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summary

European Data Protection and the Haunting Presence of Privacy

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Abstract: *Since it first appeared in the 1960s, the legal notion of personal data protection has been living in the shade of the term privacy. Whereas in the United States (US) the regulation of the processing of information related to individuals was solidly framed under the privacy tag as early as the beginning of the 1970s, European legal orders were witnessing the emergence of concurring labels. Eventually, a genuinely European legal construct was to see the light of day: personal data protection, now recognised as a specific fundamental right of the European Union (EU), formally different from any right to privacy.At the core of the construction of the notion of personal data protection there is an attempt to steer clear of the private v. public distinction, on the grounds that the boundary between private and public, as well as any traditional conceptualisations of privacy in terms of intimate or private space, had been rendered inoperative by emerging technologies - concretely, by automated data processing. The notion of personal data protection proposed to structure reality from a different perspective, based on the distinction between personal and non-personal - terms that European data protection laws were soon to define for their own purposes. Almost 50 years after its genesis, European personal data protection still appears to be strikingly intertwined with the evolving notion of privacy. This contribution examines European data protection from the perspective of its relation(s) with privacy, sketching out both the distance between the two notions and their different entanglements. It devotes particular attention to the ongoing review of the EU data protection legal landscape, which seems (finally) to be announcing a formal emancipation of personal data protection from privacy but is at the same time built upon (hidden) references to it. Between claims and silences, privacy thus continues to play a role in the shaping of EU data protection. The importance of such a role is described with the help of Jacques Derrida's insights on the functioning of the word.*

Keywords: *Data Protection, European Union, Law, Personal Data, Privacy.*

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1. Introduction

In the last half-century, the death of privacy has been repeatedly proclaimed, and its erosion persistently announced. Its legal meaning appears to have been radically expanded, profoundly altered, but also dismissed, and forcefully questioned again and again. This contribution explores the ongoing reshaping of the European personal data protection legal landscape from the perspective of its relationship with such a fragile though resilient notion. More concretely, it examines the tensions between the conceptualising European personal data protection as an autonomous legal notion and envisaging it as part of a wider privacy notion.

In order to do so, this contribution first tracks down the origins of modern privacy in the United States (US), and follows its arrival in Europe. Second, it recalls the first steps of European personal data protection as an innovative legal notion, describing its original rationale. Against this background, it depicts some of the most striking elements of the relation(s) between privacy and personal data protection, giving particular attention to their practical entanglement in European Union (EU) law. Taking into account the ongoing major revision of the EU data protection legal landscape, it investigates the latest and contrasting developments of such an embroilment. Finally, it suggests that - without dismissing the influence of factors such as technological development - the common understanding of EU data protection law can be significantly enriched by giving due consideration to how words operate and to how law operates through words.

2. Emerging Technologies and the Redefinition(s) of Privacy

Emerging technologies have always played an outstanding role in the convoluted life of privacy. In the 1960s, the debate was particularly vivid in the United States (US). Diverse modern techniques and devices, ranging from the use of polygraphs for lie detection to the hidden tape recorder triggered public debate on the possible necessity to regulate them. Special inquiries were conducted to explore their potential impact on the rights and freedoms of the individual and in particular on individual privacy.

It was computers, however, that were soon singled out as encapsulating the major threat to society that required government action. At the beginning of the 1960s, computer makers started raising the alarm that the accumulation of information rendered possible by the new machines threatened to leave individual privacy at the mercy of the man in a position to press the button that made them 'remember'[1]. By the mid-1960s, the issue of 'computers and privacy' became a topic of official interest[2].

As it turned out that privacy was dangerously threatened by the advent of computers, the question became: how exactly does the computer endanger privacy? And what was privacy, in the first place? The 'right to privacy' had traditionally been conceptualised in the US as a "*right to be let alone*", following the impulse given by Samuel Warren and Louis Brandeis in 1890[3]. Their definition focused on the need to protect the individual against external interferences, such as, for instance, the publication in the press of pictures obtained through 'modern' photograph cameras. It was a conception of privacy that seemed to assume that privacy was the opposite of publicity[4], and that it was about keeping things 'private' in the sense of hidden, secret, or undisclosed. Could that conception cover the problems linked to the storage of computerised information?

