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Lex Personalitatis & Technology-driven Law

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"Before we consider the character of Hamlet I should like to digress briefly on a number of topics. First of all, the modern concept of "personality" was completely unknown in the sixteenth century. The Greeks had no such concept, and no word for it; in scholastic Latin, personalitas, a word unknown in Classical Latin, meant simply the quality of being a man as distinct from being an animal. During the eighteenth century the word "personality" came to mean the sum of the characteristics of an individual, and in the nineteenth century it became a reified abstraction with depths, force, and, eventually, the host of problems, difficulties, and aberrations, which you, who have these little things somewhere inside you, now know very well. Any psychologist can tell you all about them. You may say, "Oh, but Elizabethans had them, even if they didn't mention them!" I can assure you that they belong to the world of words, not to the world of things, and that Elizabethans were just as innocent of them as they were of Newton's law of attraction, which was once applied to almost every conceivable subject by eighteenth-century intellectuals. The theories you entertain will pass too, unless the human mind stagnates and everybody believes what he is told.

What our ancestors had instead of personalities, which are, after all "ghosts," were characters and immortal souls"

A Medievalist looks at Hamlet D. W. Robertson Jr 1980

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The ink had barely dried on the signatures to the Lisbon Treaty in December 2007 before the debate started on what it all meant for privacy and data protection. In some countries and especially the UK the actual status of the treaty continues to be debated: is it a European Constitution in all but name or is it at least a quasi-constitutional piece of that part of international law we now term European law? Whatever its constitutional status,[1] the new document reinforces data protection law by dedicating a specific section to it at Art.16B.[2] Separate to the Treaty, in the Charter of Fundamental Rights of the European Union,[3] both a separate specific section on privacy (Art.7) and a section on personal data (Art.8) are maintained. By having these two rights side by side, one begs the question "so where do they differ? Are they still related and hierarchical…as the preamble to the Council of Europe's 1981 Data Protection Convention would have us believe or, 25 years down the line from launch of Convention 108, have they grown distinct?

Anybody following the development of Data Protection Law across Europe since 1970 culminating in the EU Directive 46/1995 and the European Charter of Rights in 2000 could be forgiven if they were to ask "But what are these countries actually agreeing to and why?" The UK approach may best be characterised as one of "fair information practices" especially in that limbo period between 1984 and 1998 when the UK had a data protection law without actually subscribing to a right to privacy at English Common law[4] or constitutional law[5]. Somewhere in the middle of the spectrum, the vast bulk of continental Europe actually subscribed to privacy as a fundamental Human Right in terms of Art 8 of the European Convention on Human Rights and viewed data protection as hierarchically one step below that, a kind of enabling right which exists to protect the hierarchically one step higher fundamental right to "private and family life". At the other end of the spectrum to the UK one finds the Germans where the Constitutional Court in the 1983 census case enunciated the "right to informational self-determination". In this instance the Court was basing itself on Arts 1 and 2 of the Grundgesetz, which guarantee the right to dignity, and the right to free development of personality, respectively. The simple truth of international politics however is that while, say, both the UK and Germany signed up to Convention 108 in 1981 and eventually Directive 46 in 1995, at no moment in time did they actually do so because they ever agreed on the principle of "informational self-determination" or indeed disagreed violently on "fair information practices". Together with the other 21-47[6] member states of the Council of Europe they agreed to a compromise, hammered out at the end of several years of negotiation. As often

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[1] For a more detailed examination of the background to the elevation of data protection to constitutional or quasi-constitutional status at the European level, see J A Cannataci, J P Mifsud Bonnici, "Data Protection Comes of Age: The Data Protection Clauses in the European Constitutional Treaty", (2005), Vol. 14 (1), *Information and Communications Technology Law*, pp.5-15.

[2] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 OJ C306 17 December 2007 p51.

[3] OJ C303 14 December 2007 p01.

[4] See the first edition of R Wacks, *The Protection of Privacy*, 1980, Sweet & Maxwell for an analysis of why the right to privacy had no real historical basis in English common law to the late 20th century.

