

*Carly Nyst examines the right to privacy and freedom of expression*

- 1 The Chinese government installs software that monitors and censors certain anti-government websites. Journalists and human rights defenders from Bahrain to Morocco have their phones tapped and their emails read by security services. Facebook takes down wall posts after States complain of “subversive material”. Google hands over user data to law enforcement authorities that include IP addresses, location data and records of communications. The US government conducts mass surveillance of foreign phone and internet users. 5
- 2 Each of these acts threatens both an individual’s freedom to express themselves, and their right to maintain a private life and private communications. In this way, privacy and free expression are two sides of the same coin, each an essential prerequisite to the survival of the other. To freely form and impart one’s political, religious or ethnical beliefs, one needs an autonomous, private space free from interference from the State, private sector or other citizens. Equally, infringements on the right to privacy – physical or online surveillance, monitoring of communications or activities, State intrusion into private, family or home affairs – prevent an individual from exercising their freedom of expression. 10 15
- 3 Such considerations are important, for in the modern world, almost every act online is an act of expression. Participating in an online chat, networking with friends and colleagues, surfing websites, reading news and downloading files -- these are all acts of imparting or accessing information. In online interactivity, there is content generated and stored, some of which is publicly available, most of which is amongst select individuals and groups. Yet each of these acts also generates transactional information, and can be monitored by unintended parties. In turn, nearly every act of expression is now observable to communications providers, and in turn, the State. 20
- 4 This scrutiny is without precedent. We could previously communicate with our friends and colleagues without it being known to anyone else. We could move around cities, countries and continents and meet with whomever we wished without it being known. We could follow and join groups and movements without having to disclose identities. The ability to act without being observed was innate to the act of expression and we benefited from privacy as we expressed ourselves by living our personal, political and professional lives. Most importantly, we believed that these were rights worth protecting, enshrining in constitutions and promoting through advocacy and protecting in law. 25 30
- 5 The protection of free expression is now generally considered a common good. Some States speak out in favour of its protection and admonish those who do not support it in the modern era, and in particular for the internet. No State, however, promotes the right to privacy. Now, when States speak often of promoting free speech and the importance of facilitating access to and use of the internet and new technologies, they rarely admit the implications of new technologies for the right to privacy. They support free expression in the modern context while ignoring the right to privacy that has so long enabled and supported free expression. 35 40

- 6 The failure of the international community to develop stronger support for the right to privacy may be due to the challenges in defining the content and contours of this right. It is undeniable that privacy does face a changing environment. New forms of data generation, storage, processing and surveillance have made it far from a static concept; its content and confines are being contested in never-ending games between individuals, governments and corporations; our own notions of privacy vary greatly across historical periods, cultures and places. 45
- 7 Understanding and protecting privacy is also challenged by the constant evolution of technologies that transform the way we think about the private and public spheres. Technological change alters our relationships and interactions with governments and the corporate sector. It also changes how we think about the realisation and protection of human rights. In order to enjoy privacy of communications individuals must be able to exchange information and ideas in a space beyond the reach of the State, the private sector and other members of society. As technologies increase the reach of the State, place power in the hands of the private sector and create new societies and citizenries online, privacy protection is increasingly crucial. 50 55
- 8 However, even as the right to privacy is viewed by citizens as their safeguard from the State, it is viewed by the State as a barrier to control, an impediment to power. Privacy is at the heart of the most basic understandings of human dignity – the ability to make autonomous choices about our lives and relationships, without outside interference or intimidation, is central to who we are as human beings. Yet by the State that seeks to control its populace, it is viewed as an impediment, and is conceptualised as hampering security, development, and modernisation. Thus, individuals are forced to choose between starkly contrasting values: on one side there is dignity, freedom and individual rights. On the other, convenience, control and national security. All of these are false choices, pitting technology as a means for evil and privacy, the preserve of darker forces in society. 60 65
- 9 The idea that we must choose between privacy and security has too often pervaded the political and economic discourses, creating false dichotomies and spurring over- simplified arguments about the roles of technologies. The discussion reveals no consideration of the values and priorities tied up in privacy and security, no reference to the potentials of technology and no indication of the other choices that exist. It has instead cast security and privacy as competing concepts, rather than mutually reinforcing values. 70
- 10 Technologies have blurred the line between public and private thought and expression; courts across the globe are confounded by questions about how to characterise social media musings and blogs, how to think about data like location, IP addresses and cookies. Today, more than ever, privacy and free expression are interlinked; an infringement upon one can be both the cause and consequence of an infringement upon the other. This is likewise so in the case of communications surveillance. The things an individual says to another person, their intimate feelings and opinions: each of these pieces of information is incredibly sensitive and personal. They have long been considered the preserve of an individual's private life, yet they are now exposed to infiltration by the State without the need for consent or exceptional justification. 75 80