To explain exactly how the computer threatened privacy, the notion was eventually broadened[5]. By the beginning of the 1970s, the word

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privacy was thus re-defined as including a new dimension, reinvented as encompassing what was to be (sometimes) called 'informational privacy', or the right of individuals to determine for themselves when, how and to what extent information about them could be processed. Soon, however, this new meaning of the word started to prevail upon any other, at least in the context of discussions on emerging technologies. It was in this peculiar sense of privacy as informational privacy, and, *de facto*, with the exclusion of any other meaning, that the word was stamped on the major US act that since then ostensibly bears its name, the 1974 Privacy Act, marking the inclusion in US law of what has been qualified as a *"serious debasement"* of the term[6]. And it was in this particular new incarnation that the word privacy then crossed the Atlantic.

3. Europe and (no) Privacy

European countries had also been concerned since the 1960s with the impact of emerging technologies on human rights. Initially, the unease referred mainly to the spread of devices depicted as facilitating eavesdropping, such as hidden and directed microphones. As in the US, however, worries eventually concentrated on computers, and more concretely on the use of large computerised data systems by public authorities.

As the word 'privacy' landed in Europe, there was some general agreement on the opportunity of taking it into account, but also on the great difficulty in determining its possible relationship with European legal orders. European experts were very much aware of the debates in the US, and often alluded to the authors of privacy's re-invention[7]. Nevertheless, it was unclear how a general notion of privacy could – if at all – be translated into different languages. For instance, many Dutch-speaking scholars thought that, in Dutch, it would be better to incorporate it as such[8]. European countries had developed their own legal techniques to protect different specific facets of what could be envisaged as privacy. Typically, for instance, what was being offered was protection for private (in the sense of confidential) correspondence and for inviolability or sacred nature of the home, conceived as a private space, but the explicit recognition of a broad 'right to privacy' as a unitary right is a late phenomenon in Europe[9]. A common European legal notion under the name of 'privacy' was in any case nowhere to be found.

The word privacy is not mentioned in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed on 4 November 1950, which constitutes the major European human rights reference. The Convention, equally authentic in English and French, formally protects in its Article 8 the right to respect for the private life (*vie privée)* of individuals, but does not refer to their privacy, in contrast to the international human rights instruments from which it is directly inspired[10]. As a matter of fact, the word privacy *almost* made it to the English version of Article 8 of the ECHR. Initial English draft versions of the text mentioned it, but the word was replaced by the expression private life only a few months before the signing of the Convention[11], allegedly to reinforce the impression of equivalence between the English and French versions.

The ultimate interpreter of the wording of the ECHR is the European Court of Human Rights (ECtHR), based in Strasbourg. Over the decades, the Court has construed the meaning of the expression private life of Article 8 of the ECHR very broadly, underlining that it cannot be reduced to an inner sphere of individual existence that would exclude social relationships and contacts with the outside world, but which, on the contrary, can definitely encompass them[12]. The Court has regularly taken great care to avoid using the word 'privacy' to refer to what is protected by Article 8 of the ECHR[13], and it has insisted on the need to read the expression 'right to respect for private life' as referring to the obligation not to interfere with the personal life of each individual[14], taking into account their personal autonomy[15], and therefore not framing it in terms of the defence of a 'private life' as opposed to a 'public life' or a 'private space' (as opposed to a 'public space')[16].

As such, the construction of private life by the ECtHR has no exact match in any national European legal order[17], although it has undoubtedly influenced all of them. Early comparative studies pointed out that what some called 'privacy' seemed to be protected under different names in some European countries[18].

Germany, for instance, granted somewhat similar protection through its Federal Constitutional Court's reading of a right to free development of personality protected in Article 2(1) of the German Basic Law. This Court eventually started to adopt a more privacy-sounding terminology, and developed in its case law what came to be known as the "*theory of the spheres*", incorporating different legal categories providing different degrees of protection based on distinctions related to degrees of 'the private'[19]. This case law contributed to the widespread use in German of the word *Privatsphäre* ('private sphere'), which has sometimes been used in EU law as the German equivalent to 'privacy'[20], even if intermittently *Privalebens* (a carbon copy of the ECHR's 'private life') replaces it[21].

