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OBSTACLES AND OPPORTUNITIES FOR THE HARMONISATION OF LAW IN EUROPE: THE CASE OF PRIVACY

I. Introduction

Over the last decade many discussions on the desirability and possibility of legal harmonisation in Europe have gone on, at the level of both politics and academia. However, at the same time, much work has been done in practical terms towards such harmonisation, without the constraints of the previously mentioned political and academic problems and debates. Many roads have been followed, all of them offering building blocks towards some form of European *ius commune*: European directives are, of course, the most prominent example of this, alongside other such important rulings within the European courts in Luxemburg and Strassbourg. Furthermore, one should not underestimate the less visible influence of private initiatives, such as the *European Contract Code* of the *Lando Commission*, European *Textbooks* or *Case Books* which are widely used in legal education, student exchanges under the *Erasmus* programme or otherwise, as well as the practical and academically orientated comparative work done in European and national administrations, law firms, international companies, national courts and in universities. Inevitably, they all have to face the same obstacles

for a unification of law in Europe, raised within whichever arena the problems may arise.

In earlier pieces of work, we have entered into that discussion in a more general and theoretical way.[1] Here, we would like to discuss the matter using the example of laws relating to issues of privacy. As it happens, privacy is an excellent example to use here, as harmonisation of the law seems easier than in many other areas, as will be seen within the auspices of this paper. On the other hand, the limitations of any harmonisation of the law can be seen too: the concrete application and interpretation of rules will always be divergent dependant on *local legal cultures*. A European harmonisation of rules and concepts in the field of the law relating to privacy seems both plausible, and indeed desirable. However, it will be more difficult, and to a certain extent unnecessary, to attempt any sort of unification as regards the concrete concept of what privacy actually is, or the rules and principles to be found within its context. The *concept* of privacy may be the same, but it is likely that the *conceptions* of privacy will remain divergent. This is, in fact, the difference between "harmonisation" of the law in comparison to "unification" of the law. "Unification" implies that the law in different legal communities is adapted until it is uniform throughout all the communities, without taking into account basic ideological assumptions and moral convictions, as well as the traditions and practices that are typical to those communities. "Harmonisation" refers to a certain variety within a homogeneity. European directives are an excellent example of this: there is a common core of rules and principles applicable throughout the state of the European Union. However, there is room for flexibility within these directives at domestic level, so as to make harmonised law fit with national legal traditions, legal techniques, doctrinal theories of law and ideological divergence. It is true to say, however, that the law is never likely to be completely unified throughout every country,

1 M. Van Hoecke, and M. Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law" *International and Comparative Law Quarterly* 1998,495-536; M. Van Hoecke, and F. Ost, "Legal Doctrine in Crisis: Towards a European Legal Science" *Legal Studies* 1998, 197-218; M. Van Hoecke, "The Harmonisation of Private Law in Europe: Some Misunderstandings" in Van Hoecke and F. Ost, eds, *The Harmonisation of Private Law in Europe*, Oxford, Hart Publishing, (forthcoming June 2000).

region, social and professional community within Europe, especially where there remains local divergencies in the application of law *within* each country.

II. Differences in Legal Culture as Obstacles for Harmonisation

Differences in legal concepts, legal principles, legal methodology, legal ideology or just customary legal practices may often prove to be major obstacles in any attempt to harmonize the law of two or more different legal systems. This remains the case, predominantly, in relation to continental and common law based legal systems, where the apparent gap seems unbridgeable. Some have argued that differing national "legal traditions" or "legal cultures" would make such a convergence, by definition, almost impossible[2]. Developments in legal practice, however, have made the position much more likely and achievable.[3] This, of course, does not mean that one should underestimate the different kinds of problems which may hinder harmonizing efforts. However, in order to cope with such problems one should analyse exactly where the differences in "legal culture" or "legal tradition" are to be found, and to what extent they are a real obstacle to the convergence of legal systems.

A. Diverging Legal Traditions

The importance of legal tradition sometimes seems to be overestimated. Major differences in these traditions are considered to block any attempt at harmonization of the legal systems stemming from such traditions. The weak point in such an approach is that traditions are presented as if they were unchangeable, as if they would be fixed once and for all.

2 P. Legrand, "European Legal Systems Are Not Converging" *ICLQ* 1996, 52-81; P. Legrand, "Uniformity, Legal Traditions and Law's Limits' *Juridisk Tidskrift* 1996-97, 306-322; P. Legrand, "Against a European Civil Code" *The Modern Law Review* 1997, 44-63; P. Legrand, "Are civilians educable?" *Legal Studies* 1998, 216-230.

3 For an argumentation against such a position we refer to: M. Van Hoecke, "The Harmonisation of Private Law in Europe: Some Misunderstandings", op. cit.

Actually, almost everything in society changes. Sometimes such changes occur very rapidly, sometimes very slowly, but there is not much, if anything, which remains unchanged in the long term.

Problems and approaches related to *privacy* are an excellent example of showing how thoroughly, and relatively quickly, these changes take place. General legal protection, relating to the law of privacy, has become a relatively new need in society. It has been caused by technological developments, such as, by the end of nineteenth century[4], photography combined with newspapers (which are easily distributed and accessible these days, thanks to quicker modes of transport such as trains or planes), and, today, computer technology and television.

These technological developments have not only created a need for a better protection of privacy, they have also influenced legal thinking. It is interesting to note that these developments have been similar in all European countries.

At the beginning of this evolution, the protection of privacy was strongly linked to the concept of *property rights*. In England and Wales, the use of the *tort of trespass*[5] or of an action in private *nuisance*[6] are examples of a proprietary approach, which has, for some time, been prevailing in other legal traditions, such as France, Germany or Italy[7]. Such an approach is typical, as a result of the emphasis placed on individual liberty within nineteenth century tenets of a liberal democracy.[8] Today, however, *individual* interests are weighed and balanced with *collective* interests. Freedom of expression, for instance, is considered to be of the utmost importance for the public political debate, which in its turn is essential for the *Rechtsstaat* or rule of law. Politicians who feel offenced by criticism may see their own "proprietary rights" denied by the courts, in order to protect the public political debate.[9]

In all European countries there seems to be a development towards the recognition of a *general principle of privacy*. In France the "right to privacy" was recognised as a "constitutional principle" by the Constitutional Council in 1995[10]. After a gradual acceptance by courts in judicial decisions, the Italian legislator very recently acknowledged a "right to privacy" in Article 1 of the Act on databases of 1996[11]. In the nineteen fifties the Italian Court of Cassation still refused to accept such a right[12], but since 1963 it has recognised that the right to privacy is a principle that is protected by the Italian legal system[13].

It is interesting to note that, even in England, where there is, traditionally, a strong reluctance towards general principles, a need is felt for some "general right of privacy"[14], which should replace or complete the piecemeal use of different *causes of action* that originally had been created for other purposes. Indeed, developments within both society

4 "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops"." (S. D. Warren and L. D. Brandeis, "The right to Privacy" *Harvard Law Review* 1890, 193-220, at p. 195).

5 E.g.: *Bernstein v Sky News Ltd* [1978] QB, 479.

6 E.g.: *Hunter v Canary Wharf Ltd* [1997] AC, 655.

7 See the contributions to the series *Protecting Privacy*, edited by Basil S. Markesinis, Clarendon Press Oxford, 1999: E. Picard, "The Right to Privacy in French Law", at p. 49; H. Stoll, "The General Right to Personality in German Law: An Outline of its Development and Present Significance", at p. 31; G. Alpa "The Protection of Privacy in Italian Law", at p.124.

8 Interesting comments on the historical developments, in France, related to this broader ideological framework can be found in Picard, op. cit., 58-69.

9 Basil Markesinis and Stefan Enchelmaier refer to a German case, where the Constitutional Court quashed a court decision which had accepted a claim by Franz Josef Strauss, at that time Minister President of Bavaria, against a Jewish writer who mentioned Strauss' name as a typical example of authoritarian German politicians whom he considered to be a threat to German democracy. ("The Applicability of Human Rights as between Individuals under German Constitutional Law' in B. S. Markesinis, *Protecting Privacy*, Oxford 1999, 191-243, at pp. 234-235, with reference to BverfGE 82 (1990), 272).

10 *Conseil constitutionnel* 18 Jan. 1995, déc. n° 94-352, *Recueil des décisions du Conseil constitutionnel*, 170.

11 G. Alpa, "The Protection of Privacy in Italian Law" in B. S. Markesinis, *Protecting Privacy*, Oxford 1999, 107.

12 *Corte di Cassatione Foro it.* 1956 I, c.796 (Alpa, p. 117).

13 *Corte di Cassatione* 20 April 1963, *Foro it.* 1963, I, 877 (ALPA p.120)

14 "In such a case, the law should protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence." (Laws J in *Hellewell v The Chief Constable of Derbyshire*, 1 WLR 1995, 804, at p.805).

