PRIVACY, PARTICIPATION AND THE CITY

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"Privacy is not something I'm entitled to. It's an absolute prerequisite." **Marlon Brando**

"You already have zero privacy. Get over it!" **Scott McNealey, CEO of Sun Microsystems**

INTRODUCTION

It is almost nine o' clock in the morning. The Northern Line platform at London Bridge station is crowded with commuters, dressed in a uniform of black, grey and brown. A man in an oversized trench-coat stands next to a woman checking her mobile phone, barely acknowledging one another. Elsewhere, a woman listens to music on headphones, while others look at the announcement board in the hope a train will arrive soon. Yet, in spite of the crowds, there is silence. The only sounds are the shuffling of feet and the whirring of an approaching train, with the occasional interjection from the station manager telling commuters to "mind the gap". After a train pulls into the station, the doors open and a line of city workers start to disembark. Jostling against those on the platform, a man's briefcase hits another's knees, as they brush past. On the train itself, there is little space for the incomers, but as the doors start to close, a woman leaps into one of the carriages, clutching her bag and bending her head forwards to fit into the available space. The train then pulls away from the station with its passengers, ready or not for the next business day at work.

At first glance, this scene may appear to have little relevance to a chapter about privacy and participation. However, as part of our everyday life in the city, we try to achieve a balance between our public persona and our private nature. For to participate in the city, it is necessary to be a "social animal"[1], but to be a social animal, we must understand ourselves in private first. As Sennett explained "while man *made* himself in public, he *realized* his nature in the private realm, above all in his experiences with his family".[2] Today, the city is characterised by conflict between the public and the private. Although the neighbourhood gossip is a common stereotype in rural communities, it can still be difficult for an individual to enjoy privacy in an urban setting. Put simply, the city is uncontrollable. Space is often at a premium and the transient nature of the environment may mean that an individual does not even know her own flatmates. Likewise, technological advances which may affect an individual's privacy are tested and used more regularly in the city, rather than in smaller, local communities. By way of example, in 2013, a marketing company called Renew was criticised for embedding sensors in recycling bins in Cheapside in London to monitor the movements of individuals in the area.[3]

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[1] Aristotle, *Politics, Book One,* Loeb Classical Library Volume 264.
[2] Richard Sennett, *The Fall of Public Man*, 1st edn, Penguin, London 2002, pp.18-19
[3] Joe Miller, 'City of London calls halt to smartphone tracking bins', BBC News, 12 August 2013, Retrieved on 24 March 2016 from www.bbc.co.uk/news/technology-23665490

Returning to our scene of rush hour on the London Underground, it can be seen that we regulate our privacy in an urban context through shared codes of behaviour or "rules of civility".[4] There is silence on the Northern Line platform on a weekday morning because of a common understanding that if an individual were to speak, she may be considered to be invading another's privacy. Her physical proximity to others is such that she is already far closer to them than is usually acceptable in day-to-day life. So, for her to speak is to invade another's privacy yet further, and in a way that may be intolerable according to the prevailing rules of civility. After all, it may be an intrusion into someone's private thoughts. Of course, in another city and at another time, this norm may be different. However, it has become part of London life with little thought or consideration by the commuters.

Using London as a setting and making reference to English law, this chapter aims to provide an insight into the contested relationship between privacy and participation. It will review the discourse surrounding the "right to the city" as advocated by Henri Lefebvre[5] and David Harvey[6], looking at the way in which the increasing privatisation of urban space has affected our participation. It will also analyse how certain rules of civility have been incorporated into English law, both through the tort of breach of confidence and legislation governing electoral malpractice. To conclude, it will argue that even though there are real concerns about our ability to participate and the use of public space, urban law should take more account of the importance of the private sphere and the concept of home.[7] For a city to flourish, so too must its citizens, and that requires them to have a degree of privacy.

THE RIGHT TO THE CITY

Traditional conceptions of rights date back to the eighteenth century, and in particular to Rousseau's theory of the social contract.[8] For Rousseau, a government could only have legitimacy in a society where citizens held and were able to exercise certain rights, such as the right to vote, the right to move and the right to representation. More recently, however, other notions of rights have emerged, with the introduction of the European Convention of Human Rights in the 1950s and Lefebvre's radical reworking of urban citizenship in the 1960s. Nowadays, Lefebvre's notion of the right to the city has become an evocative call for a renewed urban democracy, particularly by those challenging social exclusion. It can be seen as the counterpoint to the "powerless" and bureaucratic model of urban government described by Frug[9], as well as the increasing level of globalisation affecting our cities.[10] For as Lefebvre himself explained:

[4] Robert C. Post, 'The Social Foundations of Privacy: Community and Self in the Common Law Tort', *California Law Review*, Vol. 77, No. 5, 1989, pp.957-1010
[5] Henri Lefebvre, *Writings on Cities,* trans Eleonore Kofman and Elizabeth Lebas, 1st edn, Blackwell Publishing, Oxford 1996
[6] David Harvey, 'The Right to the City', *New Left Review*, Vol. 53, No. 23, 2008, pp.23-40
[7] Lorna Fox, *Conceptualising Home: Theories, Laws and Policies*, 1st edn, Hart Publishing, Oxford 2006
[8] Jean-Jaques Rousseau, *The Social Contract*, trans Christopher Betts, 1st edn, Oxford University Press, Oxford 1994
[9] Gerald E. Frug, 'The City as a Legal Concept', *Harvard Law Review*, Vol. 93, No. 6, 1980, pp.1057-1154
[10] David Harvey, 'The Right to the City', *New Left Review*, Vol. 53, Sept-Oct 2008, pp.23-40

> "The *right to the city* cannot be conceived of as a simple visiting right or as a return to traditional cities. It can only be formulated as a renewed and transformed *right to urban life*".[11]

Yet, while the right to the city may have caught both popular and academic interest, there is still a lack of clarity as to how it can transform the city, or our understanding of urban participation. In that regard, this chapter aims to provide an insight into the right itself, as well as the challenges it may pose.

