



## **The New President, His Wife and the Media: Pushing Away the Limits of Privacy Law's Protection in France?**

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### **Introduction and General Background to Privacy Protection in France**

Last February, The Guardian newspaper commented that 'French President Nicolas Sarkozy's passion for publicity has created a whole new world for the country's laws on privacy'.<sup>1</sup> This comment echoes a remark made at the same time by French law professor Hauser in the very formal French *Revue Trimestrielle de Droit Civil* where President Sarkozy was described as 'un Président publicitaire'.<sup>2</sup> Comments as such are bound to raise the curiosity of British lawyers who for years have turned to the strict French laws on privacy in their quest for a model to follow when it comes to the protection of the privacy of public figures in Britain.

Few in France would argue that President Sarkozy has inaugurated a new era in the history of the 5<sup>th</sup> Republic in respect of the relationship between the presidency and the press. Since 2006, the French people have been entertained with rumours and stories surrounding the marital difficulties of the President to be with his previous wife Cécilia and, following this, the well publicised whirlwind relationship with former model and singer Carla Bruni who has since become his wife. The novel aspect of this presidency is the fact that the parties involved have mostly deliberately courted publicity, the President himself speaking openly earlier this year at a press conference of the seriousness of his relationship with Carla Bruni. It is therefore questionable why despite this search for publicity, both the President and his wives (former and current) turned to the courts to seek redress in respect of their privacy which they assert had been invaded by the media. In this paper I will be referring to the three reported decisions concerning President Sarkozy and his wife, namely (i) the 2006 judgment against the Swiss newspaper *Le Matin* which had published a series of articles concerning the Sarkozy couple's marital difficulties, (ii) the 2008 decision in the case of President's Sarkozy's former wife Cecilia in respect of the publication of a book by a journalist to whom she confided intimate details of her private life, and (iii) the 2008 *Ryanair* decision where the low cost airline published an advert featuring the picture of the President with his wife to be, Carla Bruni.<sup>3</sup>

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<sup>1</sup> Marcel Berlins, *The Guardian*, Monday, February 4, 2008.

<sup>2</sup> Jean Hauser, *RTDC* April/June 2008, 273.

<sup>3</sup> *Nicola S. v Le Matin*, TGI Thonon Les Bains, 22 September 2006; *Ciganer-Albeniz v Cremisi, Société Flammarion and Bitton*, TGI Paris, 11 January 2008, JCP 2008, Act. 66; *N. Sarkozy v. Sté Ryanair and C. Bruni Tedeschi v Sté Ryanair*, TGI Paris, 5 February 2008, JCP 2008, Act. 117.

These recent developments in France provide a good opportunity to revisit and clarify the question of how far the law in France affords protection to public figures, especially politicians, who claim invasion of their privacy against the media. The attempt to draw a line as to when and where politicians and other celebrities should be safe from intrusive journalists and photographers has for years been the subject of heated controversy in England. The Princess of Wales fatal accident in Paris in 1997 sadly highlighted a need to reconcile press freedom and the right to privacy of public figures.<sup>4</sup> This debate has to be set against recent court cases in England which are increasingly taking into account the recognition of privacy as a human right.<sup>5</sup>

In contrast to the English approach, French law has for long recognised a so called free-standing right to privacy in respect of the private life of public figures. Protection of privacy in France can be traced back to the end of the nineteenth century when French law started to develop piecemeal personality rights, including the right to control one's image. This particular right was first recognised in 1858 in the case of the famous actress Rachel where her family were entitled to damages in respect of the unauthorised publication of a portrait of the actress on her death bed.<sup>6</sup> However, it was only in 1970 that a general right to respect for private life was added to the Civil Code in its article 9 which states that 'everyone has the right to respect for their privacy'. The civil code right to privacy was modelled on article 8 of the European Convention on Human Rights which, since its ratification by France in 1974, has become directly applicable in domestic law. Although the right to privacy is not referred as such in the text of the French constitution, in 1995 it was ascribed constitutional value by the French Constitutional Court as a corollary of the principle of individual freedom recognised by the 1789 DDHC, article 2 and the Constitution itself, article 66.<sup>7</sup>

The 1970 law is often said to have been passed with a view to provide adequate remedies against continuous intrusions by the media in the life of celebrities following a series of cases brought to the courts by the famous movie star Brigitte Bardot. However, it is not by accident that the legislation on privacy was introduced into the law in 1970 in the Presidency of Georges Pompidou. Whilst serving as De Gaulle's Prime Minister, Pompidou was involved in a high profile criminal case, the murder of Stevan Markovic – the bodyguard of a movie star – in which case Pompidou and his wife were accused of allegedly having been involved in lurid activities in the presence of the man subsequently murdered.

