

## 1 General introduction

'Personality rights' is not an obvious topic of comparative legal research. One may argue that the title of this volume reveals a typically continental European approach to the legal protection of personality interests. Is this terminological choice really compatible with the commitment of the Common Core project to a factual, bottom-up approach<sup>1</sup> and with the requirement of equal treatment of different legal cultures, which should inspire every high-quality comparative law exercise? We maintain that it is for at least three reasons.

First of all, the rights-based approach in legal matters such as privacy and self-determination has become a truly common European feature through the European Convention on Human Rights (ECHR), the jurisprudence of the European Court of Human Rights (ECtHR) and the established case law of the European Court of Justice (ECJ) on Community fundamental rights, which are already in force as general principles of EC law.<sup>2</sup>

Secondly, legal history shows that the recognition of a 'new' human interest as a 'right' always requires a lengthy period of time and intense debates in every legal system. This is a recurring pattern in the history of personality protection in continental Europe, like in other parts of Europe and in the United States.<sup>3</sup>

Thirdly, it is of great interest for comparative lawyers committed to the Common Core methodology to see how the same human interests

<sup>1</sup> M. Bussani and U. Mattei, 'The Common Core Approach to European Private Law' (1997) 3 *Columbia Journal of European Law* 339.

<sup>2</sup> Cf. G. Brügge-meier, A. Colombi Ciacchi and G. Comandé (eds.), *Fundamental Rights and Private Law in the European Union*, Vols. I and II (Cambridge: 2010).

<sup>3</sup> See G. Brügge-meier, 'Protection of Personality Rights in the Law of Delict/Torts in Europe: Mapping out Paradigms', and J. Page, 'American Tort Law and the Right to Privacy', both in this volume.

which qualify as 'rights' in some legal systems are protected in the legal systems which do not recognise this qualification. Following Sacco's approach,<sup>4</sup> this volume aims, on the one hand, to detect hidden similarities and 'cryptotypes' in the actual legal treatment accorded by different European countries to personal interests, which qualify as 'personality rights' in some of these countries. On the other hand, this volume aims to detect hidden disparities in the 'law in action' of countries whose 'law in books'<sup>5</sup> seems to protect one and the same personality interest in a similar fashion.

The working method of this project and the structure of the country reports follows the tripartition 'Operative Rules', 'Descriptive Formants' and 'Metalegal Formants' typical of the Common Core methodology:<sup>6</sup>

- (1) The Operative Rules summarise the final result, i.e. the claims given (or not given) in each of the situations described in the individual case of the questionnaire. They also specify the kinds of losses recoverable (economic, non-economic or both).
- (2) The Descriptive Formants comprehensively explain the (legislative or case law) legal bases and the requirement for their applicability in the individual case.
- (3) The Metalegal Formants deal with arguments other than formal legal ones, e.g. policy, economic, sociological, historical arguments, which are determinant for the final result. Often a legal provision is open to different interpretations and each of these is supported by policy arguments; these are discussed, if possible, in the Metalegal Formants. This is also where the authors make any general comments not belonging to the Descriptive Formants.

<sup>4</sup> R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 *American Journal of Comparative Law*, 1 and 343.

<sup>5</sup> R. Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12.

<sup>6</sup> See Bussani and Mattei, 'The Common Core Approach'; Sacco, 'Legal Formants'.

## 2 Protection of personality rights in the law of delict/torts in Europe: mapping out paradigms<sup>1</sup>

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### 1. Introduction

'Personality Rights in European Tort Law': What exactly are we talking about here? Both the term *personality right* and the term *European tort law* are misleading and need clarification right from the outset.

There is actually no such thing as 'European tort law'. The 'pigeon-hole' approach of individual torts is a particularity of the common law tradition, which finds no counterpart in the civil law. The term 'law of delict' is well-established with regard to the civil law systems, which claim 'non-contractual liability for damage caused to another', based on the general principle of *neminem laedere*.