According to Lefebvre, the right to the city has two distinct components, namely appropriation and participation.[12] With regards to appropriation, Lefebvre argued that individuals create space where they shape their lives.[13] The nature of that space is necessarily affected by an individual's class, interests or her relationships with others. Space cannot be seen simply as a geographic form or a product of the built environment. Rather, it is a fluid concept, which is constantly produced and reproduced through the acts of individuals. Take the example of a music festival set in a park. For weeks before, the organisers may arrange for a stage to be built, or allocate areas for camping, stalls and food kiosks, while excluding visitors to the park. During the festival itself, the space will be used in the manner envisaged, before being returned to its original use as a park. Moving this notion into an urban context, Lefebvre argued that an individual appropriates space by carry out her day-to-day activities, such as living and working in the city. As such, the city becomes an "oeuvre" or a work in which all of the citizens participate. It can be seen a contrast to the relative stability and homogeneity of the rural.

Turning to the right to participate in the city, this is regarded as being contingent on an individual's ability to appropriate urban space by Lefebvre. So, it follows that if an individual is able to appropriate urban space, she should have the right to determine how that land is used. In short, she should be able to participate in all decisions affecting urban space. At first, there may seem to be nothing surprising in this aspect of Lefebvre's right to the city. Yet, it represents a rejection of traditional concepts of enfranchisement and participation. More specifically, enfranchisement is no longer based on an individual's membership of a national political community. Instead, it is concerned with whether she is an urban inhabitant, or "citadin" to use Lefebvre's terminology.

Likewise, Lefebvre's notion of participation does not simply refer to an individual's right to elect government officials or vote in a referendum. To the contrary, he envisaged that citadins should play a central and direct role in all decisions affecting urban space, having the "majority and hegemonic voice".[14] In London, for example, citadins would be able to participate in decisions about the location of an office block, or a new railway station. However, they would also be able to participate in the decision-making process of other nation states that affect the production of space in the city, such as the French government's decision to demolish a

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[11] Henri Lefebvre, *Writings on Cities,* trans Eleonore Kofman and Elizabeth Lebas, 1st edn, Blackwell Publishing, Oxford 1996, p.158

[12] Mark Purcell, 'Excavating Lefebvre: The right to the city and it urban politics of the inhabitant', *Geojournal*, Vol. 58, 1991, pp.99-108

[13] Henri Lefebvre, *The Production of Space*, trans Donald Nicholson-Smith, 1st edn, Blackwell Publishing, Oxford 1991

[14] Mark Purcell, 'Excavating Lefebvre: The right to the city and it urban politics of the inhabitant', *Geojournal*, Vol. 58, 1991, pp.99-108

refugee camp in Calais, known as the "Jungle".[15] Since many of the refugees in the camp were attempting to reach the United Kingdom and in particular, London, this decision could have real effect on the production of space in the city.

Despite its initial attractiveness, Lefebvre's right to the city remains problematic and difficult to define. Even though Lefebvre perceived the right to the city to be transformative, there is little evidence that it would operate in this way in practice.[16] Applying his theory, however, the nature of the city would depend on the political leanings of its inhabitants at the time the right was invoked. Take the example of Notting Hill and Shepherds Bush in London. In the 1950s and 1960s, the area was associated with immigration from the Caribbean, where individuals would live in poor quality housing that was administered by slum landlords, such as Perec Rachman. If Lefebvre's right to the city had operated in that area at that time, this could have had a real effect on the way in which that part of London developed. It may have affirmed the rights of the Afro-Caribbean community against other marginalised groups or more powerful communities. By contrast, Notting Hill is now an affluent neighbourhood, with many of the properties being owned by an international elite. If those inhabitants were to exercise Lefebvre's right to the city, this would lead to a very different urban environment and style of governance. In this regard, Lefebvre is notably vague about the definition of a city, whether it requires a certain population or should include the suburbs.[17] Moreover, Lefebvre does not consider how the right to the city would operate where two or more cities have an interest in a particular measure. So, returning to our example of the French government's decision to demolish the "Jungle" refugee camp in Calais, it is inevitable that will affect nearby cities, such as Lille and Paris. If those cities have competing interests, it is unclear whose interests will take precedence and how that will be determined. By way of example, would the decision be made by the city where there is the greatest effect on the production of space? Or should it be the city with the largest population? How can a decision be reached on the production of space in the city, when there is no general consensus amongst the citadins?