France, which had paradoxically played a key role in contributing to early conceptions of the need to respect the 'private life' of individuals, in the context of the general need to respect individual freedom, explicitly incorporated in its legislation the need to protect the *'vie privée'* of individuals as late as 1970[22]. In the United Kingdom, the word 'privacy' was for many years regularly alluded to in important studies and unsuccessful legislative proposals with a variable scope, but for many decades failed to achieve any consolidated legal meaning.

4. Personal Data Protection as European Language

Instead of a consensus on how to incorporate or re-interpret privacy so as to better address the issue of the protection of individuals against the threats of computers, what Europe began to witness at the beginning of the 1970s was, in parallel with a continuous broadening of the concept of private life as construed by the ECtHR, the emergence of new, obliquely concurring notions.

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In 1970, the German Land of Hessen enacted its *Datenschutzgesetz*, or Data Protection Act. In 1973, Sweden adopted its *Data Lag*, or Data Act. These acts bear in their names the description of their objects: the German and Swedish words *Daten* and *data*, contrary to similar words coming from the Latin *datum* in other languages, do not refer to any kind information, but to information operated upon by machines[23]. Thus, these were acts aimed at regulating the automated processing of information. Soon after, France adopted similar legislation, though under a different tag, through which also resounded the need to regulate computerised data processing: '*informatique et libertés*'. Germany was itself not systematically loyal to the '*Datenschutz*' term, and not all the initial German acts related to the regulation of data processing were referred to by this name[24]. In addition, in 1983, the German Federal Constitutional Court granted constitutional-level protection to a right concerning the processing of personal data under a different *nomen iuris*, namely "*informationelle Selbsbestimmungsrecht*', or 'right to informational self-determination'[25].

In any case, it was the German expression *Datenschutz* that was eventually exported as a blueprint to all other European languages ('data protection') and managed to become the European way of approaching the legal issues related to the protection of individuals against automated data processing[26]. Furthermore, since 2000, the Charter of Fundamental Rights of the European Union formally recognises a fundamental right to the protection of personal data.

The emergence and consolidation of the notion of personal data protection in Europe not only marked a change of terminology, but also a crucial conceptual move away from any protection of anything 'private'. For data protection law, the determining factor to assess whether anything (for its particular purposes, any data) deserves to be protected or not, is whether or not it can be qualified as 'personal' - an adjective to be understood as 'relating to a particular person', i.e. to any identified or identifiable individual. If the data can be linked to somebody, then it is to be covered by data protection. The question of whether the data are 'private' or 'public' is, for the purposes of data protection law, irrelevant.

The logic behind this new approach relates to the difficulties of establishing genuine limits between 'private' and 'public' information[27], but also to the fact that even data that can be qualified as 'public', or that are obtained in so-called 'public' spaces can have an impact on the individual and, consequently, require some regulation.

The irrelevance of the private/public distinction for the purposes of data protection law echoes its lack of pertinence in construing the right to respect for private life as recognised by Article 8 of the ECHR by the ECtHR. The likeness between its broad interpretation of 'private life' and the scope of data protection has been recognised by the Strasbourg Court itself[28]. The Court has actually explicitly included under the scope of Article 8 of the ECHR elements of data protection, which in turn have confirmed and contributed to the stabilisation of the broad interpretation of 'private life'[29].

As an exception confirming the general rule, one can find in many data protection legal instruments special norms whose existence is based on the need to provide strengthened protection of some data. Indeed, in the beginning, there was some resistance to the idea that all 'personal data' deserve a degree of protection regardless of whether they could be described as 'private' or 'public'. As a sort of compromise between those favouring the protection of all 'personal data' and those opposing the idea, a new, 'mixed' category of data was invented: what was to be known as 'sensitive' data, or 'personal data' entitled for specially enhanced protection because of their peculiar nature, which links them to the intimate – e.g., data related to health, political choices or sexual life[30].

