INTERNATIONAL HUMAN RIGHTS LAW AND BEST PRACTICE FOR LAWYERS IN KAZAKHSTAN

February 2021

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COMMITTEE OF
ENGLAND & WALES

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PROGRAMME

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Date	Time	Topic	Speakers	Manual references
Tuesday 9 February	19:00	Derogation from human rights during a pandemic; Right to a fair trial	Jonathan Cooper OBE Grainne Mellon	• Chapters I, II, III and IV • Chapter V, Section B • Chapter IX
	20:00	Implementation of fair trial standards in the COVID-19 environment in Kazakhstan.	Inara Massanova	
Wednesday 10 February	19:00	Freedom of Expression and Assembly	Jonathan Cooper OBE Grainne Mellon	• Chapter XI
	20:00	The realisation of freedom of peaceful assembly in Kazakhstan. How has the law and practice changed in the COVID-19 environment?	Tatyana Chernobil	
Tuesday 16 February	19:00	Detention	Jonathan Cooper OBE Kate Stone	• Chapter VI • Chapter VII • Chapter VIII
	20:00	Health care access and denial for pre-trial and custodial detainees in Kazakhstan during the COVID-19 period	Elvira Bokhanova	
Wednesday 16 February	19:00	Discrimination	Jonathan Cooper OBE Kate Stone	• Chapter V, Section A
	20:00	Migrants and asylum seekers. Protection issues in the Covid-19 period in Kazakhstan.	Ayna Shormanbayeva	
Tuesday 23 February	19:00	Privacy	Jonathan Cooper OBE Professor Bill Bowring	• Chapter X
	20:00	Protecting workers' rights and modern slavery in Kazakhstan	Ayna Shormanbayeva	

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PRIVACY, POLICING AND HUMAN RIGHTS:

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ARTICLE 17, ICCPR

1) No one shall be subjected to arbitrary or unlawful interference with privacy, family, home or correspondence, nor to unlawful attacks on honour and reputation.

2) Everyone has the right to the protection of the law against such interference or attacks.

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WHAT IS PRIVACY?

- There is no set definition of privacy or a private life.
- Privacy is as much an impression as it is a legally binding principle.
- It is helpful to divide privacy into five areas. They are:
    - Identity
    - Integrity
    - Surveillance, Policing and State Administration
    - Data Protection
    - Media
- All of these aspects may be relevant to the use of SITs and the investigation of crime and law enforcement.

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RESPECT FOR PRIVATE LIFE: IDENTITY

- Access to information concerning one's origins
- Access to proof of identity
- Identity: restricting third party access to personal information
- Sexual identity
- Transgender identity
- Identity and membership of a group and community
- Names

RESPECT FOR PRIVATE LIFE: AUTONOMY AND PHYSICAL AND MORAL INTEGRITY

- Unwanted touching/medical treatment
- Disability and controlling the quality of life
- Controlling the quality of life and the right to die
- Denial of or access to medical treatment
- Reproductive rights and the termination of pregnancy
- Reproductive rights and the right to conceive
- Environmental nuisance

CONTEMPLATING PRIVACY

- The concept of privacy rights cannot be narrowly construed.
- Is there a “legitimate expectation of privacy”?
- The public and private spheres necessarily interact. They are not mutually exclusive.
- We all carry on life partly in public. Our private interests, therefore, need protection in public places.
- When the State fails to protect privacy rights properly, this creates a dysfunction between the private and public.

INTERFERING WITH PRIVACY MUST BE LAWFUL:

- No one shall be subjected to arbitrary or unlawful interference
- There must be a clear legal basis for the interference
- Statute law should set out the circumstances whereby privacy can be interfered with, particularly in the context of policing
- Less serious interferences may be governed by rules or common law, but the law must be clear and accessible

RECOGNISED GROUNDS, OR LEGITIMATE AIMS, FOR RESTRICTING PRIVACY RIGHTS?

- Legitimate aims for restricting privacy include: national security, public order or safety, protecting the rights and freedoms of others, prevention of disorder and crime, protecting health and morals and the economic well-being of the country.
- If no such legitimate aim can be identified, the attempt to limit privacy will be unlawful.
- These enumerated aims or purposes are not to be interpreted loosely.
- The *Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR* provide a helpful explanation of how these aims and purposes should be defined.

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IS IT "NECESSARY IN A DEMOCRATIC SOCIETY"?

- This is the key test, along with proportionality, that governs the lawfulness of an interference with privacy.
- "Necessary" does not mean indispensable, but neither does it mean "reasonable" or "desirable". What it implies is a pressing social need for the restriction on the right and that pressing social need must accord with the requirements of a democratic society.
- Any such pressing social need must be supported by a very good reason and satisfy the essential hallmarks of a "democratic" society: tolerance, pluralism and broad-mindedness.

IS IT PROPORTIONATE?

- Proportionality requires a determination of whether a measure, which is aimed at promoting a legitimate public policy but interferes with privacy rights, is either:
    - unacceptably broad in its application; or
    - has imposed an excessive or unreasonable burden on certain individuals.
- Factors to consider when assessing whether or not an action is disproportionate are:
    - Have relevant and sufficient reasons been advanced in support of it?
    - Was there a less restrictive measure?
    - Has there been some measure of procedural fairness in the decision-making process?
    - Do safeguards against abuse exist?
    - Does the restriction in question destroy the “very essence” of the right in question?