[5] Introduced by the Human Rights Act 1998.

[6] The number of member states grew drastically from the launching of Convention 108 in 1981 to 2008.

happens in such processes the logic of the law that is the final outcome of such convoluted international decision-making is not as tidy as it could have been.

It was at this time, precisely in the last decade of the 20th century, that technology-driven law was making a notable impact on legal thinking. While the continental Europeans were forging ahead with an omnibus approach to data protection and pockets of Nordic legal thinkers were plunging deeper into the rationale of privacy and personality[7], in the US leading IT law thinkers like Joel Reidenberg and Larry Lessig were proving their adeptness at coining terms like *Lex Informatica*[8] or reviewing "Code and other laws of cyberspace."

The Reidenberg approach was both profound and practical: it took the trans-jurisdictional needs of medieval Europe which led to the birth of *Lex Mercatoria* and argued that the Internet requires as broad a sweep with the deliberate creation of a *Lex Informatica*. Without necessarily disagreeing with much of what Reidenberg and his followers have proposed, I would like, in this short contribution, to go one step further, and invite attention to an emerging field of law which I shall, for the sake of convenience, dub *Lex Personalitatis.* By this I mean the "Law of Personality" relating to personality rights in a much wider way than that understood by most common law-based commentators. The latter tend to divide personality rights into two broad camps: that of rights over commercial exploitation of image, name etc. and privacy rights….By proposing a composite concept of *Lex Personalitatis* I am seeking to go deeper and also encompass the underlying reasons for both image/identity-related rights and privacy-related rights. In essence, I am suggesting that we should be looking to a supreme value, the individual's fundamental right to unhindered (or free) development of his/her own personality. In this sense *Lex Personalitatis* is closer in conceptual definition to the German *Persönlichkeitsrecht*, and can be viewed as both a fundamental right (*ius personalitatis*) underpinning much of, and an integral component of, *Lex Informatica*. I would also suggest that legal cultural and language barriers have prevented much of the world from understanding the depth and value of German legal thinking on the matter over the past 50 years.

During the first three months of 2008 alone, the German Constitutional Court in Karlsruhe has succeeded in contributing not only to the further development of *Lex Informatica* but also strike a blow for the further growth of this new composite right, that of *ius personalitatis,* the right to unhindered development of personality and the consequent *Lex Personalitatis.* It is perhaps high time for legal analysts across Europe to start carefully examining the slow domino effect that German law has been having across much of central and Eastern Europe over the past 25 years. For a close

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[7] For conceptualisation of data protection interests see L A Bygrave, J P Berg "Reflections on the Rationale for Data Protection Law", in J Bing and O Torvund (eds), 25 Years Anniversary Anthology in Computers and Law, (1995) pp3-40; and for an overview of the predominantly German "sphere theory" (Sphärentheorie) see A Hasselkuss, C J Kaminski, "Persönlichkeitsrecht und Datenschutz, in W Kilian, K Lenk, W Steinmüller (eds), Datenschutz, (1993), 109, 111-126.

[8] In "Lex Informatica: the formulation of information policy rules through technology", Reidenberg tends to view Lex Informatica as the 21st Century equivalent to Lex Mercatoria and makes a very strong plea for a distinct body of law, Lex Informatica since "default ground rules are just as essential for participants in the Information Society as Lex Mercatoria was to merchants hundreds of years ago." "Confusion and conflict over the rules for information flows run counter to an open, robust Information Age"; J Reidenberg, "Lex Informatica: the formulation of information policy rules through technology", (1998), Vol 76 (3), Texas Law Review, pp.553-554.

examination of the legal position in, say, Hungary, Slovenia or Romania would reveal that it is not only the Germans who give so much prominence to *Persönlichkeitsrecht*.[9] Perhaps the 1991 Romanian constitution is the clearest indicator of the shape of things to come: it appears to establish a three-tier hierarchy at the top of which one finds "supreme values of dignity …and the right to unhindered development of personality." In the second tier immediately below this, one finds three constitutional provisions dedicated to information law: Art 26 tackles the right to private life, Art 30 the right to freedom of expression and Art 32 the right to access public information. These constitutional provisions establish the basis on which the third tier of ordinary legislation on data protection or media or freedom of access to public files provide the more detailed rules which exist to promote a culture in which "ground rules for the access, distribution, and use of information will shape the trust, confidence, and fairness in the twenty-first century digital world for citizens, businesses, and governments."[10]