Within the terms of the 1970 Law everyone, whether or not they are in the public eye, have the right to respect for their private life. This principle has by now become very well established and French judges do not hesitate to make a reference to it when necessary and appropriate.

The 1970 law provides for specific remedies which include the possibility of an interim injunction to restrain any publication of private information, the seizure of any offending publication, the award of damages, and the publication of the judgement given against the newspaper or magazine. Any intrusion into someone else's private life is also an offence under article 226-1 of the New Criminal Code. Anyone found guilty in this respect is liable to a term of one year imprisonment and / or a fine to a maximum of 45 000 Euros.

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<sup>4</sup> European law, Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy was adopted on 26 June 1998, less than one year after the death of the Princess of Wales.

<sup>5</sup> See, Lord Woolf's guidelines in respect of public figures' privacy in the footballer case of *A v B* [2002] EWCA Civ 337; [2002] 3 WLR 542.

<sup>6</sup> Trib. Pr. Inst. De la Seine, 16 June 1858.

<sup>7</sup> Decision 94-352DC 18 January 1995.

The 1970 Law has generated a very important body of case law. As will be seen in the context of public figures, on account of the Strasbourg case law in respect of privacy, today, what French courts are attempting to do is to strike a balance between the freedom of the press and the people's right to know, on the one hand and, on the other hand, the individual's right to respect for private life.

As suggested by the title of this paper, I do not intend here to examine in detail French legislation protecting the individual's right to privacy.<sup>8</sup> Privacy is a multi-faceted right and can be analysed from different angles. The aspect to be developed here is the question as to what degree public figures, in particular politicians, can expect protection from the law when facts related to their private life or pictures in this respect are published in the press or used by the media. This question is even sharper and more pointed when, as in the case of President Sarkozy and his wife, plaintiffs have knowingly and deliberately opened up their private life to intense public scrutiny.

To address this question, I will first generally consider the legal status of public figures in France in respect of perceived intrusions into their private life (I). Then, I will give an account of the way in which French judges have struggled to draw a line between the public and private domain in respect of the right to privacy to be accorded to public figures (II). Finally, I will consider the factors taken into account by the courts in balancing this protection of privacy against freedom of the press and freedom of expression (III). I should point out in advance of detailing these perspectives that the Sarkozy decisions have in their essence not changed dramatically the legal landscape of privacy protection in France.

## **I. Public Figures and the Protection of Privacy in French Law**

The question to be considered under this first heading relates to the status of the individual seeking protection. Why should public figures, including politicians, be entitled to protection at all when it comes to their private life? After all they become politically significant through the attention of the media. In the projection of their public image to the general public, their family life and values, education, social status, health and even salary – information generally protected by privacy law – becomes, in their case, very relevant to a public perception of how well they will or they are carrying out their duties in respect of public office. As much as it is in England, it is often argued in France that democracy and transparency in politics – values which are currently very much on the constitutional agenda, both in France and in the UK – justify the widening of the public sphere in which politicians and public figures evolve, at the expense of privacy.<sup>9</sup> Indeed, when citizens exercise their right to vote, democratic values demand that they should be allowed to know in full the personality of those to whom they are entrusting their vote. What would otherwise be private become here the legitimate subject of public information and debate.

However, in constructing its robust law of privacy, French law has never accepted unlimited access to what is considered the private life of public figures. As mentioned earlier, it has long been established that, in principle, under article 9 of the Civil Code, people who are in the public eye also have a right to respect for their private life. In their judgments, the legal expression of this principle by French courts is: 'Given that everyone, regardless of

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<sup>8</sup> For a detailed account in English of privacy protection in France see E. Picard, 'The Right to Privacy in French Law' in B. Markesinis (ed) *Protecting Privacy*, Oxford University Press, 1999, 49; see also H. Trouille, 'Private Life and Public Image: Privacy Legislation in France', *ICLQ*, 2000, 49, 199; R. Redmond-Cooper, *The Press and the Law of Privacy*, *ICLQ*, 1985, 34, 769.