"In the circumstances, the question whether English law recognises a right of privacy, and if so what are the limitations of such right, is likely to come before your Lordships for decision in the future." (Lord Browne-Wilkinson in *R v Khan*, AC 1997, 558, at p.571).

"For a long time I have doubted the need for a general right of privacy, but the advances made by modern technology have changed my mind." (B. Neill, "Privacy: A Challenge for the Next Century" in B. S. Markesinis, ed., Protecting Privacy (Oxford 1999) 1-28, at p. 27).

and technology may eventually change even the strongest of legal traditions.

B. Diverging Legal Sources

What is striking in the field of privacy is the important role that court decisions have, in order to enhance the protection of privacy, within all European countries. The classical distinction between 'codified law" systems and "judge made law" systems, to the extent that they may even be used at all nowadays, is obviously not applicable here. Explicit recognition of a "right of privacy" in statutory provisions is a new, and relatively recent, development in Continental Europe. These statutory regulations have followed a development in case law and European regulation. They did not preceed them.

The role of European regulation, especially, is an important unifying element as regards the protection of privacy. Furthermore, since both the European Convention on Human Rights ("ECHR") and European directives have proved to be of paramount importance with regard to the legal protection of privacy within the European Union (and, actually, all over Europe[15]). The European Data Protection Directive n° 95/46/EC has directly enacted statutes protecting privacy (as regards databases) in all EU countries[16]. Again, it is remarkable that in several continental legal systems this has been the very first statutory regulation in this field[17], compared to the UK where a Data protection Act has been operating since 1984.

15 Not only because almost all European countries are member of the European Council and thus bound by the ECHR, but also because most of these countries outside the EU tend to import European Union law (see on this interesting development with a view on facilitating a future all European harmonisation of law: I. C. Kaminski, "The Power of Aspiration. The Impact of European Law on a non EU Country" in M. Van Hoecke and F. Ost, (eds.) *The Harmonisation of Private Law in Europe*, Hart Publishing, Oxford (forthcoming June 2000).

16 In the UK: the Data Protection Act 1998, in Belgium the Data Protection Act, December 11, 1998 (see for a commentary: J. Dhont and Y. Poullet, "The Data Protection Act of December 11, 1998 transposing the Directive 95/46/EC of October 24, 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data – a succinct evaluation", *CLRS*, 1999 (to be published soon). Some countries did not finish yet the transposition, e.g. France and the Netherlands.

17 Not in all countries: France, e.g. has a data protection legislation since 1978.

If legislation is strongly based on EU law, then the existing case law has mainly used European Human rights law. Several Articles, most notably 8, 9 and 10, of the ECHR offer an explicit protection of privacy. Decisions of the European Court of Human rights have directly influenced the case law of national jurisdictions.

In a first step, Italian courts founded the right to privacy based on Article 8 of the ECHR[18]. In Belgium, both before and after the Privacy Act of 1992, reference is made to this article in court decisions regarding data protection.[19]

In 1992, the French Court of Cassation, for instance, changed its position regarding the right to privacy and private life of transsexuals as far as the public recognition of their subjective sexual identity was concerned, after a European decision which condemned the French state for not having recognised such rights for one of its citizen.[20]

It is too early to detect an influence of the European Convention on UK law, but it is expected to be rather revolutionary:

> "The enactment of the Human Rights Bill will mark "the beginning of a new constitutional chapter" in the history of the United Kingdom. In the field of privacy it will perhaps have the greatest impact. ... It is likely, ..., to be used as the springboard for the development of existing causes of action so as to fill the gaps in the patchy protection of privacy in English law."[21]

18 G. Alpa, "The Protection of Privacy in Italian Law" in B. S. Markesinis, *Protecting Privacy*, Oxford 1999, 108 and 119, with reference to a decision of the Court of Appeal of Milan in the fifties.

19 S. Gutwirth, "De toepassing van het finaliteitsbeginsel van de Privacywet van 8 december 1992 tot bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens" *Tijdschrift voor Privaatrecht* 1993, 1409-1477, at p.1413, with references to court decisions.

20 Cass.ass.plén. 11 December 1992, *Grands arrêts de la jurisprudence civile*, 1994 (10th ed.), n° 22-23. The European decisions which influenced the *Cour de cassation* were: *Van Osterwijck v Belgium* 6 Nov.1980 (A.n°40); *Rees v United Kingdom* 17 Oct.1986 (A.n°106), and, most notably, *B. v France 25 March 1992* (A.n°232-C).

21 R. Singh, "Privacy and the Media: The Impact of the Human Rights Bill" in B. S. Markesinis, *Protecting Privacy* (Oxford 1999) 169-190, at pp.189-190, with reference to a comment by Lord Scarman in the House of Lords (*Hansard*, HL Deb, 3 November 1997, col.1256).

C. Diverging Legal Concepts, Rules and Principles

Diverging form and substance of legal regulation show, perhaps most visibly, the differences amongst legal systems. Different legal concepts and different rules and principles often seem to be the main obstacles to harmonisation of law. Differences in methodology or sources of law may, actually, be more important, but, indeed, are less visible. Of course, rules may change, and they often do. Again, privacy is an excellent example of this. However, concepts and principles tend to be more stable over time. They are generally strongly rooted in legal (doctrinal) tradition.

Even at this level, the field of privacy shows an impressing flexibility. It suffices to make lawyers aware of a strong need which is felt in society for the (legal) solution of new problems, in order that those lawyers may be more creative than they usually tend to be.

1. Tort

The first conclusion to be reached in this area is that there is a strikingly-apparent common approach by the courts in different legal systems, in that, they have used the concept of tort to find a desirable solution in the law relating to privacy. Civil liability is, indeed, an open concept which allows a judge to condemn a defendant to damages for any behaviour which he considers to be "wrong". There may be discussions as to what extent the alleged "fault" is a legally prohibited act. However, once the "fault" is concluded, tort law offers the solution through its ability to award damages to the "victim".

In Italy, for instance, Alpa notes:

> "In cases of breach of privacy, the reasoning is therefore as follows. The facts fall within the ambit of civil liability, which requires the application of Article 2043 of the Civil Code, the general provision on liability. The case is about "unjust" (or unlawful) damage, caused by the infringement of an absolute subjective right, the general right of personality. At present, this right is "found" by directly applying Article 2 of the Constitution."[22].

Also in France, the general provision of tortious liability, Article 1382 of the Civil code, was used before Article 9 was added to the Code in 1970, creating a subjective right to privacy.[23]

The same is true for Belgium, where the rules of Article 1382 of the Civil Code will apply, for example, in the case where the concept of medical secrecy is compromised, as stated in the deontological code and Article 458 of the Belgian Penal code. Furthermore, it will not always be an easy matter for the judge to quantify the damage caused by an act which violates an individuals privacy.

In England and Wales various actions based on tort are used, such as the *tort of nuisance*, the *tort of defamation*, the *tort of malicious falsehood*, and the *tort of harassment*.[24] There is no general action available for privacy matters.[25]

2. The Public Law - Private Law Distinction

One of the main distinctions in continental legal systems, on which the whole conceptual fabric of legal doctrine, legal education and the structure of jurisdictions, procedural law, etc., is built, is the one between "public law" and "private law". To common law countries this distinction is somewhat alien, or at least not as basic or clear cut a distinction as it is, or used to be, on the continent.

The Welfare State, with new branches of law, such as "social security law", has made it already increasingly difficult to maintain the distinction overall. Apparently, privacy is challenging, even more, our continental *summa divisio* and bringing closer together the common and civil law.

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22 G. Alpa, "Protection of Privacy in Italian Law" in B. S. Markesinis, *Protecting Privacy* (Oxford 1999) 112.

23 E. Picard, "The Right to Privacy in French Law" in B. S. Markesinis, *Protecting Privacy* (Oxford 1999) 50 and 100.

24 B. Neill, "Privacy: A Challenge for the Next Century" in B. S. Markesinis, *Protecting Privacy* (Oxford 1999) 6-12.

25 The same is true for Canada. See: K. Benyekhlef, "La protection de la Vie Privée dans les échanges internationaux d'informations", *Thémis* 1992, 11 ff.