5. Embroiling Privacy and/or Data Protection

Despite the apparently sustained development of the protection of personal data as a fully-fledged autonomous legal notion in Europe, and despite the formal absence of the word privacy in the ECHR and in the Strasbourg case-law thereof, the term has remained at the forefront of many debates on law and technologies in Europe. Both external and internal factors help to explain this.

Privacy delineates a certain context of European data protection, which operates in a predominantly English-speaking world of global private companies, and among a profusion of data exchanges with the US. It has become the *lingua franca* word for the regulation of data processing. Privacy is the dominant term in the context of the Organisation for Economic Co-operation and Development (OECD)[31], and of the Asia-Pacific Economic Cooperation (APEC) forum[32] to refer to something that, like European data protection, is concerned with the processing of data related to individuals. As a result, the expressions data protection and privacy (understood as 'informational privacy') often co-occur in international discourse.

Privacy also features in European data protection law, acting on it from the inside. Even if there is no mention of privacy in Article 8 of the ECHR, data protection legal instruments adopted both at the level of the Council of Europe and by the EU have routinely asserted that there is. This practice can be traced back to 1968 when, in tune with the computers and privacy spirit of the 1960s, the Parliamentary Assembly of the Council of Europe adopted a Recommendation explicitly referring to the "*the right to privacy which is protected by Article 8*" of the ECHR[33]. This document led, eventually, to the adoption in 1973 and 1974 of two resolutions on data protection, and, in 1981, of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (generally known as 'Convention 108')[34], which explicitly recognised as its main purpose the need to secure the respect of the right to *privacy* of individuals (with regard to automatic processing of personal data relating to them)[35].

The major EU data protection instrument, Directive 95/46/EC[36], officially aimed at giving substance and amplifying Convention 108[37], and faithfully reflected its wording by identifying as its object the protection of fundamental rights and freedoms in general, but, in particular, the "*right to privacy*"[38]. As a result, even if Article 8 of the ECHR does not establish any 'right to privacy', it does so for the purposes of EU data protection law. Since the Strasbourg Court has affirmed that data protection is an integral part of the scope of Article 8 of the ECHR, it follows that data protection is part of (what itself refers to as) privacy.

Since 2000, the EU Charter of Fundamental Rights offers a different perspective on the issue. It consecrates personal data protection as a fundamental right in a specific article (Article 8), while reproducing the content of Article 8 of the ECHR, on the right to respect for private life, in its Article 7. It follows that, for the Charter, data protection is not part of (what EU data protection law designates as)

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privacy, but something running parallel to it, and therefore potentially autonomous. As the Charter acquired legally binding force in December 2009, this new and somehow contradictory approach acquired full legal validity.

From 2000 to 2009, however, the legal status of the Charter had been unsettled. The EU legislator, as if hesitating between adopting or ignoring its perspective, routinely incorporated in EU law various formulas which, by their ambiguity, nourished further hesitations. A famous example was the sentence "*privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data*", used in 2001 to describe possible grounds for refusal of access to documents. For a number of years, EU institutions intensely debated how that sentence should be read, with the European Data Protection Supervisor (EDPS) arguing that it meant that access to documents could be refused *only if* the individual's privacy (understood as something different to personal data protection rights) was affected, and the European Commission claiming that it meant that access had to be refused even if the disclosure simply affected somebody's data protection rights. In 2010 the EU Court of Justice adopted the latter view[39].

All in all, personal data protection appears to be sometimes understood as an *equivalent to privacy* (then interpreted as 'informational privacy' or control over personal information), sometimes as *an element of privacy* (then portrayed as a broad right, not limited to the protection of what is 'private' in the sense of opposed to 'public') and sometimes as *different from privacy* (then potentially contracted to a mere protection of the 'private' as opposed to the 'public'). Thus, personal data protection and privacy can relate to each other in various, seemingly conflicting ways, and the word privacy can conceal different meanings in relation to personal data protection, meaning which will be (temporarily) determined precisely by such relationships.