<sup>9</sup> On these aspects see E. Picard, at 8.

rank, birth, wealth and present or future role in society, is entitled to have his private life respected'.<sup>10</sup> Further, under article 9 of the French Civil Code, protection of privacy has always included not only disclosure of what has been perceived as elements of a person's private life but also the unauthorised taking of photographs of people and their publication, as well as 'false light' presentation. In this respect, it should be pointed out that public figures in France have a considerable degree of control over how their image is used by the media. Thus, there is no right in France to use the picture of a public figure for a purpose or in a manner which differs from the one which was originally agreed and, further, there is no right to distort the manner in which an individual interviewed has chosen to project his image or express his opinion.<sup>11</sup> In addition, the fact that a celebrity or a politician is presumed to have given his or her tacit consent for the taking and publication of photograph in the carrying out of their public activities or official duties does not permit the use of these pictures for commercial purposes.

In all the Sarkozy cases the judges have not retreated from the principles stated above. Indeed, in the three reported decisions, the principle that everyone is entitled to a private life, independent of their status or notoriety, is a constant. Furthermore, the plaintiffs' absolute and exclusive right to control their own image is re-affirmed in the *Ryanair* judgments where the budget airline was ordered to pay damages to President Sarkozy and his new wife for using their picture in an advertisement without their consent. There are actually in the history of French law of privacy two precedents to *Ryanair* in respect of French Presidents. In 1970, French judges forbade the publication of a photograph of President Pompidou on board a motor boat which was used to advertise that brand of boat, falsely implying that he had authorised the use of his image in this way and had been paid for this.<sup>12</sup> The same decision was taken in 1976 when the picture of President Giscard D'Estaing was used as a figure appearing on a game of card.<sup>13</sup> However, in all these cases in which a defendant misappropriated a person's likeness as an endorsement of a product or service, although privacy law was used to stop the offending publication, they appear less to be involved with privacy and more to do with unauthorised commercial use.<sup>14</sup>

It has to be noted, here, that in France public figures and celebrities are afforded better protection than ordinary individuals who are not generally successful in their attempt to protect their image in similar circumstances. In recent cases where pictures of individuals have been taken, either to cover an event or to illustrate books or magazines, the courts have decided that, unless there has been a breach of their right to 'human dignity', the public interest to be informed and freedom of expression should prevail over their right to privacy.<sup>15</sup>

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<sup>10</sup> An application of this principle was made in the case of former president of the Republic F. Mitterrand in *SA Editions Plon v. Mitterrand*, Civ. 16 July 1997, D. 1997 452. More recently, it was applied in the case of the disclosure by Paris Match of the existence of Prince Albert of Monaco's illegitimate child, Civ. 1 27 February 2007, D. 2007, AJ. 804. The European Court of Human Rights adopt the same approach in *Von Hannover v. Germany*, no 59320/00, 24 June 2004.

<sup>11</sup> A classic illustration is Paris 13 February 1971 *Société des Publications et Société Marie-Claire Albums v J.P. Belmondo*, JCP 1971 II 16774. More recently, see Civ 1, 30 May 2000, D. 2001, Somm. 1989 (the case of rock singer J. Hallyday).

<sup>12</sup> TGI Paris, 4 April 1970, JCP 1970 II 16328.

<sup>13</sup> TGI Nancy, 15 October 1976, JCP 1977 II 18526.

<sup>14</sup> In the *Ryanair* case, Carla Bruni was seeking 500, 000 euros of damages which according to her was the commercial value of her image for visual advertising on French territory. On a similar confusion between the right to privacy and the commercial right to publicity in American courts see, D. Bedingfield, 'Privacy or Publicity? The Enduring Confusion Surrounding the American Tort of Invasion of Privacy', MLR 55, 1992, 111.

<sup>15</sup> Thus, the picture of a victim of a terrorist attack can be published without her consent as long as there is no interference with her dignity (Cass Civ 1, 20 February 2001, D. 2001, 1199); the same applies to the picture of a

## II. Private and Public Life: Where to Draw the Line?

The second question to be raised with regards to public figures relates to where the line is to be drawn between their private and their public life. In French law this line is usually drawn by consent of the person invoking the right to privacy. In this respect, the courts have decided that persons in the public eye are generally considered as having given tacit consent to publication of information associated with public activities and official duties, in contrast to which express consent is needed if publication relates to private activities. The same applies to the taking and publication of a person's photograph. This is in fact an application in privacy law of the old principle 'volenti non fit injuria' (where consent is given there can be no wrong).