Although mainly based on European and national principles of human rights, which aim at protecting the individual against public authorities, privacy rights are considered to fully apply to relationships between private persons[26]. In practice, privacy problems have mainly occured within such a context, especially in cases where the media are invading the private life of an individual. Not all legal systems have yet been able to find a way out of this proliferation of the right to privacy and its challenge to the "public law - private law" distinction. In the case of France, where there is a right to privacy as an "individual freedom" in the field of public law, as well as a right to privacy as a "personal integrity" in the field of private law, Picard notes:

> "Indeed, the *summa divisio* between public and private law, which deeply characterizes the French legal system, powerfully hinders both clarification and unification. This fundamental distinction remains real today even though a "constitutional private law" is currently beginning to appear."[27]

In practice, however, similar regulations seem to be applied in much the same way in the realms of both public and private law.[28] This distinction is even more fundamental to French legal tradition than it is to other continental legal systems. So, it will obviously take more time to bridge the gap between the "public" and "private" dimension of the right to privacy in France than anywhere else. However, once concepts such as

26 For Germany, see: H. Stoll, The General Right to Personality in German Law: An Outline of its Development and Present Significance", in *Protecting Privacy*, edited by B. S. Markesinis (Clarendon Press Oxford 1999) 33, and, especially, the article by Markesinis and Enchelmaier in the same series, in which they are discussing at length "The Applicability of Human Rights as between Individuals under German Constitutional Law" (pp. 191-243) and make very clear the tension between the public law approach and the private law approach in court decisions.
For Belgium, see: S. Gutwirth, op. cit., at p.1422
For the UK the matter is discussed in: B. Neill, "Privacy: A Challenge for the Next Century", op. cit., at p. 21.

27 E. Picard, "The Right to Privacy in French Law", in B. S. Markesinis, ed., *Protecting Privacy* (Clarendon Press Oxford 1999) 70 .

28 T. Leonard and Y. Poullet, "Les libertés comme fondement de la protection des données nominatives" in F. Rigaux, e.a., *La vie privée: une liberté parmi les autres?* (Brussels 1992) 231-277, at p. 271, fn. 70.

"constitutional private law" are used to describe recent developments in the law, it will become increasinglty difficult to maintain the distinction as an absolute *summa divisio*.

3. Punitive Damages

Punitive damages are a largely unknown concept to the continental legal traditions. As a rule, victims of a tort, are entitled to compensation for real damage, no more and no less. Punitive damages, which tend to force the condemned party to abstain from similar future behaviour, are alien to the continental traditions. This aim is accomplished through the means of administrative fines or criminal sanctions. In both cases the (punitive) money goes to the State, never to the victim, who may only claim damages for his proven loss.

This reluctance towards punitive damages has already been weakened by the introduction in several legal systems, during the last few decades, of the possibility to claim and to be awarded a punitive damage ("*astreinte*", "*dwangsom*", "*Zwangsgeld*") in cases where the condemned party does not abide by a court decision (e.g.: a punitive damage of 100.000 Euro a day, if this party goes on with a forbidden practice after he has been officially informed of the judgement which condemned that practice).[29]

In cases relating to privacy, courts are often faced with the commercial practices of the media, or of people who sell, for instance, photos or films to the media, which remain financially rewarding, even after payment of damages to (some of) the victims. As it is not the same practice, which is consistently carried out in relation to these particular people or groups in society, a damage of the *astreinte* type cannot be used with efficacious results. For this reason, courts tend to allow real punitive damages to the victim. In France, Princess Caroline of Monaco, for instance, obtained 80.000 FF for an article by a specialized magazine, relating to her private life.[30]

29 In Belgium the *dwangsom* or *astreinte* has been introduced in an Act of 1980.

30 Cass., civ. 5 November 1996, *JurisClasseur Périodique* 1997 II, 22805.

The family of former president François Mitterand obtained 340.000 FF for the publication of medical details on the president's deadly illness in a book entitled "*Le Grand Secret*".[31]

In Germany, the same princess Caroline obtained 180.000 DM for repeated attacks on her personality as a result of incorrect reporting and the fabrication of false "exclusive interviews".[32]

4. Right to Privacy as a Constitutional Principle

As already mentioned above, there is a tendency, not only to accept a general principle of "right to privacy", but also to consider it as somewhat of a *constitutional* principle. The right to privacy does not seem to be included in any of the European constitutions, but is often derived from other constitutional principles, such as the right to individual freedom (Art.66 French Constitution), the free development of one's personality (Art.2 of the German Constitution), the inviolability of human dignity (Art.1 of the German Constitution), or the protection of the individual (Art. 2 of the Italian Constitution).

To the extent that the European Convention on Human Rights is included in the national legal systems, these rights have a somewhat constitutional status. As Articles 8, 9 and 10 are regularly invoked to support the recognition of a right to privacy, it is undeniably recognised as a "constitutional principle". In the UK, especially, it tends to become one of the major "constitutional principles".

As it is, all European countries but two (Yugoslavia and Ukraine) share the same human rights framework of the ECHR. In all these countries a close link is recognised between a "right to privacy" and one or more of the other human rights. In most cases, these rights are also enshrined in the national constitution. If not, the ECHR functions as a "constitutional basis". This means that not only is the right to privacy, in most countries, recognised as a general legal principle, but that, moreover, it has generally the status of a concrete *constitutional* principle.

31 Cour d'appel Paris, 1ère ch.A, 27 May 1997, *JurisClasseur Périodique* 1997 II, 22894.
32 Oberlandesgericht Hamburg 25 July 1996, *Neue Juristische Wochenschrift* 1996, 2870.

5. The Proportionality Principle

The *proportionality principle* is an example of a "European" legal principle, in the sense that it has been developed on the basis of an interaction amongst developments in different national legal systems and, indeed, the case law of the European Court of Justice. This process is also an example of the gradual emergence of a real *European legal doctrine*. As is the case in the common law tradition, the courts have played a leading role in the establishment of such legal doctrine[33]. It would appear that Continental and common law legal traditions have met somewhere in between. Furthermore, it would seem that the proportionality principle is set to play an increasing role in the law relating to privacy.

Also in the field of *privacy* the proportionality principle seems to play an increasing role.

When arguing in favour of an application of this principle in the area of privacy, in Belgian law, Thierry Léonard and Yves Poullet offer a good summary of its content:

> "The application of the principle of proportionality implies a triple test, both in the case of an infringement by an individual on the right or liberty of another, and in the case of a determined act taken in the execution of a competence. The first one concerns the control of utility of the act or the means used. It must be verified whether or not a sufficient link of causality exists with the intended goal which is pursued. The second one is related to the indispensable character of the measures that are taken or envisaged, with regard to the fact that they cannot be replaced by other measures that permit to attain the same objective, with an identical efficacy, and with more respect to liberty and the interests of the rights that are irritated. The third part assures that the infringement on such liberties, caused by the taken measures, is not disproportionate with regard to the pursued goal."[34]

33 It also shows how closely intertwined scholarly writing and legal practice may be. One of the main actors in the elaboration of the proportionality principle by the European Court of Justice has been Walter van Gerven, who was advocate-general at this court between 1988 and 1994, but during most of his professional life mainly a university professor, and not one of the least notorious ones.

In Germany, where the proportionality principle had originally developed, the principle is fully accepted and often invoked in court decisions, including in the area of privacy.[35]

In the United Kingdom a recently revised *code of practice* has been issued by the *Press Complaints Commission*. Article 14 stipulates that "an infringement of privacy has to be justified by an overriding public interest in disclosure of the information", and it adds to this: "Moreover, the means of obtaining the information must be *proportionate* to the matter under investigation."

As well as this, the *Guidelines on the Use of Equipment in Police Surveillance Operations*, issued by the British *Home Office* in 1984 contain a similar provision:

> "In judging how far the seriousness of the crime under investigation justifies the use of particular surveillance techniques, authorising officers should satisfy themselves that the degree of intrusion into the privacy of those affected by the surveillance is commensurate with the seriousness of the offence."[36]

In Italy, Guido Alpa, quotes a court decision of 1953 in which a similar statement is to be found:

> "Nevertheless, the invasion of the private life of another person, even when it is lawful, must be seen to be justified (...) in other words it must be proportionate to the said public interest."[37]

34 T. Leonard and Y. Poullet, "Les libertés comme fondement de la protection des données nominatives" in F. Rigaux, et al., *La vie privée: une liberté parmi les autres?* (Brussels 1992) 231-277, at p. 253, referring to: W. Van Gerven, "Principe de proportionnalité, abus de droit et droits fondamentaux", *Journal des Tribunaux* 1992, 305-309 and to his conclusions in the case Eurim-Pharma, C-347/89, *Rec.*, p.1760.

35 E.g.: Bundesverfassungsgericht, 15 December 1983, *EUGRZ* 1983, 588.

36 Paragraph 5 of these Guidelines. More details, as for both examples, may be found in: B. Neill, "Privacy: A Challenge for the Next Century" in B. S. Markesinis, *Protecting Privacy* (Oxford 1999) 15-17.

37 G. Alpa, "Protection of Privacy in Italian Law", op. cit., 116, refering to the *Tribunale di Roma* 14 September 1953, *Foro it.* 1954, I, 115.

In France, Etienne Picard also refers to the applicability of the proportionality principle in privacy cases, be it in a somewhat different context:

> "The principle of proportionality, as found, inter alia, in Article 10 of ECHR, applies in such cases, as there must be a balance between the scope and view of the coercive measure and the extent to which amends have to be made for the violation of the victim's rights."[38]

However, it is important to note that this generalised acceptance of the proportionality principle all over Europe, including the Common Law countries, is not an isolated development in the, somewhat exceptional, field of privacy.