Is it discriminatory?

- As part of the test for assessing the legality of an interference with human rights, the issue of discrimination must be addressed, even if there has been no violation of the substantive right at issue. As a general principle, a distinction will be considered discriminatory if:
    - it has no objective and reasonable justification;
    - it does not have a very good reason for it; and,
    - it is disproportionate.
- If these tests cannot be met, and there is a difference of treatment, that difference of treatment will amount to discrimination and will be unlawful.

Policing and Human Rights

- Effective policing & law enforcement promotes safe, secure and contented communities.
- Policing by consent: balancing the rights of the community with the rights of individuals.
- Confidence and trust in policing requires that it is:
    - objective,
    - proportionate,
    - non-discriminatory and
    - accountable.
- It also requires that it is transparent.
- Can this requirement for transparent policing justify covert policing or special investigation techniques (SITs)?

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What are SITS?

- SITs are techniques used by authorised law enforcement officials, and other relevant competent authorities, in the context of criminal investigations for the purpose of detecting and investigating serious crimes and suspects.
- Their aim is to gather information in such a way as not to alert the target persons.
- SITs share in common the fact that they are secret, or covert, in nature.
- SITs may include (and are not limited to):
  - undercover operations (including covert investigations);
  - the use of informants;
  - observation (including cross-border observation);
  - electronic surveillance;
  - interception of communications (telephone, fax, e-mail, mail);
  - searches (including of premises and objects, such as computers, cars, etc);
  - cross-border pursuits; and
  - pseudo-purchases or other “pseudo-offences”.

SITS & HUMAN RIGHTS

- Human rights standards can endorse the use of SITs for assisting in solving and preventing serious crime and/or terrorism.
- SITs have the potential to interfere with fundamental human rights and freedoms. The rights that will be engaged by SITs are:
    - Respect for private life
    - Fair trial
    - Effective remedy

  Their use could have the effect of compromising effective policing.

  SITs and the consequences of their use, without careful regulation, can subvert democracy.

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INFORMERS, UNDERCOVER OFFICERS AND ENTRAPMENT

- Even the public interest in the detection of serious crime cannot justify the instigation of criminal offences by undercover agents.
- The law governing the use of undercover agents must be clear and precise.
- It must also provide safeguards against abuse.
- So long as informers and/or undercover officers keep within the reasonable limits in relation to surveillance no issues arise under the right to a fair trial, neither does any privacy issue arise under the right to respect for private life.
- The defence must, however, have the opportunity of challenging the evidence.

SURVEILLANCE

- The existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime.
- The legislation at issue must be accessible and foreseeable as to its effects.
- The law must indicate the degree of the discretion conferred on the competent authorities and the manner of its exercise with adequate precision.
- It must be stressed that surveillance will only be appropriate to consider as an option in relation to serious criminal activity.

***Klass v. Germany* (1978):** exceptional circumstances can permit the practice of covert surveillance, however the State does not enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance.

> "the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate. The Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. This assessment has only a relative character: it depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law."

INTERCEPTION OF COMMUNICATIONS

- The interception of communications will interfere with the right to correspondence as well as the right to private life. Any interception must meet minimum requirements of:
    - confidentiality;
    - integrity; and
    - availability
- These requirements mean:
    - that the information should be accessible only to certain authorised persons (confidentiality);
    - that the information should be authentic and complete, thus granting a minimum standard of reliability (integrity); and
    - that the technical system in place to intercept telecommunications is accessible whenever necessary (availability).

AS REGARDS TELEPHONE TAPPING, THE LAW SHOULD:

- set out the categories of persons whose telephones may be tapped;
- spell out the nature of the offences justifying the use of tapping;
- indicate the duration of the measure;
- explain the procedure for drawing up the summary reports containing intercepted conversations;
- identify the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge and the defence; and
- clarify the circumstances in which they are to be erased or destroyed (in particular following discharge or acquittal of the accused).

JUDICIAL CONTROL

- To allow a non-judicial authority alone to decide on intercept operations may constitute a violation of privacy rights.
- There needs to be appropriate legislative measures to ensure adequate control of the implementation of special investigation techniques by judicial authorities or other independent bodies through prior authorisation, supervision during the investigation or *ex post facto* review.
- The most effective control is a system of prior authorisation, although this is not always appropriate or possible.

JUDICIAL CONTROL

- Whether prior authorisation or *ex post facto* review is required may depend on the nature of the operation and the power in question.
- *Klass v. Germany*: the Court accepted that a mechanism for supervision of telephone tapping, involving a confidential committee to review authorisations rather than prior judicial authorisation, was sufficient in the circumstances for the measure not to constitute a disproportionate interference with privacy rights.
- The Court acknowledged the serious nature of the interference and the real possibilities of abuse; however, it was willing to accept it because it was convinced that the safeguards were both adequate and effective in the circumstances.
- Additional specific protection mechanisms (such as an independent "Commissioner for legal protection") should also be established.