However, here a first difficulty derives from the fact that it is not always easy to determine the limits of the plaintiff's consent and whether publication has exceeded the limits of any such permission given, actual or implicit. In this respect the courts rely increasingly on the past track record of the plaintiff. If a person has already given publicity to some aspects of his or her private life, then these aspects become 'public facts' and protection is from then on withheld. The landmark case in this regard concerns Princess Stephanie of Monaco's divorce which, according to the Court of Cassation in 2002, could not be considered as a new disclosure at the time of the alleged breach and thus constituted a 'mere repetition of publicly known facts' at the material time.<sup>16</sup> It is on this basis that Cecilia, the former wife of President Sarkozy, was unsuccessful in a claim for breach of privacy when a book published earlier this year by a journalist to whom she had given substantial interviews was published revealing her marital difficulties which led to her divorce from President Sarkozy. The judge decided against her on the grounds, not only of freedom of expression, but also on account of the fact that most of the information published had already appeared in the media with the connivance of both parties involved.<sup>17</sup>

A second difficulty in respect of the distinction between public and private facts lies in the definition itself of these terms in the context of public figures. Perhaps, the most notorious case to have highlighted the difficulty as to where to draw the line between public and private life in this area, was the publication in 1996, following President F. Mitterrand's death, of his doctor's book 'The Big Secret'. It was alleged by President Mitterrand's family that the book, in giving a detailed account of the President's cancer during his term of mandate, was in breach not only of medical confidentiality but also of the President's right to privacy. The late President's family obtained on the basis of article 9 of the Civil Code an injunction for the immediate suspension of the distribution of the book. This injunction was upheld on appeal and in the Court of Cassation.<sup>18</sup> The Mitterrand decision was criticised in France given that President Mitterrand of his own volition had undertaken to issue health bulletins every six months. Therefore, at this stage, his health had become a matter of public interest and concern. Furthermore, since on the President's instructions, his doctor had concealed his illness, when the courts upheld the President's right to privacy they were in fact upholding a

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victim of a road traffic accident (Civ. 2, 4 November 2004, D. 2005, Jur. 696; JCP 2004 10186) and to the publication of an artistic book showing the pictures of individuals taken on the street (TGI Paris, 9 May 2007 and 25 June 2007, D. 2008, 57). See, however, the *Téléthon* case where two children suffering from a genetic disease appeared on a TV programme and had subsequently their pictures published without their parent's consent in a school textbook. The Court of Cassation decided that, in the absence of the plaintiffs' consent, the second publication was in breach of their privacy since the pictures had been used in a way which was not originally intended by them (Civ 1, 14 June 2007 D. 2007 AJ 1879).

<sup>16</sup> Cass. Civ. 1, 3 April 2002, D. 2002, Jur. 3164.

<sup>17</sup> *Cinager-Albeniz*, op cit at 3.

<sup>18</sup> Cass. 16 July 1997.

right to lie on a matter of public interest in direct contradiction with democratic values. The Mitterrand case shows the strong discretionary powers of judges when adjudicating on issues of political relevance.<sup>19</sup>

Despite these difficulties of demarcation between private and public life, there are however certain areas which, on account of transparency, are definitely excluded from the law protection. Such is information concerning the income and assets of public figures which is permitted to be published as long as this information has not been obtained by fraudulent means.<sup>20</sup> Also, it has been decided that, in some circumstances, there is a legitimate right for the public to know about family events concerning the life of celebrities or other public figures such as births, marriages and divorces and, even, family conflicts, as long as the details surrounding these events are not considered to be 'intimate'.<sup>21</sup> Article 9 of the Civil Code refers to the notion of 'intimacy' and courts have made recourse to it when appropriate in borderline cases. In the 2006 Sarkozy case against the Swiss newspaper *Le Matin*, the court drew a distinction between articles disclosing private facts which fell within the public domain by reason of their connection with current affairs, such as the marital difficulties of the then presidential candidate, and articles relating to the more intimate details of the candidate and his wife's private life, which it held not to impinge on current affairs and, thus, were to be protected from publication. What is interesting to note is the judge's remark that the Sarkozys were themselves responsible for 'pushing out the limits of the law's protection under article 9 of the Civil Code' by acting out in public their relationship which, in other circumstances, would have been protected.<sup>22</sup> But, here again, in the judge deliberations nothing new was added to the reasoning applied in previous cases.

### III. Balancing Conflicting Rights in the French Courts

As already mentioned, in the debate on privacy, there is a tension between conflicting interests, namely protection of private life against freedom of expression, which requires the court to strike a balance between them. This tension is once again well illustrated in the Sarkozy cases. What French courts have been doing in this balancing of interest is to determine in each case what was paramount, taking into account the status of the persons involved and the factual circumstances of the case. This process has sometimes drawn the courts into inconsistent decisions. However, a certain number of rules and principles have emerged, essentially arising out of the jurisprudence coming out of the Strasbourg Court.