In 1992, Lord Bingham, at that time Lord Justice of the English Court of Appeal, referred to the "doctrine of proportionality" as an example of the "changing perspectives of English law":

> "A further, equally obvious, example is the nascent doctrine of proportionality, born in Germany, adopted by France and the European Community and recognised by Lord Diplock as a possible recruit to the list of established grounds for reviewing administrative decisions."[39]

6. Other Common Principles

Of course, not all concepts, rules or principles are alien to one or more of the European legal traditions. As mentioned in the Background Paper to this conference, all Member States of the European Union share a common legal tradition (Roman law) and important common legal principles, which are a constituent part of every legal system, such as the freedom of contract, private ownership and the freedom of to form associations.[40]

38 E. Picard, "The Right to Privacy in French Law", op. cit., 99.

39 T. H. Bingham, ""There is a World Elsewhere": The Changing Perspectives of English Law" *International and Comparative Law Quarterly* 1992, 513-529, at p.523.

40 See Appendix to this volume.

Apart from those principles, which appear, or at least used, to be somewhat alien to some of the legal traditions, there are other, less problematic, ones which seem to have developed at the same time, in all or most European legal systems, in perfect harmony, in every legal tradition. Examples are, in the field of privacy:

The *finality principle*, which limits the power of a company, to collect and to store personal data, to the type of business which one could normally expect from such a company. This principle is explicitly laid down in statutory texts in Germany, Austria, Denmark, Norway and The Netherlands.[41]

The *principle of personal freedom*, which has been essential to Western legal tradition over the last few centuries.

Whenever an institution or company is allowed to store personal data, this principle implies:

(a) a right to "transparency" or to information on the existence and content of the database,

(b) a free and informed agreement by the person who's data is being stored, and

(c) a right to anonymity: nobody else should have access to the stored information.[42]

The *principle of non-discrimination* is also an important basic principle of current Western legal culture. In privacy matters, it has, for instance, been explicitly stated as a guideline by the French CNIL ("*Commission nationale de l'information et des libertés*") for the use of medical cards: the collection of personal data should not affect in any way the free choice for the patient of his doctor, nor the choice of the most appropriate medical treatment.[43]

41 T. Leonard and Y. Poullet, "Les libertés comme fondement de la protection des données nominatives", op. cit., p. 244.
42 T. Leonard and Y. Poullet, op. cit., p. 239.
43 T. Leonard and Y. Poullet, op. cit., p. 240.

III. A Common European Conception of Privacy?

From this point on, we would like to scrutinise whether or not a common European conception of privacy is needed and/or attainable.

Until now, we rather have been discussing technical legal obstacles to harmonisation, more concretely in the field of privacy. In this chapter attention will be paid to the ideological elements, to the values which are underlying the privacy protection in the different States and communities throughout Europe.

Besides some general considerations regarding privacy in general, special attention will be paid to data protection legislation as well as the measures used to regulate it therein.

The specific caseof data protection legislation is important because it reveals that a common European *legal* definition/conseption of privacy is not needed in order to guarantee an adequate protection and would even have a stiffening effect. However, we think that common conceptions of privacy are necessary and should be promoted in the context of the approximation of data protection laws within the framework of the Data Protection Directive. A process of creation of (a) common conception(s) should not merely be situated within the paradigm of State laws, i.e. trying to achieve a common understanding within the States in order to achieve a common European understanding, but will probably better be attained by a sectorial approach.

Trying to define what should be understood by privacy is a tough challenge, possibly beyond the borders of legal discourse. The majority of definitions certainly touch on part of the truth, though never seem to give a complete picture, or, indeed, convey a metaphorical or tautological character. Within the field of law, however, there is need for clarity:

> "A properly legal concept must be a principle that translates into a rule, and the rule, in turn, must translate into a set of applications. But no such translations are feasible unless we impose some definite conceptual limits."[44]

44 T. Gerety, "Redefining privacy", 12 *Harvard Civil-Rights Civil-Liberties Law Review*, 1977, p. 234, note 110.

An attempt at defining "privacy" has already been made with Resolution 428(1970) of the Consultative Assembly (now: Parliamentary Assembly) of the Council of Europe, which contains the Declaration concerning the relationship between the Mass Media and Human Rights:

> "The right to privacy consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially."

It is striking that the list of values that are listed in this definition are rather open-ended and have a vague, or ambiguous, character.[45]

The fact that privacy is mostly conceived as an open-ended category does not have to be considered as negative. It leaves space for protectionist creativity of the judges, the administration and the privacy authorities. Furthermore, the technological developments, which take a very fast pace can not be caught up with concrete concepts.[46]

45 Furthermore, it should be underlined that the quest for clarity is not evident and is essentially inherent to the epistemological paradigm in which Western Culture and the law have been situated since the impact of Modernism: In legal discourse (and even beyond that) reality is thought of as being made out of "laws" and "concepts" which can be known with certainty. We can however – as Heidegger has shown in a convincing fashion – only have certainty about reality as far as the latter is a construct of human intellect (*Vorstellendes Denken*). Truth is exchanged for certainty (*Seinsvergessenheit*). The certainty we obtain, however, has its price: reductionism. The same is true when we try to establish – to conform with the demands of legalism – a fixed conception of privacy: we run the risk of putting forward a conception that only reproduces part of what it is meant to be, in relation to its social context, and impact on daily life. (see for a more elaborated version of this thesis, J. Dhont and L. J. Wintgens, "Wet en Wereldbeeld", *Tijdschrift voor Wetgeving – Omnilegie*, 1999, 105 ff.)

46 See also, L. Abygrave, *Data Protection Law: Approaching Its Rationale, Logic and Limits*, Faculty of Law, University of Oslo, 1999, 183-184: " [...]the failure to define privacy and integrity in data protection laws is not necessarily a weakness with these laws: it provides room for flexibility in their implementation. Further, the fact that the concepts of privacy and integrity are somewhat vague does not necessarily detract from their utility in data protection laws and discourse: it enables them to assimilate and express in a relatively comprehensive, economic manner the congeries of fears attached to increasingly intrusive data-processing practices."

If we look at the concept of privacy from a historical perspective, we note that its origins are remarkably early. In fact, it has only been since the historical publication of Warren and Brandeis's article in 1890[47], that specific attention has been paid to privacy. However, privacy protection had already existed prior to this period, all be it in a more concealed way: Consider the situation of rules concerning medical secrecy, the prohibition to make a hole or window in a common wall (Art.675 CC), the secret character of judicial inquiry, etc. In England, the Justices of the Peace Act, 1361, provided that peeping toms and eavesdroppers should be bound over to keep the peace and be of good behaviour, while in the eighteenth century a great constitutional debate raged over government search and seizure.[48] These rules did not, primarily, protect privacy, but rather more achieved this protection in an almost implicit way. Although there may be more reasons for the emergence of privacy, we would like to mention the two main elements, which are important for a correct understanding of privacy nowadays: *liberal democracy* and *technical development*, which we already mentioned briefly above.

A. Liberal Democracy

Following the development of liberal democracy, more attention was given to the fundamental freedoms of the citizen. As democracy can best be seen as a legitimizing process of political power, it will be inherent to democracy that this happens in a free and unconstrained way. This implies, indeed, that citizens are emancipated, autonomous and can take decisions of their own free will. Picard puts it as follows[49]:

> "[Before the Democratic revolution took place, the "subject figure"] sought to take a part in a collective determination of the rules governing community life, and even to contribute to the creation of the social and political bond, supposedly based on a "social contract". But that subject

47 See supra. note 4.

48 X, chapter 8, p. 185.

49 E. Picard, op. cit., p. 59.

> remained inspired by the "Liberty of Antiquity" which had no real idea of individual liberty, private life, and privacy."

And further:

> "But it was "the Modernists" who really invented liberty as understood today; the Modernists and, more accurately, "the Liberals", who are essentially individualists. They have gradually succeeded in asserting liberty in its two different dimensions. One involves inter-subject relationships and is thus turned towards social life in which liberty acts within, and upon, the outside order of human existence, with all the proper reserves due to civil and penal liabilities, which accompany it. The other turns more towards itself and seeks to protect the subject from the outside. Its aim is to isolate him or her from public relationships, to delimit a closed zone within which liberty does not, in principle, have to account to anyone."

These two dimensions are also present in the etymological roots of the notion of a "person" – "*persona*": which means "mask". A mask hides the true face from reality and forms the link with society. This duality can also be found in the definition of privacy forwarded by Westin: "Privacy is the control individuals, groups and institutions have over when, how and to what extent information about them is disclosed to third parties."[50]

This definition puts an emphasis on two important factors: the *control of information* ("to determine for themselves") and *identity* ("information about them"). Westin distinguishes four physical and psychological components inherent to privacy: *solitude*, which makes it possible that a person can think and reflect; *intimacy* which is necessary for the development of family ties and friendships; *anonymity*, which makes it possible that a person can exist beyond any identification and the *withholding of information*.[51] Also, in this case, anonymity refers to the control one wants to have over information concerning oneself. Though

50 A. F. Westin, *Privacy and Freedom* (New York 1967).

51 A. F. Westin, "Science, Privacy and Freedom: Issues and Proposals for the 1970's", 66 *Col. L.Rev.*, 1966, 1003, p. 1020-1021.

in certain contexts, one is obliged to reveal something about oneself, for instance when one pays taxes, when one contracts.