Finally, and perhaps in the context of this chapter, most importantly, some commentators have argued that the right to the city fails to take proper account of the importance of the private sphere, or the way in which they are interrelated. So, while Lefebvre argued that all citadins had the right to live in the city, he gave little thought to housing conditions or the space that an individual required to flourish. Instead, he simply rejected the notion of property rights, denouncing them as part of a "bureaucratic society of urban consumption".[18] Looking at this matter from a feminist perspective, it should be noted that Lefebvre does not consider how a woman's rights within her home may affect her enjoyment of the city, or the possibility that she may be

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[15] Robert Booth, 'Calais camp demolitions 'forcing more refugees to make crossing to UK', *The Guardian*, 24 March 2016, Retrieved on 24 March 2016 from www.theguardian.com/world/2016/mar/24/calais-refugee-camp-demolitions-increase-uk-asylum-seekers

[16] In his theory, Lefebvre does not address whether any checks and balances are required to prevent citadins from introducing exclusionary and discriminatory measures, such as racially restricted covenants. This has led to the continued and ongoing residential segregation of certain racial groups in America. See Kevin Fox Gotham, 'Urban Space, Restrictive Covenants, and the Origin of Racial Residential Segregation in a U.S. City, 1900-1950', *International Journal of Urban and Regional Research*, Vol. 24, No. 3, 2000, pp.616-33

[17] Mark Purcell, 'Excavating Lefebvre: The right to the city and it urban politics of the inhabitant', *Geojournal*, Vol. 58, 1991, pp.99-108

[18] Mustafa Dikeç, 'Justice and the spatial imagination', *Environment and Planning A*, Vol. 33, 2001, pp.1785-1805

excluded from certain public spaces through fear of harassment and unwelcome attention.[19] That same criticism may be made with regards to certain racial groups, or other disadvantaged members of society, such as the disabled and homeless.[20] After all, to participate in the city, an individual must have access to a space where she can express herself fully and without fear of recrimination. If she lives in an environment controlled by others, be it a home, prison or on the streets, this may not be possible.

THE PRIVATE CITY OR A PUBLIC SPACE?

In the context of the debate over the privatisation of urban space, it is notable there has been a growing interest in the right to the city, as well as the notion of the "commons". In cities across the world, shopping malls are being privatised, together with large areas of open space.[21] Even shelters in public parks are becoming high-end coffee kiosks, serving hot drinks at a price only a few residents can afford.[22] As Klein commented:

> "There are oppositional threads taking form in many different campaigns and movements. The spirit that they share is a radical reclaiming of the commons. As our communal spaces disappear – town squares, streets, schools, farms, plants – are being displaced by the ballooning marketplace, a spirit of resistance is taking hold around the world. People are reclaiming bits of nature and culture and saying 'this is going to be public space"'.[23]

If the commons is understood as land or resources that are managed by a community and to which we all have access[24], it can be seen in housing cooperatives, village greens[25] or even informal settlements that have been built outside the city.[26] Using London as an example, the River Thames can be seen as an urban commons. Since the city was established by the Romans, the river has been used by inhabitants for both trade and leisure pursuits, while in 1989, the Thames Path was granted the status of being an official National Trail. As a result of this designation, members of the public are able to walk approximately 200 miles from the river's source in the Cotswolds to the Thames Barrier. However, that right has been curtailed by property developers, who have built large residential complexes or apartment blocks by the banks of the river. This has meant that it is increasingly difficult for ramblers to walk along the Thames Path, without passing through private

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[19] Tovi Fenster, 'The Right to the Gendered City: Different Formations of Belonging in Everyday Life', *Journal of Gender Studies*, Vol. 14, No. 3, 2005, pp.217-231

[20] Don Mitchell, *The Right to the City: Social Justice and the Fight for Public Space*, 1st edn, The Guildford Press, New York 2003

[21] Antonia Layard, 'Shopping in the Public Realm: A Law of Place', *Journal of Law and Society*, Vol. 37, No. 3, 2010, pp.412-441

[22] Take the example of the Kiosk Café in Bethnal Green Gardens in London. Until recently, this was a unique Art Deco style public shelter, designed by the London Passenger Transport Board architect, Charles Holden. See planning application no. PA/14/02366 from the London Borough of Tower Hamlets.

[23] Naomi Klein, 'Reclaiming the Commons', *New Left Review*, Vol. 9, May-June 2001, pp.81-89

[24] Nicholas Blomley, 'Enclosure, Common Right and the Property of the Poor', *Social and Legal Studies*, Vol. 17, No. 3, pp.311-331

[25] s.15 Commons Act 2006

[26] Boaventura de Sousa Santos, 'The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada', *Law and Society Review*, Vol. 12, No. 1, pp.5-126

developments where access is controlled by a security guard or locked gate.[27] Once again, this highlights the conflict between an individual's right to enjoy the city and another's right to privacy. Put simply, the owner of a waterside apartment may wish to exclude members of the public from the space outside her building to protect her own quiet enjoyment of the land. Yet, in doing so, the property owner is limiting the right to the city enjoyed by another individual.