5. "A European Data Protection Framework for the 21st Century": Spectres of Privacy

European data protection is currently at an historic crossroads: EU institutions have embarked on the revision of the main instruments of the EU data protection legal framework. The legislative package presented to this end by the European Commission in January 2012, consisting primarily of a Regulation[40], a Directive[41] and a Communication[42] introducing both, is particularly illustrative of the complex relations between privacy and data protection. On the surface, the European Commission seems to be announcing the liberation of EU data protection from any reference to the right to privacy, incorporating the new instruments directly as the development of the EU right to the protection of personal data, now unambiguously portrayed as an autonomous fundamental right of the EU. At a deeper level, however, the force of privacy can be perceived as the original impetus behind various mechanisms suddenly re-named as data protection instruments, and, thus, also as the concealed path through which various future provisions might need to be read and interpreted.

The new Regulation proposed by the European Commission is to become the major future EU data protection legal instrument. It should replace Directive 95/46/EC, which, as highlighted, singled out as one of its objectives the insurance of the right to privacy. The text proposed by the European Commission for the upcoming Regulation obliterates such reference to privacy, to be replaced by a reference to the protection of personal data. Remarkably, despite this being a major proposed change in the wording of the very first Article of the new legal instrument, which is to determine the interpretation of all its other provisions, the European Commission has not acknowledged this as being a change requiring deeper discussion[43]. Nor does the European Commission ever point out that there are outstanding terminological differences between the Regulation and the Communication that is supposed to introduce it.

The proposed Regulation mentions privacy only in a limited number of cases: in relation to sensitive data[44] and data breaches[45], but little more. In contrast, the Communication uses it abundantly. As if privacy and data protection were synonymous, or, at least interchangeable words, the English version of the Communication is titled "*Safeguarding* Privacy *in a Connected World*", and subtitled *"A European* Data Protection *Framework for the 21st Century"*. It explains that the European Commission, in order to reinforce EU data protection, is to encourage the use of use of *privacy*-enhancing technologies, *privacy*-friendly default settings and *privacy* certification schemes[46], as well as of the 'privacy by design' principle[47]. Should these occurrences of the word privacy be interpreted as meaning the same as data protection, or something different?

Read in conjunction with other language versions, all of them equally authentic for the purposes of EU law, the Communication reveals a fluctuating understanding of the word. In the German version, privacy has in some instances been translated as *Privatsphäre* (private sphere): 'privacy-enhancing technologies' are referred to as *Technologien zum Schutz der Privatsphäre*)[48]. In others, privacy has been replaced with *Datenschutz* (data protection): for instance, 'privacy-friendly default settings' are identified as *datenschutzgerechte Standardeinstellungen*. The Spanish and the Italian versions support the idea that the word privacy is used by the Communication in its own peculiar modern sense that none of these languages have ever attempted to fully translate – the Spanish version thus relies on systematically referring to *privacidad* (a loan translation from 'privacy'), and the Italian version on the direct borrowing of *privacy*.

If the interpretation of the word privacy in the Communication is uneasy, what is clear is that most of its potential occurrences in the Regulation have been replaced with allusions to data protection. The references to 'privacy by design' are especially demonstrative of the movements that have taken place between texts. Whereas the Commission announces in the Communication that it is introducing the principle of 'privacy by design', in the opening paragraphs presenting the Regulation it asserts that its provisions will set out obligations arising from the principles of 'data protection by design'[49], without providing any explanation on whether this might be something different, or new. There are no references to 'privacy by design' in the English version of the proposed text for the Regulation[50], but only to 'data protection by design' – except for one, actually, which seems to have survived as a residual proof that there were mentions of 'privacy by design' at some point of the drafting[51].

The (almost complete) replacing of 'privacy by design' by 'data protection by design' in the final text of the proposed Regulation[52] can be interpreted as suggesting that privacy and data protection *must* mean the same, because otherwise one could not function as a substitute of the other[53]. But it can also be perceived as the confirmation that they *do not* mean the same, or else there would be no reason for the substitution. In any case, what is certain is

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that the notion of 'data protection by design' as presented in the proposed Regulation now harbours inside it the traces of the 'privacy by design' whose place it has taken. With it, the expression also carries the traces inhabiting privacy, which can include echoes of facets that 'data protection' as such was supposed to be *absolutely unconcerned with*, such as those related to any distinction between the private and the public. Thus, despite announcing a significant step towards the emancipation of EU personal data protection from privacy, the current review process of the EU data protection legal framework continues to fuel their entanglement.