The conceptualisation of privacy will be dependent on the sort of political atmosphere/theory that is current in any given society, and the place the idea of "autonomy" has in it. This leads us to the conclusion that a concept of privacy will be very contextual. Vorstenbosch shows us, in a convincing way, how privacy is differently conceived in societies that adhere to a utilitarian theory, or liberal theory (veneration of the autonomy), a republican theory (obligations of the citizen at the cost of autonomy) and the communautarian theory (relation of autonomy to the "moral community").[52]

The link between a concept of privacy, and the idea of democracy, is made explicit in the second paragraph of Article 8 of the ECHR. Interference with the right to respect for private and family life, home and correspondence, is only permitted in cases within this paragraph, and as far as the interference is in accordance with the concepts of law and necessity in a *democratic society*. A limitation of a fundamental right is evaluated as being necessary in a democratic society if an urgent need in society exists, and the interference is proportionate with the pre-supposed purpose.[53] There is no such a thing as a substantive definition of a "democratic society" because its meaning is reduced to the application of the principle of proportionality, though it marks the characteristic properties of the concept of privacy, insofar as it belongs to the realm of democratic values.

The substantive democratic nature of privacy is also emphasised by the Commission that linked the right of privacy in Article 8 of the ECHR to the right to freedom of expression in Article 10 ECHR by stating that

> "the concept of privacy in Article 8 also includes, to a certain extent, the right to establish and maintain relations with other human beings for the *fulfilment of one's own personality*."[54] [55]

52 J. Vorstenbosch, "Privacy and autonomy: conflicting theories" in *Privacy disputed*, P. Ippel; (ed.), Den Haag, 1995, p. 70-77.

53 Handyside case, 7 December 1976, *Publications of the European Court of Human Rights*, Series A, 24, NJ 1978, 236 (§48 and 49); Müller case, 24 May 1988, *Publications of the European Court of Human Rights*, Series A, 133, NJCM-Bulletin 1988, 666 (§36 and 43).

This intellectual exercise, to connect privacy to human dignity as well as to the conditions on developing one's own personality, is a very important one and has already been made by the *Bundesverfassungsgericht* in 1983.[56] In this case, an action was brought before the highest German court by the Green party against an Act concerning a census, and its measures of execution. The Court agreed with the Green party, establishing the theory of "informational self-determination" (*Informationnelles Selbstbestimmungsrecht*) and considers this right as part of the fundamental rights of German citizens, who have the right to control the image that is made of themselves, whilst at the same time, being in interaction with society; the citizen has to be protected against any abuse made of his personal information, whilst processing, both presently and in the future. This right is vested within the concept of human dignity, in the situation where one is acting in a free manner within society, as guaranteed by the essential principals of the *Grundgesetz*.[57] Of course, this right is not absolute and should be weighed and balanced with other rights and interests. Although the theory of informational self-determination is – currently at least - not accepted in most Member States, its importance lies in the idea that privacy is best comprehended in terms of "liberty".[58] However, no clear idea exists as to what, precisely, should be understood by the idea of "liberty", within legal discourse. The advantage of this approach is that it covers the contextual dependence of this value by putting it in balance with other rights, freedoms or interests.

The theory of "informational self-determination" is at the core of the Data Protection Directive and is *inter alia* reflected in the following principles: the need for an explicit, informed consent of the data subject as a legitimate ground for the processing of the personal data of the last

54 Appl. 8962/80, *X and Y v. Belgium*, D&R 1982, p. 112 (124).

55 Furthermore can the restrictions to the freedom of expression as stated in article 10 (2) ECHR be interpreted as forming a constitutive element of privacy: the protection of a person's reputation and the prevention of disclosure of information received in confidence.

56 BverfG., EUGRZ, 1983, 588.

57 H. Burkert, *Datenschutz und Informations- und Kommunikationstechnik: Eine Problemskizze*, Bonn, G.M.D., 1985.

58 See F. Rigaux, *La protection de la vie privée et les autres biens de la personnalité*, Brussels, Bruylant, 1990, p. 758.

(Art.7), the transparency principle of data processing (Art. 10 and 11), the conditional right to object against the processing (Art. 14), etc.[59] It is clear that by imposing these principles, the European legislator did not merely want to establish rules to implement the idea of "informational self-determination", though created a regulatory environment for respect and dignity of the personality of the data subject in a digital realm. This could, however, only be realised by rules that are fundamentally *procedural* in nature (cf. *infra*) because the privacy-related questions and conflicts are very diversified and what is felt to be an encroachment to one's privacy is quite culturally determined. Article 1(1) and the recitals 10 and 11 of the Data Protection Directive confirm this idea. We come back to this point later.

B. Technological Evolution

The impact of the evolution of new technologies (such as computers, the internet, mobile phones, GPS, etc.) is, somewhat, Janus-faced: The computer makes an efficient and correct management of information possible, but creates at the same time, a great risk. Data is processed very rapidly, databases can be matched, and the interdependence between networks is, in most cases, far from clear (e.g. the Belgian Federal Crossroad Bank). This technical evolution has lead to a different approach in relation to the problem of privacy i.e. the protection of data or *informational privacy*. By 1968, the Parliamentary Assembly of the Council of Europe directed a recommendation to the Committee of Ministers asking them to investigate how far the ECHR and the national laws of Member States give sufficient protection to rights of privacy, especially in light of new scientific and technological developments. This resulted, in 1973 and 1974, in two resolutions by the Committee of Ministers, concerning the protection of personal data in the public and private sector.[60] This resulted in the elaboration of the Convention

59 See in the same sense, T. Pöysti, "Privacy and European private law in the constitution of the legal space", Judicial Academy of Northern Finland Publications 4/1999, 130-132.

60 Council of Europe, Resolution (73) *22 On the protection of privacy of individuals vis-à-vis electronic data banks in the private sector*; Council of Europe, Resolution (74) *29 On the protection of the privacy of individuals vis-à-vis electronic data banks in the public sector.*

for the Protection of Individuals in relation to the Automatic processing of Personal Data.[61] This Convention should be regarded as determining the scope of Article 8 of the ECHR. As the Convention is quite general in its wording, and gives no solutions to specific problems of privacy, many Recommendations are worked out by the Committee of Ministers of the Council of Europe.[62]

The flight of the technological evolution and the threat inherent to it for the informational privacy was one of the basic concerns of the European legislator and underlies the Data Protection Directive.[63]

It is important to note that similar problems arise in many states, which could induce a common understanding about what the concept of privacy actually entails or encompasses (e.g. the Internet, medical telematics). Furthermore, the introduction of new technologies in many types of social interaction will affect other legal institutions, that are privacy related, and may elicit an approximation between them. For example: the rules concerning medical secrecy are quite rigid in Belgium, but they may be affected by medical telematics applications in a cross-border environment.

The impact of new technologies on social life is very complex and should be approached with sufficient carefulness. It has already been shown that the law is in most cases late, and nearly always inefficient or not efficacious. The reason for this could be that technology creates its own reality and induces its own regularities and is further in an intricate way entangled with economic forces. Therefore, respect for the right to privacy can only be improved in as far as the fundamental principles are included in the technologies (e.g. the use of Privacy Enhancing Technologies). Technology should be developed in such a fashion that the free choice of the citizen is not compromised in a disproportional manner and that it functions with respect for the principle of transparency. The inclusion of democratic values in the process of development of new technologies requires a pluridisciplinary app-

61 Convention for the Protection of Individuals with regard to the Automatic Processing of Personal data of the Council of Europe, Strasbourg January 28, 1981, Europe. T.S. , n° 108.
62 E.g. see for an overview: *http://www.coe.fr/cm/indexes/doc.0.html.*
63 See recitals 2, 3, 10 and 11 of the Data Protection Directive.

roach. This can be stimulated at a political level, by rendering the industries sensitive for privacy, and by seeing to it that the interests of the citizens are sufficiently protected where the democratic debate is moving from the legal to the technological level.

C. An Attempt at a European Conception of Privacy?

The United Nations Manual on the Prevention and Control of Computer-related Crimes[64] mentions the diversity of concepts relating to privacy laws in its 129th paragraph :

> "Special legislation against infringements of privacy have been passed in most Western legal systems. Moreover, the courts in most countries have also developed a civil action protecting privacy interests. An analysis of national laws demonstrates that various international actions have led to a considerable degree of uniformity among the general administrative and civil law regulations of national privacy laws. Most national privacy statutes include, for example, provisions addressing the limitation of data collection or the individual's right of access to his or her personal data. In spite of this tendency, considerable differences in general administrative and civil regulations remain. These differences concern the legislative rationale, the scope of application (especially with regard to legal persons and manually recorded data), the procedural requirements for commencing the processing of personal data and the substantive requirements for processing such data, as well as the respective control institutions."

