierre Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law*, Hart, Oxford and Portland (Oregon), 2000; 141ff:” Protection of personality rights and privacy”.

Since 1969 the cour de cassation publishes a yearly report, addressed to the Minister of Justice and the President of the Republic and containing a review of the case law of the past year, suggestions of legislative or other legal reforms, a study on a given topic⁴² and information on the other activities of the Court. So does the Conseil d'Etat. The first Report was 37 pages long, the latest one 610 pages. Its first Report included a reflection on the case law relating to the rights of personality, especially the respect for privacy. In addition to rulings on substance the Report mentioned the utility of preventive measures. In 1963 the cour de cassation held that the impounding of the edition of a newspaper was lawful⁴³. In 1966 it also held that a judge acting in interlocutory proceedings was empowered, in order to limit, as far as possible, the loss, to order the seizure of a newspaper if the invasion of privacy was an intolerable one⁴⁴. The Report noted that in these cases such steps were justified in view of the gravity of the invasion of privacy. However, there was a problem, especially for seizures: under the 1881 statute on the press⁴⁵ seizure of only four copies is allowed when libel (both a tort and an offence in French law) is committed. Since invasion of privacy is only a tort, a problem arises. The Report quoted a recent book on press law criticizing the case law⁴⁶ and suggested an intervention of Parliament in order to conciliate the democratic principles concerning the law on the press and the no less legitimate respect of the private life by empowering the courts to take different and more flexible steps than the controversial ones. The Report recognized that in this matter a quick intervention of the courts was necessary, hence the utility of interlocutory proceedings. The actual suggestion was a rather bland one and related only to procedure: instead of a single judge, a bench of three. In addition, the State Prosecutor would give his opinion⁴⁷. Why this prudence? This was the first report of the Cour de cassation and it might have been reluctant of giving the impression to dictate its views to Parliament. Or maybe there was no consensus on the substance of a reform. This led the Government to include in a Bill on judicial reform, a provision not very different from the present article 9 of the Civil Code. The "*travaux préparatoires*" are of special interest. The National Assembly Committee noted the divergences between academic authors

⁴² The topic of the 2010 Report was « the right to know ».

⁴³ Cass.civ. 2,27 Nov. 1963, *Dame Riefenstahl c Alexandrov et Librairie Plon*, JCP.1965.II.14443 ;Bull. 1963.II., n° 772, p 577.

⁴⁴ Cass.civ 2, 12 July 1966, *SARL France Editions et Publications c Veuve Gérard Philipe*, D.S.1967.181, note P.Mimin ;Bull. 1966.II, n° 778,p 545 ; 25 Nov. 1966,*Société' La France Continue' c Gall*, id, II.n° 929, p. 640

⁴⁵ Art. 51.

⁴⁶ An illustration of the influence of academic writings.

⁴⁷ In French law the State Prosecutor (*parquet*) is entitled to give his opinion in all cases. In fact he rarely does so in civil ones.- Cour de cassation, *Rapport de la Cour de cassation. Année judiciaire 1968-1969*, La Documentation française, 1970, pp 14-15. See H.Solus," Le rapport de la cour de cassation, 1968-1969", JCP.1970.I.2321, n° 19 c).

on the subject, the hesitation perceptible in some rulings about the basis on the new right to privacy, the absence of definition of the notion of private life and the necessity to conciliate the right to privacy and freedom of expression⁴⁸. Before the National Assembly article 8 ECHR was mentioned in relation with the principle affirmed in the first para of article 9, although France had not yet ratified the Convention.

Both the Minister of Justice and Parliament seemed ready to accept the new case law, no less and no more. An amendment proposing to affirm, in the Civil Code, the rights of personality and their protection was rejected almost without discussion. An important opportunity was thus missed because of intellectual timidity. As to the second para of article 9, which empowers the courts to use any steps in order to prevent or to stop an invasion of the “intimacy of privacy”, the Minister of Justice was very clear: the aim of this provision was to protect freedom of expression and to arrive at a fair balance between the two rights concerned.⁴⁹

II.1. Contents

The result was article 9 of the Civil Code:

“Everyone has the right to respect for his private life.