OBLIGATION TO PROVIDE TRAINING

- Adequate training of competent authorities in charge of decisions about and supervision of special investigation techniques should be provided. Such training should comprise:
    - technical and operational aspects of SITs;
    - criminal procedural legislation in connection with them; and
    - relevant training in human rights.

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UNLAWFULLY OBTAINED EVIDENCE AND THE RIGHT TO A FAIR TRIAL

- As a general principle, any evidence obtained in breach of private life rights should not form part of a criminal prosecution, because to do so may violate the right to a fair trial.
- Evidence gained from an interference with privacy should not be submitted in such a way as to jeopardise the right of the accused to a fair trial.
- The right to a fair trial requires that the proceedings as a whole, including the way in which evidence is submitted, must be fair.
- However, in exceptional circumstances evidence relied upon which interferes with privacy may not necessarily render the trial unfair. Relevant questions in determining the fairness of the trial will include:
    - who had authorised the breach of privacy and how;
    - whether the evidence could have been collected in another way; and also
    - the weight and probative value of the evidence.

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- In determining whether a trial has been fair where unlawfully obtained evidence in breach of privacy rights has been relied on, the following factors will be relevant:
    - whether there was a breach of domestic law as well as IHRL;
    - whether the breach of IHRL was in good faith or not;
    - whether there was any element of entrapment or inducement;
    - whether the unlawfully obtained evidence is the only evidence against the defendant will also be relevant but not determinative.

OTHER ASPECTS OF OPERATIONAL POLICING AND PRIVATE LIFE RIGHTS: PHOTOGRAPHS, FINGERPRINTS, DNA, SAMPLES

The taking of personal details, photographs, DNA and body samples all engage the right to respect for private life and have to be justified.

SCENARIO

M was arrested and charged with harassment of his girlfriend. His fingerprints and DNA samples were taken and placed on police national computer databases. A few months later the case was formally discontinued because M and his girlfriend got back together.

M requested that his fingerprints, DNA samples and profiles be destroyed. The request was refused.

A law permitted the retention of fingerprints or samples taken from a person in connection with the investigation of an offence even if that person was subsequently acquitted or the case was discontinued for whatever reason. The data in question could be retained irrespective of the nature or gravity of the offence or the age of the suspected offender. The data could also be held indefinitely.

M argues that the retention of his DNA and fingerprints is a violation of his right to respect for his private life which is neither necessary or proportionate.

The government assert that the retention of DNA and/or fingerprints does not engage the right to private life or if it does it is lawful interference for the purposes of crime prevention.

Who is right?

SCENARIO: CCTV

A CCTV surveillance system is installed in a town centre. One night P attempts to commit suicide in the town by cutting his wrists with a knife, unaware that he was being filmed by CCTV. The police are called and P is given medical assistance.

The Town council then decide to publish still photographs taken from the CCTV footage. P's face was not specifically masked. The story is then picked up and is shown on local and then national TV. Although there were some attempts to mask P's face, these were inadequate. Many of P's friends and family recognise him.

P challenges the release of the footage and argues that it is in breach of his privacy rights.

The Government argues that the right to respect for private life is not engaged or interfered with. Are they correct?

FACIAL RECOGNITION TECHNOLOGY

Facial recognition can be used for passive and general surveillance and does not require the knowledge, consent or active participation of the people being monitored

Will the spread of biometric mass surveillance alter human behaviour?

What are the implications for our democratic values?

Does the technology entrench discrimination?

Why has San Francisco banned the use of facial recognition technology?

What human rights are engaged?

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PRIVACY AND DATA PROTECTION

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PRIVACY AND DATA PROTECTION

- Data protection and respect for private life go hand in hand.
- Data protection regimes have to build in safeguards, as a minimum, which are commensurate with privacy rights.

PRIVACY AND DATA PROTECTION

There are a number of principles for the fair and lawful collection and use of data. These include:

- Data can only be collected for a specific purpose and should not be used for any other reason;
- Data must be accurate, adequate for this purpose and stored only for as long as is necessary;
- There must be a right of access to and rectification of data for the person concerned (data subject);
- Special protection must be made for data of a sensitive nature, for example on religion, political beliefs, sexual orientation, genetics or medical information.

DATA PROTECTION

- National legislation must contains these basic principles in respect of the personal data of every individual on their territory.
- Anyone processing personal data must comply with the eight enforceable principles of good practice. These require that data must be:
    - fairly and lawfully processed
    - processed for limited purposes
    - adequate, relevant and not excessive
    - accurate
    - not kept longer than necessary
    - processed in accordance with the data subject's rights
    - secure
    - not transferred to countries without adequate protection

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RACIAL AND RELIGIOUS PROFILING

- The general collection and processing of information solely by reference to criteria such as race or religion, and the use of that information as a starting point for investigations, without any specific or individual reasons to suspect the persons involved, raises serious doubts about whether such activities are compliant with privacy rights and the protection from discrimination.

- The only circumstances where it could be lawful is if there is a specific and concrete danger to the existence of the State, or the life of an identified individual.

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