At this juncture, it is perhaps pertinent to consider Gray and Gray's conception of "quasi-public" property.[28] In terms of land, Gray and Gray have argued that "notions of "public" and "private" operate not dichotomously, but continuously across a spectrum in which adjacent connotations shade easily into one another".[29] By way of explanation, many of the public services that we use on a regular basis, such as parks, libraries and civic buildings, operate on privately owned land, even if the title is held by a local authority or government department. Given the nature of the land and the character of its owner, it is arguable that any exclusion from these places could be challenged on proportionality grounds under the Human Rights 1998, with the users invoking either Article 8, Article 10 or Article 11 of the European Convention on Human Rights. Yet, the complexity of property arrangements in the city mean that disputes over access are rarely so simple. For example, if a local authority had an office in a privately owned building, could the freeholder exercise her discretion to refuse entry to certain individuals? Is it reasonable for the owner of a riverside property to impose conditions on when and how part of the Thames Path can be used? Should the owner of a shopping centre be able to exclude members of the public from the property on a permanent and ongoing basis for acts of nuisance and anti-social behaviour?

In fact, the last question was answered in the affirmative by the Court of Appeal in *CIN Properties Ltd v. Rawlins*[30]. Although there was an implied permission for members of the public to enter a shopping centre, this was an equitable right that could be revoked with immediate effect.[31] Moreover, there was no obligation on the landowner to act rationally, or consider whether the exclusion was proportionate to the aim that she was trying to achieve. Interestingly, that decision was upheld by the European Court of Human Rights in *Appleby v. United Kingdom*[32], where a landowner was able to exclude an individual from a shopping mall for collecting signatures to protest against a local development. This did not represent a breach of the applicant's rights to freedom of assembly or expression, and neither could the government be expected to take any responsibility for the applicant's human rights.

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[27] Jack Shenker, 'Privatised London: the Thames Path walk that resembles a prison corridor', *The Guardian*, 24 February 2015, Retrieved on 24 March 2016 from www.theguardian.com/cities/2015/feb/24/private-london-exposed-thames-path-riverside-walking-route

[28] Kevin J. Gray and Susan F. Gray,'Private Property and Public Propriety' in ed. Janet McClean, *Property and the Constitution,* 1st edn, Hart Publishing, Oxford 1999; Kevin J. Gray and Susan F. Gray, 'Civil Rights, Civil Wrongs and Quasi-Public Space', European Human Rights Law Review, Vol. 4, 1999, pp46-102

[29] Kevin J. Gray and Susan F. Gray,'Private Property and Public Propriety' in ed. Janet McClean, *Property and the Constitution,* 1st edn, Hart Publishing, Oxford 1999

[30] *CIN Properties Limited v. Rawlins* [1995] 2 EGLR 130

[31] *Wood v. Leadbitter* (1845) 13 M&W 838

[32] *Appleby and Others v. United Kingdom* [2003] ECHR 222, (2003) 37 EHRR 38

More recently, however, there has been a move by the courts towards restricting a landowner's ability to evict individuals from her property. In a minority opinion in *Malik v. Fassenfelt*[33], Sir Alan Ward held that Article 8 of the European Convention on Human Rights was engaged where squatters had established a settlement and used the property as their home. As a result, the squatters could only be evicted if the eviction was a legitimate means of achieving proportionate aim. At first glance, this may appear to be an affirmation of the right to the city and an individual's ability to take part in all aspects of urban life. After all, by allowing an individual to remain on another person's land, she may be able to participate fully in the life of the community as an active citizen. Nevertheless, that decision is necessarily limited. Referring to the jurisprudence on evictions from social housing[34], Sir Alan Ward accepted that the circumstances that would prevent the eviction of a squatter or an occupier would have to be "exceptional". Indeed, it is difficult to envisage a case where the squatter's rights would take precedence over those of the owner. Further, it fails to take account of other legislation, which may exclude an individual from certain parts of the city. For instance, under the Anti-Social Behaviour, Crime and Policing Act 2014, a local authority is able to obtain an "injunction to prevent nuisance and annoyance" against an individual whose behaviour is likely to cause alarm, harassment or distress, for what could be an indefinite period of time. Had that law been in force at the time of the judgment in *CIN Properties Ltd v. Rawlins*[35], the young men may have found themselves subject to such an injunction that permanently excluded them from the shopping centre in question. In short, although the law that is used may be different, the consequences remain the same.

As we have seen before, the right to the city demands the right to use urban space, both for an individual's day-to-day activities and her participation in political life. In other words, a citadin needs to have a space where her voice can be heard without any undue restrictions, as well as gain access to the political process.[36] Nevertheless, a balance needs to be struck between our right to public space and private property rights. Writing on the plight of the homelessness, Waldron explains:

> "there is no place governed by a private property rule where he is allowed to be whenever he chooses, no place governed by a private property rule from which he may not at any time be excluded as a result of someone else's say-so".[37]

Put simply, a person who is homeless has nowhere to carry out her private functions, such as cooking, washing, sleeping and eating. She is allowed to live on the streets or under bridges, but only in the manner that society allows her to do so. Extrapolating Waldron's argument further, the same problem could arise if all land was common or publicly held. For instance, where in a warzone or a dystopian wasteland could an individual go to carry out her daily routine, without any unnecessary interference from others? Once again, she may be allowed to live in a refugee camp or a deserted building, but only in the manner that society allows her to do

[33] *Malik v. Fassenfelt* [2013] EWCA Civ 798
[34] *Manchester City Council v. Pinnock* [2010] UKSC 45, [2010] 3 WLR 1441; *London Borough of Hounslow v. Powell* [2011] UKSC 8
[35] *CIN Properties Limited v. Rawlins* [1995] 2 EGLR 130
[36] Jürgen Habermas, 'The public sphere: An encyclopaedia article', *New German Critique*, Vol. 3, Autumn 1974, pp.49-55
[37] Jeremy Waldron, 'Homelessness and Freedom', *UCLA Law Review*, Vol. 37, 1991-1992, pp.295-324

so. In these circumstances, it is necessary for us to examine the notion of privacy and how that can be achieved in the city, both through property rights and other laws. For the private sphere is not only where an individual lives the most intimate part of her life, but it is also the place in which she develops her ideas and associations with others. It is the place where an individual becomes a fully developed citadin.