If differing concepts, indeed conceptions, of privacy laws existed in 1994, then nowadays these differences should, in a European context - theoretical at least -, be minimal due to the aforementioned legal instruments, as well as, to European Directives 95/46/EC[65] and 97/66/EC[66]. Of course, it is possible that another approach to problems

64 International review of criminal policy, nos 43 and 44, United Nations, New York, 1994, p. 19.
65 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

related to privacy may rise outside the domain of informational privacy. Here, however, we limit ourselves to the area of data protection. From this point on, we will attempt to give a general overview of the forces of integration against those of differentiation.

D. Differentiation

a) As regards rights of privacy in general, the European Court of Human Rights in Strasbourg only exercises marginal control. The Court does not utilise a conceptual definition of private life or privacy as a basis to evaluate any possible interference. Only when an interference is esteemed to be a notorious encroachment on the right to privacy will the court then intervene. Having analysed the case law of the Court, one does not have a substantive idea about the conception of privacy that is followed in Strasbourg. Of course, the Leander case teaches us that information, which can be found in a secret police register, forms part of private life.[67] The same is true for personal information concerning somebody's stay in a children's home or foster home[68] as well as the confidentiality of telecommunications.[69] However, rereading the decisions of the Court, one notices that in most cases the outcome leaves the reader with a feeling of vagueness about what privacy actually means. Of course, it would be difficult for the Court to offer a detailed conception of privacy that could be applied in all cases. One could, however, ask if the theory of "positive obligations" under Article 8 ECHR, does not suppose a common conception of privacy. How could the Member States to the ECHR otherwise estimate if they have to change their law in order to fulfil the obligations emanating from the Convention?

In the theoretical hypothesis of the establishment of a definition by the Court or the European institutions, the protection of this value would

66 Directive 97/66/EC of the European Parliament and of the council of December 15, 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (O.J. L 24 – 30.01.1998).
67 ECHR, 26 March 1987 (*Leander* Case) A.116, p. 22.
68 ECHR, 7 July 1989 (*Gaskin* Case) *NJ* 1991, p. 659.
69 ECHR, 6 September 1978 (*Klass* Case) A.28, p. 20.

be petrified and run the risk of being less effective and less adapted to very diverging circumstances in a constantly changing society. We will come back to this point in the context of the Data Protection Directive.

b) In the context of informational privacy, Directive 95/46/EC does not, in fact, provide any definition of privacy. The protectional regime that is developed departs from the notion of "personal data" as defined in Article 2[70] to which many principles relating to data quality and criteria for making data processing legitimate are attached.[71] The designers of the Data Protection Directive were of course aware of the cultural and contextual differentiation, which exists within the concept of privacy.[72] The goal of the Directive lies not in pushing forward a common conception, but rather in protecting privacy as a democratic principle. Or, to put it in another way, it is a principle that is fundamental to the architecture of a democratic European society[73], i.e. privacy understood as a constitutive part of human dignity and self-determination. In imposing the Member States to respect this Community legislation, it obliges them to reflect about privacy as a value of society.

The plurality of privacy conceptions is transcended by common rules within the Data Protection Directive which have, mainly, a *procedural* character. In doing so, it creates a standard (of minimal protection) that is formal in nature, rather than substantive. The merit of the Data Protection Directive lies, indeed, in the creation of an operational scheme of questions that have to be treated and answered in the context of any concrete dispute relating to its operation. A privacy problem is therefore, contemplated, through a bundle of procedural questions.

70 Article 2 (a): "Personal data shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, psychological, mental, economic, cultural or social identity."
71 See Article 6 and 7 of Directive 95/46/EC.
72 These different conceptions exists not merely and/or necessarily between the many Member States but also within the geographical borders of a State. E.g. in Belgium there exists dissension if the medical secrecy belongs to the domain of privacy. It is important to see that a common conception of privacy will be community-dependent rather than state-dependent (of course a community can fall together with the borders of a state).
73 See considerants nr. 1, 2, 10 & 11 of the Data Protection Directive.

Leaving aside the details, we conclude that the Directive obliges the controller to respect some basic principles such as the principle of fair and lawful processing, the principle of proportionality and subsidiarity (Art. 6), the obligation to inform the data subject (Art. 10), the data subject's right of access to data (Art. 12), notification of the data protection authority (Art. 18), etc. These rules leave, at least in general[74], some (sometimes a lot)[75] degree of flexibility to the Member States, and does not provide a clear answer to concrete conflicts. E.g. Art. 1 (b):

> "The principle of finality does not apply to the processing of data for historical, statistical or scientific purposes provided that *appropriate safeguards* are taken."

The fact that data is encoded, would, according to some members of the Belgian Privacy Commission, be a sufficient safeguard, which would exclude, *inter alia,* the duty to inform the data subject. However, this interpretation is not followed in other countries, such as the Netherlands.[76]

The degree of flexibility granted to the Member States is not without ambiguity. Considerant 9 states that:

> "Whereas, given the equivalent protection resulting from the approximation of national laws, the free movement between them of personal data on grounds relating to protection of rights and freedoms of individuals, and in particular the right to privacy; whereas Member States will be left a margin for manoeuvre, which may, in the context of implementation of the Directive, also be exercised by the business and social partners; whereas Member States will therefore be able to specify in their national law the general conditions governing the lawfulness of data processing; whereas in doing so the Member States shall strive to improve the protection currently provided by their legislation; whereas, within the limits of this margin for manoeuvre and in accordance with Community law, disparities could arise in the implementation of the Directive, and this could have an effect on the movement of data within a Member State as well as within the Community."

74 Of course some rules are quite clear and will be quite identical in the Member States, e.g. the legitimate grounds of data processing (Art. 7(a)-7(e); the right to object in cases of direct marketing (Art. 14 (b)); rules concerning confidentiality and security of processing (Art. 17). Also the rules laid down in the Privacy-Telecom Directive 97/66/EC are quite concretely defined and do not leave many choise over to the Member States. However, clear wording and rules do not withstand the technological evolutions; already at the time of the redaction of this Directive it was outdated due to the digitalisation of telecommunications.

75 E.g. in the case of the processing of personal data and the freedom of expression (art. 9 of the Data Protection Directive).

76 Other articles where the Member States are given a broad margin for manoeuvre are the Artt. 7(f), 8(4), 10, 11, 13 and 14(a).

The elaboration of the Directive exists in an attempt to exercise a balance between, on the one hand, a certain and regular approach between Member States, by imposing a common reasoning (principle of finality, proportionality, subsidiarity, duty to inform, etc.) and a common standard of protection, though with respect to the legal, moral and cultural diversity of different Member States. To what extent this degree of flexibility is effective is quite difficult to establish and will, *inter alia*, be determined by the marginal control of the ECJ, respect for the ECHR and the case law of the Court in Strasbourg. Fundamentally, however, is a certain flexibility or elasticity that is reserved to Member States, in accordance with the principle of subsidiarity. We believe, however, that in reality, and over time, a fine tuning or adjustment between differing norms – due to differing privacy conceptions – will take place.

In order to guarantee the free circulation of information (Art. 1 (2) of the Data Protection Directive), a common understanding of privacy will be needed. A certain interpretation or conception, in country A may be estimated to be lawful, while this is not the case in country B. If there is no agreement concerning the lawfulness of particular interpretations, this could undermine the purpose of the Directive. As well as this, for reasons of consumer protection, would be detrimental to the free flow of data if no common protection is provided due to the absence of any common understanding of the idea of privacy. In a context where E-commerce will become an everyday part of life, a potential client will not be willing to leave his personal information if he knows that his privacy is protected less in another State. If a State offers a better protection regime than another State, this may in the long term, along

the same line of reasoning, keep potential customers at bay and, as a result, be detrimental to economic welfare.[77] Furthermore, it is clear that the process of the convergence debate of the informations, telecommunications and the audio-visual sectors, the call for equivalent protection of personal data and privacy in general, will be even more compelling.

It is important to note that, when defending that there might be a need for a common understanding about privacy in the context of transborder flux of data, this does not mean that a *legal* definitional concept of privacy should be developed and imposed. First of all, it is expected that the forces of the market will induce such a common understanding. Such a pressure on the market is precisely facilitated by the Data Protection Directive. Furthermore, and importantly, this process of creation of a common understanding of privacy should take place with respect for the *principle of subsidiarity*. If a common definition or concept would be imposed by Europe, it would risk to be a common denominator which would reflect only a feeble picture of what privacy is really meant to be according to the citizens. This would excavate the right to privacy and have an adverse effect: the ethical norm or expectations would be defied by the legal norm. It may precisely be recommended to apply a bottom-up approach by debating privacy at local levels and to move up progessively to the European level. Because privacy matters are very contextual, a sectorial proceeding may be more succesful (e.g. medical sector while establishing a telematics system between hospitals, the sector of the press). It is here were the redaction of codes of conducts may come into the game.