6. Concluding Remarks

It is commonplace to assert that law changes (or can, or should change) in reaction to technological progress. While this is undoubtedly true, it is also true that language (the language that law is made of) has also a crucial role to play. In this contribution we have highlighted the role of the word privacy in the emergence and shaping of EU personal data protection. Debates on privacy and computers contributed significantly to its genesis, which nevertheless occurred outside any privacy framing – even if personal data protection was eventually to be deeply entangled with international privacy discourses. Privacy has played many contradictory roles in the progressive construction of EU protection of personal data: as a legal notion to be surpassed, as a concept contributing to its reshaping, as an intermittent *alter ego*, and, more recently, as a (sudden and uncommented) void to be filled.

We claim that European personal data protection should not, for the sake of accuracy, be generally described as privacy – not even as a sort of 'informational privacy'. It is a legal notion which emerged historically as something different, and the specificity of which is being increasingly asserted in EU law. At the same time, we acknowledge that it can sometimes be accurately envisaged, referred, treated, interpreted as privacy, and that this word and the relationships to it are crucial for the existence of personal data protection. In a sense, it is the instability of the meaning of privacy that has kept and continues to keep personal data protection moving forward, despite the apparent disconnection of EU data protection law; like an inescapable spectre privacy still haunts it.

This paradoxical situation is in our view best understood with the help of French philosopher Jacques Derrida and his insights into the dissemination of meaning through words, and more particularly, on the construction of meaning in law as an incessant movement[54]. Taking as a starting point that legal text continuously displaces legal meaning[55], it follows that a word can encapsulate a multiplicity of linked readings, which can at a certain point be rendered visible (or invisible), supporting new readings of existing text. This way of meaning being forged is related to Derrida's idea of *différence*, referring to the possibility for a word to conceal the key to many possible meanings, and by virtue of which the word is productive, in the sense that it can disseminate specific effects even through what it conceals[56]. In this sense, the complexities of the relation(s) between personal data protection and privacy in Europe, and their current seemingly paradoxical connections, are not just side-effects of mistranslations, or of incoherent legal interpretations, or of any factual error, but genuine phenomena inherent in the dissemination of meaning through words, and an illustration of the relevance of these phenomena to the understanding of law and of its evolution.

Notes

[1] **Vance Packard.** *The Naked Society*, Penguin Books, Harmondsworth, p. 49, 1971 (first published in 1964).

[2] Especially after in 1965 a report recommended that a centralised data system should store all information collected by the US government.

[3] **Samuel Warren, Louis Brandeis.** "The right to privacy", *Harvard Law Review,* 4(5), pp. 193–220, 1890.

[4] For an example of a defence of this conceptualisation, still popular in many fields: **Christena E. Nippert-Eng.** *Islands of Privacy*, The University of Chicago Press, Chicago, p. 4, 2010.

[5] See especially: **Alan F. Westin.** *Privacy and Freedom*, Atheneum, New York, 1970 (first published in 1967).

[6] **Roger Clarke.** "*What's 'Privacy'?*", paper presented at the Workshop at the Australian Law Reform Commission on 28 July 2006, available at <http://www.anu.edu.au/people/Roger.Clarke/DV/Privacy.html> [Last Accessed: February 2012].

[7] Notably, Alan F. Westin.

[8] As an example, in 1970 took place in Brussels the third conference edition of a series of Conferences devoted to the ECHR, titled in English *Privacy and Human Rights* and, in Dutch, *Privacy en Rechten van de Mens* (*Privacy en Rechten van de Mens: 3e Internationaal Colloquium over het Europees Verdrag tot Bescherming van de Rechten van de Mens [1970-Brussel]* (1974), Leuven, Acco).