The primary raison d'être of such complex legal provision is not however to permit the use of informatics for trade or leisure. The latter is more likely to be an intended by-product. Certainly "*informatica*" is important, indeed essential for "*commercium*" and hence *Lex informatica* is certainly very important, but I submit that the raison d'etre of the hierarchical structure in Romania just outlined above goes beyond *Lex Informatica.* It is the realisation that the supreme value at law is that of the right of dignity and free development of personality, i.e. the *ius personalitatis* that inspires and underpins such law. It is not unnatural for the post-communist countries to use their experience of systemic abuse of personal information in 50 years of pre-digital communism to nurture a more profound appreciation of why the flow of information in society is so important and consequently why its regulation must be subservient to the individual's right to the unhindered development of one's personality. In doing so in the Information Age, they are helping to develop a *Lex Personalitatis* the scope of which is broader than that encapsulated by the term "personality rights" in the Anglo-Saxon legal world.

The term "personality rights" in the plural is not unique to the Anglo-Saxon world. They are likewise termed to be a plural entity in, say, French or Romanian jurisprudence. As suggested previously, the distinction I am drawing here between *Lex Personalitatis* and "personality rights" as understood in much of the Common Law world is that *Lex Personalitatis* is deeper and broader than "personality rights" as commonly understood by most English and American lawyers. In 2008-speak it also encompasses other concepts such as informational self-determination and the right to "a guarantee of confidentiality and integrity in information-technology systems"[11], basing everything on an underlying (and/or over-arching) supreme value of the unhindered right to development of personality. In this sense existing rights of

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[9] The law of the right to personality.

[10] See note 8.

[11] This was the full name of the latest civil right, introduced by the German Constitutional Court which court president Hans-Jürgen Papier admitted was unprecedented in German law. See SPIEGEL ONLINE - February 28, 2008, 02:45 PM, at: http://www.spiegel.de/international/germany/0,1518,538378,00.html.

whatever nature (commercial use of images, informational self-determination, etc.) are the current components of the existing corpus that constitutes *Lex Personalitiatis.*

In Germany, like France and the US, personality rights were largely born out of technological development, this time the birth of photography in the nineteenth century. The 1898 Bismarck case around unauthorised images of a person led to the 1907 copyright clauses in the Kunsturhebergesetz (Law on Copyright in Arts) in §22 which granted rights to an individual captured in a portrait.[12]

Across the border in France, whereas the Napoleonic Civil Code of 1804 ignored personality rights, the technology of film and the endless pursuit of actress Brigitte Bardot brought changes to French law by the last quarter of the twentieth century.[13] In the US, the term "right of publicity" appears to have been coined by Judge Jerome Frank in the 1953 case *Haelan Laboratories, Inc. v Topps Chewing Gum, Inc.*.[14] While some debate has been fuelled by the furore over privacy, most of the focus of the US debate has been on the right to commercialization of images and the right to charge for or bar entirely the commercial exploitation of name, likeness, voice or "personality." German case law developments have not been immune to such concerns as evident in the recent case of Princess Caroline[15] but have tended to go much further than anybody else in developing *Lex Personalitatis.* In a nutshell, the German "judiciary" has derived a general right of personality ("*allgemeines Persönlichkeitsrecht*") from the rights enshrined in Articles 1 I and 2 I of the German constitution (*Grundgesetz*). It provides protection to valuable aspects/qualities/attributes *(Eigenschaften*) of the human personality ("*Persönlichkeitsgüter*") not already protected elsewhere (eg by §828 I BGB) and forms a final barrier against the erosion/penetration of privacy in the personal domain. The right has constitutional rank and includes a right to informational self-determination" ("*informationelle Selbstbestimmung*"). In the event of a conflict between a person's own sphere of personality *("Eigensphäre der Persönlichkeit)* and the legitimate interest of others, it must (again) be resolved by balancing".[16]