One could also ask whether the drawing up of codes of conduct by private, business or other organisations should not be put within a European perspective also. It will be – in the light of Article 27 of the Directive 95/46/EC - one of the duties of the States to promote the elaboration of codes of conduct as far as state legislation is not efficient or efficacious due to the complexity and diversity of privacy related problems. State law is obliged at least to fix the standards which serve

77 See in the same sense: T. Pöysti, loc. cit., Judicial Academy of Northern Finland Publications, 1999/4, 127.

as a basis for the development of self-regulation, and its associated normative techniques, and to see to it that the mechanisms for the setting up of these regulatory techniques and the application of the content of these private norms is transparent and takes account of the interests of the various parties concerned.[78] This implies that the democratic content of such codes should closely be watched by the states. As far as these codes get an international or European character, a common understanding of privacy seems to be necessary in order to make such an undertaking successful. A European code of conduct for a given sector may buttress a common understanding of sensitive points relating to privacy and create a common understanding of privacy in that sector and beyond its borders. Such an understanding will also be necessary in order to get an equal application of these codes throughout the European territory. An example of a European code of conduct is the EFPIA Code of Conduct for the Pharmaceutical Industry on the Processing of Personal Data in Research and Development.[79]

c) The control by the ECJ will be quite marginal and will not lead to a clear conception about what a right to privacy actually is. Even if the court could formulate a definition, this would lead a very short life, due to its inapplicability or shortcomings in particular situations.

As far as a common European understanding of privacy is possible, as outlined in the foregoing paragraphs, it is rather a search for common values and ethical principles. It has to be asked whether, overall, there is any need for a common European legal conception of privacy at all, which would be applicable in an identical way in all areas and in all places all over Europe.

d) A relevant point of potential conflict exists in the duality of control in relation to rules of privacy. Firstly, one must respect Convention n° 108 of January 28, 1981, that enforces the principle of respect to the right to privacy as stated in Article 8 of the ECHR, and, secondly, the Data Protection Directive. Professor Rigaux puts it as follows[80]:

78 Y. Poullet, "Some considerations on cyberspace law" (not published).
79 Draft version nr. 13, August 19, 1998.

"[...] Le principal problème n'est pas que les dispositions protectrices des deux instruments ne sont pas identiques et que leur champs d'application respectifs ne coïncident pas totalement. Il a plutôt pour objet la concurrence de deux recours parallèles.

L'application de la loi nationale s'efforçant de satisfaire aux deux obligations internationales pourra faire l'objet d'une question préjudicielle adressée à la Cour de justice des Communautés européennes afin d'obtenir l'interprétation d'une disposition de la directive et de permettre par la suite au juge étatique de décider si la loi nationale est ou non conforme à cette interprétation. Aprés l'épuisement des voies de recours interne contre cette décision, il est loisible à l'une des parties d'alléguer une transgression de l'article 8 de la Convention du 4 novembre 1950, pour l'interprétation de laquelle la Cour européenne des droits de l'homme ne laissera pas de consulter la Convention du 28 janvier 1981. Quelle qu'ait été l'interprétation donnée par la Cour de justice des Communautés européennes à la directive communautaire, la Cour européenne des droits de l'homme a compétence pour vérifier la conformité de la décision judiciaire nationale à un intrument différent, le seul qui soit pertinent à son égard."

E. Integration

Besides the doubts that are presented, above, as to the elaboration of a European conception of privacy, there are some elements which point in the direction of integrative movements:

- All international legal instruments, and most European Directives form a conceptual framework regarding problems related to privacy. A certain uniformity, or parallelism, should exist once all Member States have adopted the directive, more precisely an analogy of qualifying and tackling concepts of privacy – even if there exists a considerable difference between State norms – it should make a comparison and transborder discussion easier. Indeed, a harmonisation or integration of the rules is to a certain extent (cf. *supra*) a reality, though without

80 F. Rigaux, "Monism and Dualism in European Jurisdictions" in M. Van Hoecke and F. Ost, (eds.), *The Harmonisation of Private Law in Europe* (Oxford, Hart Publishing 2000 (forthcoming)).

necessarily entailing a common conception of privacy, as the latter is culturally differentiated.

- It has already been argued above that a common understanding (most likely at a sectorial level) will be facilitated by the Data Protection Directive and stimulated by the market forces.

- The meetings of the Working Group on the Protection of Individuals with regard to the Processing of Personal Data (also called Group 29) forms a platform where common European privacy problems and policies are discussed.[81] This Working Group will, for instance, examine questions concerning the application of the national measures adopted under Directive 95/46/EC, give an opinion on codes of conduct drawn up at Community level, and make recommendations on all matters relating to the protection of persons with regard to the processing of personal data in the Community (see Art. 30 Directive). Examples of recommendations drafted in the group are: Recommendation 1/97 on Data Protection Law and the media; Recommendation 2/97: Report and Guidance by the International Working Group on Data Protection in Telecommunications; Recommendation 3/97 concerning the anonymity on the internet.[82] This platform will continue to be importnat in the process of adjustment between the differences in regulation in the Member States.

The democratic function of Group 29 and the various national data protection authorities should be stressed here: They are intermediary institutions between the citizen and the European legislator / the States (or private groups, in the context of the elaboration of codes of conduct) informing the legislator about the need for further enactment and in the other direction, they operationalize the rules in concrete cases. In fact, such a process of continuous *evaluation of legislation* should be better institutionalised, thus leading to an increase of the quality and effecti-

81 This organ is composed of a representative of the supervisory authority or authorities designated by each Member State and of a representative of the authority or authorities established for the Community institutions and bodies, and of a representative of the Commission.

82 See: *http://europa.eu.int/comm/dg15/en/media/dataport/index.htm.*

vity of legislation. Moreover, it will also offer space for conceiving, developing and promoting some common conception(s) of privacy.

- Meetings of other institutions or organisations should be mentioned such as the European Group on Ethics (which developed a recommendation concerning the protection of privacy in the context of the introduction of the "healthcard" in many Member States) and the Berlin Group (concerning the protection of privacy in the telecommunications sector).

- An increasing amount of privacy problems are created by the increasing developments in modern technology. This leads us to the observation that the problems are mostly the same throughout the entire European Union. Furthermore, these problems may in many cases have a transborder character. One may think, more concretely, of the digital environment of communications and the merging of telecommunications, and of the audio-visual and information sector.

By way of provisional conclusion it can be posited here that, in establishing a protection regime for informational privacy, the Data Protection Directive creates the constitutive conditions for a common conception of privacy in general (cf. *supra* recitals 10 and 11), but also for the freedom of information and freedom to contract – especially in a transborder context. It is clear that in a digital environment, lack of common understanding about privacy would not only be detrimental to this value itself, but also to the economic efficiency and freedoms that are promoted by the Treaty on the European Union.

IV. Conclusion

In earlier pieces of work, we have distinguished six areas which, when considered together, form a *legal culture*, and on the basis of which differences and similarities amongst such cultures may be analysed: a concept of law, a theory of valid legal sources, a methodology of law, a theory of argumentation, a theory of legitimation of the law and some common basic ideology.[83]

Amongst European legal systems, there are no structural differences as regards the (mainstream) concept of law, argumentation theory, or the view on (possible) legitimation of the law. EU countries also share, to a large extent, a common basic ideology. A divergence of ideological position tends to divide the nation state itself, rather than to divide the states which make up the EU.[84]

(Traditional) differences are to be found in the areas of source and methodology of the law, when comparing common law and continental systems. However, the analysis of such differences in the field of privacy shows how quickly these differences are fading away. As it happens; in the field of privacy; there is almost nothing left of them. In the UK, legislation pertaining to privacy was on the statute books prior to some of its continental neighbours. On the Continent, the law on privacy has mainly been elaborated by decisions of the court. The same concepts, such as tort, and the same principles, such as the proportionality principle, have been used on both sides of the Channel. Decisions of the European Court of Justice and of the European Court of Human Rights have been very influential in this field and have, as a result of this, exerted an important unifying role. Through the incorporation of the European Convention on Human Rights into English law, an enhanced harmonisation of English and continental (privacy) law may be expected, including a generalized recognition of a "right to privacy" as a general principle. Continental legal systems are, in turn, moving towards the common law by introducing punitive damages, be it for the time being only in the field of privacy, but, in the future, perhaps, into broader areas of private law. This coupled with the declining distinction between the public-private divide as an overall *summa divisio*, can only enhance the effect of such integrative movements.