IDEAS AND UNDERSTANDINGS OF PRIVACY

As a legal concept, privacy is notoriously difficult to define. Traditionally seen as "the right to be let alone"[38], it has more recently been described by Solove as a "relief from social friction. It enables people to engage in worthwhile activities that they would otherwise find impossible".[39] In England and Wales, the courts have refused to recognise a general right to privacy.[40] Yet, notions of privacy are present elsewhere in the law. Take landlord and tenant law for example. It is almost a truism that every residential tenancy agreement contains the implied covenant of quiet enjoyment.[41] This allows a tenant to use the rental property without any unreasonable interference from others, and in particular, her landlord. If a landlord enters a property without the tenant's consent or cuts off any essential services, this will be deemed to be a breach of contract and possibly even a criminal offence.[42] Meanwhile, harassment is a criminal offence[43], as is sending grossly offensive, indecent or obscene messages.[44] There is also legislation governing the dissemination of personal information[45] and perhaps, most importantly, a restitutionary claim for breach of confidence has been developed.[46]

Nevertheless, even though privacy has been described as a concept in "disarray"[47], there is often something instinctive about any breach. From a young age, we are able to recognise when there has been an unacceptable intrusion into our personal space, be it a parent entering a bedroom or teacher looking at messages on a student's mobile phone. We can also identify when another person's right to privacy has been breached. So, for instance, most individuals would agree that a woman's privacy has been invaded if she sees a peeping tom at the window, or finds an embarrassing photograph has been published in the press without her consent. The common theme in these examples is that others were involved, and have behaved towards us in a manner that we consider to be unacceptable. As such, privacy can be seen as a set of social norms that govern our relationships with others, and regulate any interactions.[48] To that end, there may be little need for privacy

[38] Thomas Cooley, *Cooley on Torts*, 2nd ed, 1888, p.29
[39] Daniel J. Solove, 'A Taxonomy of Privacy', *University of Pennsylvania Law Review*, Vol. 154, No. 3, 2008, pp.477-560
[40] *Kaye v. Robertson* [1990] EWCA Civ 21; [1991] FSR 62. This position was later affirmed in *Wainwright v. Home Office* [2003] UKHL 53; [2004] 2 AC 406
[41] *Jenkins v. Jackson* [1888] 40 Ch. D. 71. See also *Kenny v. Preen* [1963] 1 QB 499; [1962] EWCA Civ 2; [1962] 3 WLR 1233; [1962] 3 All ER 814
[42] s.5 Protection from Eviction Act 1977
[43] s.2 Protection from Harassment Act 1997
[44] s.127 Communications Act 2003
[45] Data Protection Act 1998
[46] *Douglas v. Hello!* [2001] 2 WLR 992
[47] Daniel J. Solove, 'A Taxonomy of Privacy', *University of Pennsylvania Law Review*, Vol. 154, No. 3, 2008, pp.477-560
[48] Robert C. Post, 'The Social Foundations of Privacy: Community and Self in the Common Law Tort', *California Law Review*, Vol. 77, No. 5, pp.957-1010

laws on a deserted island with only one or two inhabitants, but by way of contrast, the privacy of a citadin is likely to be challenged on a day-to-day basis, in view of the large, diverse and transient population of the city.

PRIVACY IN THE CITY

To understand how privacy operates in the city, it is necessary for us to examine how the law strikes a balance between an individual's right to be let alone, and the rights of others to freedom of expression and assembly. Often, these cases can be difficult and fact-dependent. Nevertheless, in part, that can be explained by the contradictory nature of an individual herself. On one hand, she may have a desire to be part of a community, but at the same time, she may wish for privacy. In her study of social ordering in four urban neighbourhoods, Merry observed such a contradiction in how middle-class Americans perceive society.[49] Individuals would often express a desire to have distance from their neighbours, but if there was any anti-social behaviour, they would look to the police for assistance. Even though Merry's study is over twenty years old, the conflict between an individual's need for privacy and community continues to exist. Indeed, it has become even more contested, given that the population of towns and cities is ever-increasing and space is more limited.

Despite the continued challenges to an individual's privacy, the English courts have failed to regulate our interactions with others in urban life adequately. Although the character of the neighbourhood may be a factor in determining whether certain conduct amounts to a nuisance[50], this only discriminates in favour of individuals living in the countryside, to the detriment of those in the city. More specifically, the law will not offer an individual any protection against her neighbour's reasonable use of land, even if it has a real and lasting effect on her wellbeing. In short, we must tolerate what our neighbours do, even if that hurts us. In *Southwark Borough Council v. Mills*[51], for example, the House of Lords expressed sympathy for a tenant living in the inner city, who could hear "not only the neighbours' televisions and their babies crying but their coming and going, their cooking and cleaning, their quarrels and their love-making".[52] However, she had no claim in nuisance for the reasonable daily activities of those living nearby. As a citadin, she was *expected* to know that she may have to endure the behaviour of her neighbours, before taking up residence in the apartment.