Of note, in Germany, the "*allgemeines Persönlichkeitsrecht"* is treated as *"sonstiges Recht"* (absolute right) in §823 I 1 BGB. It is a framework right *("Rahmenrecht")* and supplements the special Personality rights (*"besondere Persönlichkeitsrechte")* expressly mentioned in §823 BGB and in other statutory provisions (eg. the right to one's name (§12 BGB) and the right to one's picture (§22ff KUG).[17] While the 1983

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[12] An individual can decide on whether the picture should be published or not. The statute contains exceptions for events linked to contemporary history, public events and for the public interest.

[13] Article 9, Code civil, **loi** du 17 juillet 1970 See also H Trouille, "Private Life and Public Image: Privacy Legislation in France", (2000), Vol. 49 (1), *The International and Comparative Law Quarterly*, pp. 199-208.

[14] 202 F.2d 866 (2d Cir.).

[15] See T Lundmark, R Chlup, "Princess Caroline in Bismark's Shadow: Photographs of Public Figures in German Law", Feb 2001, accessed at http://jurist.law.pitt.edu/world/gercor2.htm on 22 February 2008. This relates to the decisions of the German Supreme Federal Court and the German Supreme Constitutional Court and should not to be confused with the *von Hannover vs. Germany* case which has received the attention of legal reporting more recently.

[16] H D Fisher, *The German Legal System and Language*, 2002 pp 241-242.

[17] *Ibid.*

Census case which produced "informational self-determination" remains the landmark example[18] the Constitutional Court in Karlsruhe has striven to outdo itself in 2008. Firstly, in February, it virtually established a new right to on-line privacy. "The German Constitutional Court ruled that a surveillance law passed in 2007 in the state of North Rhine-Westphalia gave police and state officials too much power to spy on citizens using "trojan horse" software, which can be delivered by e-mail and used to scan the contents of a hard drive. Not only did the law violate the right to privacy, the court said, but it also violated a basic right for a citizen using a computer with an Internet connection to "a guarantee of confidentiality and integrity in information-technology systems."[19] Then, within a month, in March 2008, it struck the first major blow against the EU Data Retention Directive. "After 30,000 Germans filed a class-action suit, Germany's constitutional court in Karlsruhe blocked large parts of a new data-collection bill lawmakers say will help stop terror attacks… The law gave the federal government broad access to stored telephone and Internet data -- including e-mail addresses, length of call and numbers dialled -- for a six-month period. In the case of cell phone calls, service providers could potentially save data on the location calls were made from. The law went into effect in January 2008. But in March the German Constitutional Court in Karlsruhe issued an injunction against it, declaring parts of the law unconstitutional pending further review".[20]

In spite of the considerable lead it has taken in such matters in Europe, Germany's thrust on *ius personalitatis* is still very much work-in-progress…while the entire subject of *Lex Personalitatis* cries out for a structured and purposeful debate at the highest levels across Europe. Had this happened earlier perhaps we would not have ended up with two different sections, one on private life and the other on data protection, in the Charter on Fundamental Rights but possibly a more carefully thought-out over-arching, pan-European principle of *ius personalitatis*. As things stand, some countries are developing and embracing *Lex Personalitatis* while others profess to go for "fair information practices" but implicitly or explicitly reject the notion that *ius personalitatis* exists in their law. The extent to which technology and concerns about technology will drive change in either direction remains to be seen but Elizabethan non-issues about personality will doubtless come to mind as more and more EU member states will follow Germany's lead in their attempt to reconcile "why" we have data protection with "how" we're going to achieve it.

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[18] BVerfGE 65, 1; "Volkszählungsurteil" 1983.

[19] SPIEGEL ONLINE - February 28, 2008, 02:45 PM, at: http://www.spiegel.de/international/germany/0,1518,538378,00.html

[20] http://www.spiegel.de/international/germany/0,1518,542398,00.html