Legal tradition and national legal cultures do not seem to be real obstacles to harmonisation of the law in the field of privacy. Courts have been very flexible in the interpretation of their national laws when

83 M. Van Hoecke and M. Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law", *ICLQ* 1998, at pp. 513-516.

84 See, for an example taken from English and German case law: M. Van Hoecke and M. Warrington, op. cit., 516-519.

deciding privacy cases. The German *Bundesgerichtshof,* for instance, has awarded damages for immaterial loss, even though the Civil Code excludes such damages unless they are expressly provided for by law (§253 and §847).[85] The French *Conseil constitutionnel* accepted the concept of "*domicile*", in the sense of the official main residence of a person, to include even cars, in order to be able to protect privacy on the basis of the "inviolability of the domicile".[86] Once judges agree that a specific result should be reached, whatever legal basis should be found for it, almost anything seems to become possible. This is eloquently put by Guido Alpa when discussing this phenomenon in relation to decisions of Italian courts in cases of privacy:

> "Since, however, it was necessary, for formal reasons, to discover a provision of legislation on which to base the protection of the interest under discussion, the judges made use, by analogy, of an interpretation of Article 10 of the Civil Code. They did not consider the rules of the Constitution, because at that time the provisions of the Constitution were not regarded as applicable to relationships between private individuals but were seen as being relevant only to the relations between state and private persons."[87]

As well as this, as the ideological position of judges towards privacy problems seems to be very similar all over Europe, the *solutions* given to these problems are very comparable. If there are differences in the legal *underpinning* of the judgments, it is just because judges have to conform to the concepts, rules, principles and methods, which are possible within their legal system and acceptable within their national legal culture[88]. If some new and better legal instruments are offered to

85 BGH 14 February 1957, *Bundesgerichtshofszeitung* 26, 349, referred to by H. Stoll "General Right to Personality in German Law", op. cit., at p. 34. This article offers a few other examples of "creativity" of German judges, e.g. at pp. 32 and 36.

86 Conseil constitutionnel 12 January 1977, déc. n° 75-76 in Favoreu and Philip, *Les Grandes Décisions du Conseil constitutionnel* 1997 (9th ed.), n° 24, referred to by E. Picard, "The Right to Privacy in French Law", op. cit., 51, where a few more examples of liberal interpretation by French courts may be found in the following pages.

87 G. Alpa, "Protection of Privacy in Italian Law", op. cit., 116 and he adds that this approach had been severely criticized because of an alleged too broad interpretation of the law.

88 Compare the analysis of English and German court decisions as to cases where cohabitants

them, they will be all too happy to use them. Their "foreign" or "European" source would be no obstacle at all.

Of course, those technical differences in concepts, rules, methodology, style, etc., may yet constitute obstacles for harmonising the law of privacy throughout Europe. However, there are no longer any paradigmatical or structural differences here, as traditionally existed between the common and civil law. Differences between, for instance, French and German law may prove more important than differences existing between either of these sytems and , for example, English law.

The only way to overcome those differences in the long term is the elaboration of a genuine *European legal doctrine*. This is already developing around "European law" in the strict sense, namely through EU law and ECHR law. What we need, however, is the emergence of a European scholarly forum in which legal solutions, concepts, rules, principles and methods are discussed with a view on solving "national" legal problems. As argued elsewhere[89], such a European legal doctrine is needed for solving current problems of "nationalised" legal science: increasingly accelerating changes of the law, increasing specialisation, proliferations of actors in the field of doctrinal elaboration of the law, pluralisation of the legal systems (regionalisation and Europeanisation of law making competences) and the information chaos which follows from the previous developments. It is only at a European level that a sufficiently broad scholarly basis may be found to elaborate a really scientific legal doctrine, which is not exclusively orientated towards solving practical problems of domestic law. It is, at this level, that in a contest between alternative concepts, rules, principles and methods, the best one will ultimately survive and receive general acceptance throughout Europe. Following directly on from the free movements of goods and persons, is the free "market" of legal concepts, rules, principles and methods which will offer "a better law at a lower price".[90] A European

stand as sureties in: M. Van Hoecke and M. Warrington, op. cit., 516-519.

89 M. Van Hoecke and F. Ost, "Legal Doctrine in Crisis: Towards a European Legal Science" *Legal Studies* 1998.

90 In the same sense: J. M. Smits, "Een Europees privaatrecht als gemengd rechtsstelsel, of: naar een *ius commune* door vrij verkeer van rechtsregels" *Nederlands Juristenblad* 1998, 61-66.

doctrine which discusses legal problems with a participation of representants from *all* legal cultures will, for sure, offer an added value, compared to the present day situation where many legal cultures are simply importing legal concepts and legal constructions from other legal systems, as is obviously the case in the field of privacy.[91]

The *Principles of European Contract Law*, drafted by the Lando Commission, are in fact, one of the first examples of a concrete result of such scholarly discussion and testing out of legal instruments, at a European level.

The elaboration of European textbooks and case books and all forms of "Europeanisation" of legal education are important preparatory steps in this direction too.

As scholars, judges and legislators in every legal system seem to struggle with the privacy concept per se, and hence, with the concrete elaboration and demarcation of privacy rights, a European discussion about the privacy concept should be a first point on the agenda of any European legal doctrine in this field.

More theoretical approaches may be more feasible and rewarding at this level, such as an analysis of the "rights" concept in terms of "freedom", "claim", "liberty" and the like[92], or an economic analysis of law approach, which, actually, has already been followed "unconsciously" by judges, who award punitive damages, against the nature of their legal tradition.

Such a better theoretical underpinning can only help to raise both the academic and practical qualities of legal doctrine.

91 Guido Alpa has discussed at length the privacy transplants into Italian law in "Protection of Privacy in Italian Law", op. cit., 106-108.

92 E.g. along the lines of the analysis made by Wesley N. Hohfeld in the early 20th Century, but, until today still largely neglected in legal doctrinal work (W. N. Hohfeld, "Fundamental Legal Conceptions" *Yale Law Journal* 1913, 16 ff., SHohfeldian analysis of the concept of "right" has been applied to some extent in the field of privacy: D. N. Maccormick, "A Note on Privacy", *Law Quarterly Review* 1973, 23; F. Rigaux, *La protection de la vie privée et des autres biens de la personnalité*, Brussels/Paris 1990, 758: "Ainsi, (a) la notion de droits civils non patrimoniaux est le fruit d'une confusion entre un droit et une liberté; (b) les biens de la personnalité sont dans le commerce, avec des restrictions qui y sont propres, mais qui n'excèdent pas celles que le droit commun assigne à la liberté contractuelle en d'autres matières; (c) les normes protégeant la vie privée ne confèrent pas un droit subjectif non patrimonial."

All this, of course, will not make lawyers throughout Europe think in an identical way. As argued above, diverging interpretations and approaches are unavoidable. Actually, they are required in order to create a *discussion* and, hence, an elaboration of legal doctrine, and a refinement of theories.

Such divergences may be linked to geographically marked legal communities and their traditions, as exists most prominently in the case of Nation States. However, they are not the only kind of communities which are relevant in this respect. Legal regulations are often differently perceived according to the social or professional community to which they belong. Privacy protection will have a very different meaning for journalists, on one hand, and for movie stars or politicians, on the other. Cameras in public places are generally perceived by young people as an intrusion into one's privacy; whereas for elderly people this feeling does not exist, in fact, the converse is true: they feel safe. They perceive it as a kind of protection against potential agression. All things considered, as regards a conception of "privacy", it appears to be more important to belong to one of these categories, than it is to belong to one European country or another. Local divergences will remain influential to some extent, but, more and more, they will refrain from following the ideas and constraints of national borders. They will have a larger geographical basis, such as "southern Europe" as opposed to "northern Europe", or a more limited one, such as the south of Italy, as opposed to northern Italy, or Flanders as opposed to the French speaking part of Belgium Generally speaking, divergences which are strictly marked by national legal traditions will fade away. This is not only due to the fact that other geographical levels are becoming more important, but also because "geographical pluralism" will be, to a large extent, replaced by other kinds of pluralism, by other divisions between communities, which appear to become more important, according to the circumstances: with regard to privacy, royal families have more in common with each other, all over Europe, than they have with journalists in their own country; and the same idea is formulated for these journalists. Young people will have more common interests and approaches all over Europe, than they have with older generations in their own country.

Although we pointed to some diverging elements in the domain of data protection, it is our firm belief that the principles and rules in the Data Protection Directive offer a frame for further integration of European privacy laws and for a common conception of "privacy". More concretely, we posited that in a context of transborder flow of data and for reasons of economic efficiency there is a need for equivalent protection. Such a common conception will, in a first move, possibly be sector-dependent, as privacy remains a very contextual and culturally diversified notion. However, in the context of increasing digitalisation of communication and other kinds of social interaction, there is a need for respect of human dignity and the personality of the citizens. The Data Protection rules and principles reflect the basic democratic principles that are underlying the constitution of the European Union, but they have to be operationalised. This is only possible if a shared understanding of the basic values is attained.

Finding a balance between all these interests and approaches of different groups and communities, will become one of the main tasks of European legal doctrine, which, at least in a first stage, will also have to find a balance between diverging national legal traditions.