[9] **Carlos Ruiz Miguel.** *La configuración constitucional del derecho a la intimidad*. Universidad Complutense de Madrid, Madrid, p. 76, 1992.

[10] See, notably, Article 12 of the Universal Declaration of Human Rights, which in 1948 asserted that "*no one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour and reputation*".

[11] In the documents of the 'travaux préparatoires' of the ECHR the appearance of the expression 'private life' in the English draft can be dated to August 1950. Although it was common practice to underline in each new draft the changes proposed in relation to the previous draft, the sudden replacing of 'privacy' whit 'private life' was not identified as a change, and not underlined (Draft Convention adopted by the Sub-Committee on Human Rights (7th August 1950) (Registry of the Council of Europe (1967), *Travaux préparatoires de l'article 8 de la Convention européenne des Droits de l'homme -European Court of Human Rights: Preparatory work on Article 8 of the European Convention on Human Rights (Bilingual information document)*, CDH (67) 5, 12 May, Strasbourg, p. 17).

[12] Judgement of the ECtHR of 16 December 1992, Case of Niemietz v. Germany, Application no. 13710/88, § 29.

[13] The word tends to appear only exceptionally in a very peculiar context, namely each time that the ECtHR considers the possible relevance of the "*reasonable expectations of privacy*" doctrine (see, for instance, *Gillan and Quinton v. the United Kingdom, Application no. 4158/05),* Judgment of 12 January 2010, *§ 61*).

[14] Incidentally, this reverberates the original meaning of the Latin *'privus'* as 'singular', 'individual' (**Ferdinand David Schoeman.** *Privacy and Social Freedom*, Cambridge University Press, Cambridge, p. 116), (1992, 2008).

[15] *Pretty v. the United Kingdom, no. 2346/02, § 61, ECHR 2002-III.*

[16] PG and JH v UK (Reports 2001-IX), Peck v UK (Reports 2003-I), and Perry v UK (Reports 2003-IX).

[17] **Kiteri García.** *Le droit civil européen: nouvelle matière, nouveau concept*. Larcier, Bruxelles, p. 185, 2008.

[18] In this sense, **Stig Strömholm.** *Right of privacy and rights of the personality: A comparative survey*. Boktryckeri AB Thule, Stockholm, 1967.

[19] **Robert Alexy.** *A Theory Of Constitutional Rights*, Oxford University Press, London, p. 236, (2002/2010). See in particular the Elfes judgment. Subsequent case law made it possible to identify three spheres of decreasing intensity of protection: the innermost sphere, a broader sphere of privacy, which embraces private life to the extent and a social sphere.

[20] See, for instance, the German version of the Directive 95/46/EC.

[21] See, for instance, the German version of the EU Charter ("*Artikel 7: Achtung des Privat- und*

Familienlebens").

[22] **Y. Détraigne, A.-M. Escoffier.** *Rapport d'information fait au nom de la commission des Lois constitutionnelles, de législation, du suffrage universel, du Règlement et de l'administration générale par le groupe de travail relatif au respect de la vie privée à l'heure des mémoires numériques*. Sénat, p. 14, 2009.

[23] **Frits W. Hondius.** *Emerging data protection in Europe*, North-Holland Publishing Company, Amsterdam / Oxford, p. 84, 1975.

[24] For instance, on 24 January 1974 the Land of Rhineland-Palatinate adopted the *Gesetz gegen missbräuchlich Datennutzung.*

[25] In the *Volkszählungsurteil*, or Judgement for the Census*,* which also marked the overcoming of the "*theory of the spheres*" (**Mónica Arenas Ramiro.** *El derecho fundamental a la protección de datos personales en Europa*. Tirant Lo Blanch, Valencia, p. 392, 2006).

[26] Certainly not without hesitations and contradictions. Spain is perhaps the country that best illustrates the volatility of some terminological fashions, as the doctrine, the legislator, the judiciary have been subsequently succumbing to all possible loans from other European countries (leading for instance to the surfacing of expressions such as *'libertad informática', 'autodeterminación informativa',* or *'privacidad'*).