Without prejudice for compensation for injury suffered, the court may prescribe any measures, such as sequestration, seizure and others, appropriate to prevent or put an end to an invasion of the intimacy of private life⁵⁰; in case of emergency those measures may be provided for by interim order”.

Several remarks are in order here. The first one relates to the context of the discussion and the adoption of article 9. Public opinion welcomed the reform and the press, in or out of Parliament, did not lobby against it. The second remark is that Article 9 of the Civil Code is not part of the 1881 law on the press. It does not mention the media. It applies to all invasions of privacy, irrespective of its authors, public or private. The third remark is that what the text does *not* contain is as interesting as its actual content. It does not contain a definition of “private life” or of its “*intimité*”, a statement of defences or a complete list of available remedies. It is silent on the procedural reforms suggested by the Cour de cassation. It amounted to a codification of the case law: the affirmation of a general principle, the confirmation of the powers of the courts, even in interlocutory proceedings, to order the necessary measures, including preventive ones. The fourth remark relates to what followed.

⁴⁸ Assemblée nationale, n° 1147, Annexe au procès-verbal de la séance du 21 mai 1970. Rapport sur le projet de loi tendant à renforcer la garantie des droits individuels des citoyens... Tome II, troisième partie - Protection de la vie privée, pp. 3-8

⁴⁹ Journal officiel, Débats de l'Assemblée nationale, 2^{ème} séance du 28 mai 1970, p. 2068.

⁵⁰ I prefer this expression to that of « personal privacy » in order to translate “*l'intimité de la vie privée*”.

After some initial hesitation of the courts⁵¹ the scope of the protection and of the remedies afforded by article 9 extended to all invasions of private life, and not only to the invasion of its *intimité*, especially in interlocutory proceedings. There were two reasons for that. The first one is that before 1970 the courts ordered a seizure in case of “intolerable” invasions of privacy which, in fact always related to its “*intimité*”. The result was therefore the same⁵². The other reason was the procedural reforms which extended, from 1971 on, the scope of the powers of the “*juge des référés*” under articles 808 and 809 of the New Code of Civil Procedure⁵³. The two notions of “imminent damage” and of “manifestly illegal nuisance”⁵⁴ have been extensively used by courts in privacy cases⁵⁵. The fifth remark is that the case law of the European Court of Human Rights on privacy and the media did not influence the drafting of the new provision, since it did not exist at the time. The sixth remark is that the protection of article 9 has been extended to that of one’s name, image and to the dignity of the person. The last remark is that article 9 of the Civil Code has not been changed for the past 40 years and there are no proposals, *mirabile dictu*, in an age of damaging legislative instability; to do so, which says something on its quality.

The 1970 statute, in addition to Article 9, created a number of offences relating to the protection of privacy.

Concluding remarks

This is indeed a relevant illustration of judicial law-making, applied to an important social and legal issue. Placed before the need to provide plaintiffs adapted remedies resting on a sound legal basis - and the silence of Parliament, a luxury that judges may not afford - the courts took the initiative of creating the new right to privacy and of applying it. I approve such an

⁵¹ See Beignier, op. cit.56, n.1.

⁵² As noted by Advocate General Lindon in his commentary of the statute of 17 July 1970: R. Lindon, “Les dispositions de la loi du 17 juillet 1970 relatives à la protection de la vie privée”, JCP.1970.I.2357, at § 6.

⁵³ Its present text of article 809 is the following one: « The president (of the court) may always, even when confronted with a serious challenge, order in a summary procedure such protective measures or measures to restore (the parties) to (their) previous state as required, either to avoid an imminent damage or to abate a manifestly illegal nuisance. – In cases where the existence of the obligation is not seriously disputable, he may award an interim payment to the creditor or order the mandatory performance of the obligation even when it is an obligation to do a particular thing”. See J.Vincent and S. Guinchard, *Procédure civile*, 27th ed., Dalloz, 2003, n° 236 ff.

⁵⁴ *Trouble manifestation illicite*.

⁵⁵ See J.P. Ancel, » La protection judiciaire. La voie civile », Gazette du Palais. 1994.2.988.

initiative. On substance they had in mind, in one way or another, the rights of personality. On remedies they were guided by an important concept: that of the inherent powers of the courts.