To that end, it is notable that many of the laws governing privacy in England and Wales apply an objective test, looking at the breach from the perspective of the "reasonable man" or "the man on the Clapham omnibus".[53] As Post argued, such a test can be seen as an extrapolation of the community's moral judgment on whether certain behaviour is acceptable, or if it is an invasion of privacy.[54] Yet, there may be particular issues with placing the reasonable man in the context of the city. By its very nature, the city is diverse in terms of age, culture, religion and ethnic background. In London, for instance, is the reasonable man a bearded hipster, city worker or lifelong resident? In addition, the use of an objective test means that little consideration

[49] Sally E. Merry, "Mending Walls and Building Fences: Constructing the Private Neighbourhood', *Journal of Legal Pluralism*, Vol. 33, 1993, pp.71-91
[50] *Sturges v Bridgman* (1879) LR 11 Ch D 852
[51] *Southwark Borough Council v. Mills* [1999] UKHL 40; [1999] 4 All ER 449; [1999] 3 WLR 939
[52] Lord Hoffman in *Southwark Borough Council v. Mills* [1999] UKHL 40; [1999] 4 All ER 449; [1999] 3 WLR 939
[53] Sir Richard Henn Collins MR in *McQuire v. Western Morning News* [1903] 2 KB 100 (CA)
[54] Robert C. Post, 'The Social Foundations of Privacy: Community and Self in the Common Law Tort', *California Law Review*, Vol. 77, No. 5, pp.957-1010

is given to the way in which an individual's surroundings affect her behaviour towards others. That is to say, the conduct of the reasonable man is not considered from a spatial perspective. Rather, he is deemed to be a "legal fiction", which arises by the application of an impersonal standard.[55] Taking into account the above considerations, the objective standard may be better seen as the moral judgement of a small number of individuals within the legal system, rather than as reflective of the interests of those living in the city. Against that background, this chapter will conclude by examining two instances where the courts has attempted to balance privacy and our right to participate in the city.

PUBLIC INTEREST IN A PRIVATE LIFE

Ever since lawyers have contemplated an action for breach of privacy, there has been a debate over the level of privacy that should be enjoyed by an individual in public life. As Warren and Brandeis explained:

> "The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may properly prefer to keep private, made public against their will. It is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, prevented".[56]

So, for instance, to establish a claim for breach of confidence in England and Wales, a claimant must demonstrate that the information in question is private, and that the interests in keeping it private outweigh those in favour of publication.[57] Further, in deciding whether to allow publication, the judge will consider whether an individual is performing an official function, or is simply in the public eye. Using that analysis, the courts have allowed personal information to be published about Sir Fred Goodwin, the former Chief Executive of the Royal Bank of Scotland[58], and Boris Johnson, a prominent Conservative politician.[59]

Looking at this matter in the context of privacy and urban participation, a number of questions still remain. By way of example, what protection should be afforded to an individual who participates in the political life of the city, but to a lesser degree, such as a local councillor or an elected police commissioner? Likewise, the city contains a number of organisations that carry out a public function, but are run by private enterprises, such as housing associations and academy schools. How much privacy should the headmaster of such a school enjoy? Is there a legitimate public interest in the behaviour of a chief executive of a housing association, if he has acted recklessly in his private life?

Returning to Lefebvre's notion of the right to the city, it could be argued that all of these individuals make decisions that affect the production of urban space. Therefore, any relevant information about their private lives should be disclosed. Put simply, it affects a citadin's participation in the city, as well as any decisions she makes. Nevertheless, that fails to address how the publication of private information may affect the wellbeing

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[55] *Healthcare at Home Limited v. The Common Services Agency* [2014] UKSC 49
[56] Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy', *Harvard Law Review*, Vol. 4, No. 5, 1890, pp.193-220
[57] *McKennitt v. Ash* [2008] QB 73
[58] *Goodwin v. News Group Newspapers Limited* (No. 3) [2011] EWHC 1437 (QB)
[59] *AAA v. Associated Newspapers Limited* [2013] EWCA Civ 554

of an individual and her family. It could deter her from participating fully in urban life, or even from carrying out her usual daily activities. More importantly, however, there is a risk that this could deter other members of the community from participating in the city, particularly women or those from minority groups.[60] For the city to operate effectively, there needs to be participation at grass-roots level and across all ages, races, genders and cultures. Without this, the interests of certain groups of citadins will not be represented adequately or at all.