[27] **Pierre Kayser.** *La protection de la vie privée par le droit: Protection du secret de la vie privée*. Presses Universitaires d'Aix-Marseille, Marseille, p. 15, 1995 (3e édition).

[28] Judgement of the ECtHR of 16 February 2000, *Case of Amann v. Switzerland,* Application no. 27798/95, § 65.

[29] See notably: Judgement of the ECtHR of 4 May 2000, *Case of Rotaru v. Romania,* Application no. 28341/95.

[30] **Spiros Simitis.** "Les garanties générales quant à la qualité des données à caractère personnel faisant l'objet d'un traitement automatisé" in Centre d'informatique appliquée au droit de la Faculté de droit de l'Université Libre de Bruxelles (ed.), *Informatique et droit en Europe: Actes du Colloque organisé par la Faculté de Droit avec la participation de l'Association belge des Juristes d'Entreprises Belgische Vereniging van Bedrijfsjuristen les 14, 15 et 16 juin 1984*, Bruxelles, Éditions de l'Université de Bruxelles / Bruylant, p. 308, 1985.

[31] Involved in discussions on computers and policy since 1968, and responsible for the 1980 *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*.

[32] Which has its own Privacy Framework since 2005.

[33] **Council of Europe.** *Recommendation (68) 509 On Human Rights and Modern Scientific and Technological Developments*, adopted by the Assembly on 31st January 1968 (16th Sitting).

[34] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 28.1.1981.

[35] Article 1 of Convention 108.

[36] Directive 95/46/EC of the European Parliament and 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, *Official Journal of the European Communities*, L 281, 23.11.1995, pp. 31-50.

[37] Recital 11 of Directive 95/46/EC.

[38] Article 1(1) of Directive 95/46/EC.

[39] Judgment of the Court (Grand Chamber) of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd*., Case C-28/08 P, 2010 I-06051.

[40] **European Commission.** *Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)*, COM(2012) 11 final, Brussels 25.1.2012, Brussels.

[41] **European Commission.** *Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data*, COM(2012) 10 final, Brussels 25.1.2012, Brussels.

[42] **European Commission.** *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Safeguarding Privacy in a Connected World: A European Data Protection Framework for the 21st Century*, COM(2012) 9 final, Brussels, 25.1.2012.

[43] See, for the absence of justification for such change, the "*detailed explanations*" in COM(2012) 11 final, p. 7.

[44] Recital (41) of the proposed Regulation.

[45] Recital (67) and Article 32 of the proposed Regulation.

[46] COM(2012) 9 final, p. 6.

[47] COM(2012) 9 final, p. 7.

[48] Also in this sense, the title of the German version: "*Der Schutz der Privatsphäre in einer vernetzten Welt*".

[49] COM(2012) 11 final, p. 10.

[50] Recitals (61), (129) and (131) and Article 23 of the proposed Regulation.

[51] Article 30 of the proposed Regulation. This reference has no equivalent in any other language versions, except partially in those that appear to have been directly translated from the English version (such as the Portuguese).

[52] As well as parallel changes occurred for instance in relation to 'data protection (former privacy) impact assessments'.

[53] In this sense, the French version of the Communication already referred to '*protection des données dès la conception'* (or 'protection of data since the conception').

[54] **Jacques Derrida.** *Force de loi: Le "Fondement mystique de l'autorité"*. Galilée, Paris, p. 51, 2005. ISBN: 2718604328.

[55] **Niklas Luhmann.** *Law as a Social System*. Oxford University Press, Oxford, p. 242, 2009 (see p. 236 for his embracing of Derrida's contribution).

[56] **Jacques Derrida.** *La Différance*. Conférence prononcée à la Société française de philosophie, le 27 janvier 1968, publiée simultanément dans le *Bulletin de la société française de philosophie* (juillet-septembre 1968) et dans *Théorie d'ensemble* (coll. Tel Quel), Ed. du Seuil, 1968. On the relevance for law of these ideas, see notably: **Pierre Legrand.** "On the Singularity of Law", *Harvard International Law Journal,* 47(2), pp.517-530, 2006.