Generally, French courts approach the balancing exercise required in this area in the light of two principles:

- 1) There is no hierarchy between the competing rights involved. All have the same normative value.
- 2) All measures taken in the balancing process must be proportionate to the aim pursued.

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<sup>19</sup> The ban of the publication of the book was lifted following the European Court of Human Rights decision of 18 May 2004 (*Plon v France* no 58148/00).

<sup>20</sup> Cass. Civ. 1, 29 May 1991 D. 1992, J, 213; CA Paris 20 October 1987, D. 1988, Somm. 197, where a well known weekly magazine published an article of the 100 wealthiest French people.

<sup>21</sup> The divorce of one of the Princesses of Monaco is not a 'private fact' in Civ. 1, 3 April 2002, D. 2002 J. 3164; the same applies to the disclosure of Princess Caroline's marriage and birth of her child in CA Versailles 27 June 2002 and Civ. 2, 19 February 2004, D. 2004, Jur. 2596. However, the disclosure of Prince Albert's illegitimate child is a breach of his privacy (this case has been referred to the European Court of Human Right).

<sup>22</sup> *Nicolas S. v Le Matin*, op cit at 3.

More specifically, freedom of the press and freedom of expression must prevail when there is a public interest to be informed of a current event (*fait d'actualité*) or when the fact against which the privacy issue is raised is capable of contributing to a 'debate of general interest'. This latter notion is again borrowed from the Strasbourg jurisprudence and has been assimilated in the French case law quite recently.<sup>23</sup> Although this notion overlaps with *fait d'actualité*, it does not necessarily need to be a current event.

However, privacy will override press freedom and freedom of expression when the disclosure either concerns the 'intimacy of private life' or when intrusion was made in complete disregard to 'human dignity'. This latter notion was first raised by the French constitutional court in 1994 when asked to review the legislation on bioethics;<sup>24</sup> it is today encapsulated in article 16 of the French Civil Code and has been used widely by the courts in the context of personal rights, including the right to privacy. Human dignity has never been clearly defined but encompasses any degrading or humiliating treatment of an individual by the media. Recent cases refer in addition to the level of distress caused by possible disclosure. A most dramatic application of the principle of human dignity was made in the case of the Prefect Claude Erignac who was murdered in Ajaccio, Corsica, on 6 February 1998. At this event, the French weekly magazine *Paris Match* published a colour photograph showing Mr Erignac's lifeless body lying on the ground, his face turned partly towards the camera. The judges decided that the publication of such a photograph constituted an intolerable injury to the feelings of the victim's family who had undergone a particularly serious emotional shock in view of the exceptional circumstances of the murder and, further, that the need for information could not justify the existence of such an infringement.<sup>25</sup> *Paris Match* was ordered to publish a statement in the following issue saying that the photograph was published without the consent of the victim's family and was an intrusion into the intimacy of their private life.

## Conclusion

From this review of the French law of privacy related to public figures, it can be said that the *Sarkozy* cases are generally within the line of the case law to date. In short, nothing much has changed. Although, on this side of the Channel, some commentators were led to think that French media were starting to behave like their British counterparts, on the contrary, it appears in the light of the three judgments given, that French Presidents are still ready to launch a counter-offensive when their privacy is threatened, that the media know by experience when to step back and judges how to balance in the 'right' direction the interests involved.

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<sup>23</sup> See *Von Hannover v Germany*, op cit at 10, at paras 60 and 76 (according to the European Court, the 'debate of general interest' was the decisive factor in balancing the protection of private life against freedom of expression). In France, see the case of *Express-Expansion v J. Copin*, Civ. 1, 24 October 2006, Bull. Civ. I, 437; D. 2006 IR 2754. Here, in order to keep its readership abreast of current influential networking chains in France, a magazine published a list of local councillors belonging to free mason guilds. The Court decided that such disclosure was a legitimate contribution to 'a debate of general interest'.

<sup>24</sup> DC 94-343-344, 27 July 1994, Bioéthique.

<sup>25</sup> TGI Paris 12 February 1998, upheld on appeal on 24 February 1998 and in the Court of Cassation in its decision dated 20 December 2000. The European Court of Human Rights to which the case was referred decided that there was no violation of article 10 of the Convention on freedom of expression in this case (*Hachette, Filipacchi v France*, 14 June 2007, no 71111/01).

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