PUBLIC PARTICIPATION IN A PRIVATE DECISION

Aside from claims for breach of confidence, the law governing the conduct of elections regulates privacy and participation in the city, both through domestic legislation in the Representation of the People Act 1983 and the European Convention on Human Rights. Although it is a qualified right[61], Article 1, Protocol 3 of the European Convention on Human Rights provides that elections shall be held at regular intervals and by secret ballot, under conditions which ensure the free expression of members of the public. Of course, if an election is not conducted properly, it cannot be said to be democratic or represent the will of the people. In that regard, there are obligations on the candidates and their supporters, as well as public officials[62], the returning officer[63], broadcasters[64] and the police.[65] By way of example, it is an illegal practice to publish any false statement about a candidate's personal character or conduct, unless the publisher has reasonable grounds for believing it to be true. Likewise, it is a criminal offence to procure votes in exchange for money, a financial benefit[66] or hospitality.[67]

In recent years and in particular, under the Blair Government, there has been a move towards the devolution of power to regional governments and local authorities, with the London Assembly and the elected position of Mayor of London being established in the Greater London Authority Act 1999. Further, the Local Government Act 2000 gave local authorities the ability to adopt a governance structure with a directly elected mayor, if that was approved by the electorate in a referendum. As a consequence, this has renewed interest in local democracy, but it has also meant that elections are bitterly fought between different interest groups, each seeking control of the authority in question. Given the contested nature of the city, these developments have proved to be problematic in London, and nowhere more so than in the London Borough of Tower Hamlets. The London Borough of Tower Hamlets can perhaps be best described as one of the most diverse and heavily

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[60] Shalailah Medhora, 'Julia Gillard backlash puts woman with traditional gender beliefs off politics – study', *The Guardian*, 13 January 2015, Retrieved on 26 March 2016 from www.theguardian.com/world/2015/jan/13/julia-gillard-backlash-puts-women-with-traditional-gender-beliefs-off-politics-study; George Eaton, 'Why Chukka Umunna withdrew from the Labour leadership race', *New Statesman*, 15 May 2015, Retrieved on 26 March 2016 from www.newstatesman.com/politics/2015/05/why-chuka-umunna-withdrew-labour-leadership-race

[61] *Hirst v. United Kingdom (No. 2)* 19 BHRC 546, (2006) 42 EHRR 41, [2006] 1 Prison LR 220, 42 EHRR 41, [2005] ECHR 681

[62] s.99 Representation of the People Act 1983

[63] s.28 Representation of the People Act 1983

[64] s.93 Representation of the People Act 1983

[65] s.100 Representation of the People Act 1983

[66] s.113 Representation of the People Act 1983

[67] s.114 Representation of the People Act 1983

populated areas of London. At one time, the borough had a reputation for poverty and crime[68], with an underlying narrative of "waves of foreign immigration"[69], dating back to the arrival of French Huguenots in the seventeenth century. Nowadays, there are still areas of real deprivation, but it is also home to the Tower of London, Canary Wharf, Spitalfields Market and Brick Lane. Moreover, Tower Hamlets has had a history of electoral problems, as well as political conflicts with central Government.[70] So, perhaps it is pertinent to examine the most recent judgment involving electoral malpractice in the borough, namely *Erlam v. Rahman*.[71]

The judgment in *Erlam v. Rahman* concerned a petition by four voters in the London Borough of Tower Hamlets, alleging that the election of Lutfur Rahman as Mayor in 2014 should be set aside on the basis of corrupt and illegal practices.[72] The petition contained numerous instances of alleged electoral malpractice, including personation, treating, bribery, making unlawful payments to canvassers, tampering with ballot papers and misleading voters as to the political affiliation of Mr Rahman. Most importantly, however, the petition alleged that there had been undue influence on the part of Mr Rahman and his supporters, involving both spiritual injury and intimidation at polling stations.

With regards to the allegation of intimidation at polling stations, the petitioners adduced evidence of voters being harassed by the jeering and cat-calling of Mr Rahman's supporters. Some spoke of having to "run the gauntlet" into the polling station. One woman even told the court that Mr Rahman's supporters besieged her car, banging on its windows with leaflets from his campaign.[73] Arguably, this demonstrates that proper consideration should be given to both the spatial and temporal aspects of our participation in the city, as well as the privacy that requires. As Zick has claimed, many accounts of participation fail to address the importance of place.[74] In part, the conduct of Mr Rahman's supporters was objectionable because they were based at the polling station on an election day. Had this campaigning taken place in a different place or on a different day, an individual may not have felt intimated by the supporters' behaviour, or obligated to vote in a certain way. On an election day, an individual needs to have privacy to be able to cast her vote freely, but a candidate's supporters may wish to canvass at every opportunity. As a result, participation in urban life can lead to greater and ever-increasing challenges to privacy. To that end, it is notable that when the mayoral election was re-run in Tower Hamlets in 2015, there was a greater police presence at polling stations.[75] In addition, zoning was used to protect voters from unreasonable interference by candidates and their supporters in a manner that was reminiscent of the "bubbles" surrounding abortion clinics in the USA.[76]

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[68] Arthur Morrison, *Tales of the Mean Streets*, 1st edn, Methuen & Co, London 1894; Arthur Morrison, *A Child of the Jago*, 1st edn, Methuen & Co, London 1896; Sarah Wise, *The Blackest Streets: The Life and Death of a Victorian Slum,* 1st edn, Vintage, London 2009

[69] Spitalfields, *Spitalfields History*, Retrieved on 24 March 2016 from www.spitalfields.co.uk/spitalfields-history

[70] *Erlam v. Rahman* [2015] EWHC 1215, pp.56-57

[71] *Erlam v. Rahman* [2015] EWHC 1215

[72] s.158 Representation for the People Act 1983

[73] *Erlam v. Rahman* [2015] EWHC 1215, pp.178

[74] Timothy Zick, 'Speech and Spatial Tactics', *Texas Law Review*, Vol. 84, No. 3, 2006, pp.581-651

[75] Catherine Neilan, 'Tower Hamlets mayoral election: Police will be monitoring voting tomorrow to curb "fraudulent activity"', *City A.M.*, 10 June 2015, Retrieved on 24 March 2016 from www.cityam.com/217626/tower-hamlets-mayoral-election-police-will-be-monitoring-voting-tomorrow-curb-fraudulent

[76] *Madsen v. Women's Health Center Inc.*, 512 US 753 (1994)

A Canvassing Exclusion Zone, Ben Johnson Primary School in London, 11 June 2015

Turning to the allegation of undue spiritual injury, the election commissioner summarised the petitioners' case in the following terms:

> "Mr Rahman… was determined to play the religious card. The campaign would be targeted at Tower Hamlets' Muslim population with a stark message. Islam is under threat: it is the duty of all devout Muslims to vote for Mr Rahman and his party".[77]

In support of that allegation, the petitioners cited two occasions during the election campaign where Mr Rahman had shared a platform with Mr Hoque, the Chairman of the Council of Mosques. From a video and a contemporaneous newspaper article that was written by one of Mr Rahman's supporters, it was evident that Mr Hoque enthusiastically endorsed Mr Rahman's candidature, and had encouraged voters to elect him as Mayor of Tower Hamlets. Further, a letter was sent to a local Bangladeshi newspaper, the Weekly Desh, by 101 Muslim clerics and scholars, in support of Mr Rahman. Rightly or wrongly, the election commissioner characterised this letter as a call by influential religious leaders to the faithful, informing them that it was their duty to vote for Mr Rahman.

At first glance, this allegation may appear to have little relevance to an individual's privacy in the city. Yet, there are certain private matters that are so fundamental to ourselves and our personhood that to refer to them

[77] *Erlam v. Rahman* [2015] EWHC 1215, pp.160

in an election campaign could be seen as unfair and even undemocratic. Take the example of a candidate who threatens to assault a voter, if she fails to cast her vote in a certain way. That is a simple case where an individual is unable to exercise her democratic right for fear of harm. By way of analogy, is there any real difference if a voter is told that it is her religious duty to elect a certain candidate? If she is devout in her religion, she may believe that any failure to comply with the teachings of a religious leader could lead to grave consequences. To argue otherwise is to fail to take account of the strength of an individual's religious beliefs. However, it is that same devoutness that may encourage an individual to participate in the city. Indeed, supporters of Mr Rahman have argued that the judgment could be regarded as being discriminatory and even racist.[78] They may contend that by placing restrictions on the content of a candidate's election campaign, the law does not adequately consider the interests of different communities or the way in which they may wish to participate in the city. Given these competing interests, it may be appropriate to consider urban participation from a utilitarian perspective. In other words, participation in the city should be regulated in such a way that the greatest number of citadins are able to take part in urban life with as few restrictions as possible, so long as the privacy of others is respected. Here, it is notable that in *Erlam v. Rahman*[79], the election court that there was no undue intimidation at polling stations, even though the conduct of Mr Rahman's supporters may have been unacceptable to some voters.

CONCLUDING REMARKS

To summarise, it is difficult to see how a consensus can be reached as to the balance that should be struck between an individual's right to privacy and her ability to participate in urban life. Such a conflict is inherent in the contested nature of the city, as well as the wider incongruity between social capital and diversity.[80] One approach, however, may be to view the relationship between privacy and participation as the operation of a social norm. As such, this necessarily depends on the nature of the city itself, as well as the expectations of its citadins and any shared codes of behaviour. Returning to our original example of the London Underground, there is an implicit understanding amongst commuters that a train journey during rush hour may involve physical intrusions in the personal space of others. To prevent further intrusion into an individual's private space, there is silence. Of course, that conduct is a social norm, and may be particular to London. It may not be replicated on the Paris Metro, New York Subway or Berlin U-Bahn.

Nevertheless, there is still a circularity to the arguments surrounding both privacy and participation. Put simply, an individual should be encouraged to participate in all aspects of city life, and that requires the wider community to respect her privacy. Yet, to participate, an individual must relinquish certain aspects of her right to a private life and accept that her acts may intrude on the privacy of others. Perhaps this circularity is why the conflict between privacy and urban participation has not been considered in greater detail in the academic

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[78] Nadine El-Enany, 'Why Muslims Can't Trust the Legal System: The Lutfur Rahman Judgment And Institutional Racism', *Critical Legal Thinking*, 16 May 2015, Retrieved on 24 March 2016 from www.criticallegalthinking.com/2015/05/16/why-muslims-cant-trust-the-legal-system

[79] *Erlam v. Rahman* [2015] EWHC 1215

[80] Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community*, Simon & Schuster, New York 2000; Stephanie Stern, 'The Dark Side of Town: The Social Capital Revolution in Residential Property', *Virginia Law Review*, Vol. 99, pp.811-877

literature. Even so, without privacy or a private space, an interest group would not be able to organise its members. An individual would not be able to develop her sense of self in a way that allows her to participate in public life. The city has been developed both through privacy and participation, and that should be given due consideration in any account of urban law.