As for the notion of 'personality right', in modern civil law there are two clear-cut notions of 'rights': *public law* recognises fundamental rights, be they classic human rights declaring the freedom of citizens from state intervention<sup>2</sup> or be they social or economic rights requesting assistance and performances for citizens from public authorities. These are 'innate' and inalienable rights of human beings as such or of the citizens of the respective political entity, and are mostly enshrined in written constitutions. *Private law* provides for subjective rights:<sup>3</sup>

<sup>1</sup> An earlier and partly different version of this chapter was published in N.R. Whitty and R. Zimmermann (eds.), *Rights of Personality in Scots Law: A Comparative Perspective* (Dundee: 2009).

<sup>2</sup> These national or European fundamental rights are also capable of developing *states' duties of protection*. On the European level see ECJ, 15.12.1995, case C-415/93 *Bosman* [1995] ECR I-4921; for a leading German monograph, see J. Dietlein, *Die Lehre von den grundrechtlichen Schutzpflichten* (2nd edn., Berlin: 2005).

<sup>3</sup> *Droits subjectifs/diritti soggettivi*. On this civilian category, alien to common lawyers, see H. Coing, 'Zur Geschichte des Begriffs "subjektives Recht"', in *Gesammelte Aufsätze*, Vol. 1 (Frankfurt/M.: 1982), p. 241; F.H. Lawson, 'Das subjektive Recht' in the English Law of Torts', in *Selected Essays*, Vol. 1: Many Laws

(absolute) property rights in corporeal things or intellectual achievements and (relational) obligations (*Forderungen*), e.g. a creditor's right to claim money from a debtor. These subjective rights are, by definition, alienable, heritable and of monetary value. They constitute the assets of a person. Civil *personality rights* do not fit into this dichotomy. They are hybrids, sort of *private human rights*. They function as a metaphor for non-physical aspects of the persona and this nomenclature has helped them to be recognised by private law. The law of delict protects both the 'have' and the 'being' of individuals. The protection of the 'being' was traditionally restricted to both the guarantee of bodily (psycho-physical) integrity and the guarantee of honour and reputation against defamation.<sup>4</sup> The law of defamation is a well-established field of – criminal and private – law in almost every legal system. However, *new* non-bodily aspects of the persona appeared within the scope of the law of delict/tort under the guise of personality rights. These include dignity, autonomy, privacy etc. These are what *personality rights* or an overarching *general personality right* are. Under this terminological umbrella, legitimate personality interests are developed and protected by the law of delict. One has to lift this metaphorical veil to get to the substance – the diversity of personality interests and the specificity of their scope of protection.<sup>5</sup> A special and controversial case in this respect is the 'right' to one's likeness. It supposedly has a double nature. It can be an inalienable personality 'right' or an alienable and descendible property right ('right to publicity').<sup>6</sup>

(Amsterdam: 1977), p. 176; G. Samuel, '“Le Droit Subjectif” and English Law' (1987) 46 *Cambridge Law Journal* 264.

<sup>4</sup> This has already been the scope of protection of the Roman *actio iniuriarum*. On its impact on the modern law, see R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Cape Town: 1990), Ch. 31 and below in the text.

<sup>5</sup> The attempts in Anglo-American tort law to focus exclusively on 'a' privacy tort and to define privacy comprehensively are misleading. See, as a recent example, D.J. Solove, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania Law Review* 477. These attempts seem to be strongly indebted to the traditional pigeon-holing approach of the common law of torts. Instead, the protection of personality interests is an open textured concept. See already R. Pound, 'Interests of Personality' (1915) 28 *Harvard Law Review* 343/445 (sociological jurisprudence) and recently J. Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford: 2006), Ch. 11 (philosophical jurisprudence); see also C. van Dam, *European Tort Law* (Oxford: 2006), p. 149.

<sup>6</sup> On the US, see J.T. McCarthy, *The Rights of Publicity and Privacy*, 2 Vols., (2nd edn., Eagan: 2002); for Europe see H. Beverly-Smith, A. Ohly and A. Lucas-Schloetter, *Privacy, Property and Personality. Civil Law Perspectives on Commercial Appropriation* (Cambridge: 2005). The leading German monograph is H.P. Götting, *Persönlichkeitsrechte als Vermögensrechte* (Tübingen: 1995).

The notion '*persona*', *personnalité* or *persönlichkeit* appeared in the legal world at two different periods in history and in two different forms – firstly through the Institutes of Gaius in the second century AD,<sup>7</sup> which later inspired the *Institutiones* of Justinian's *Corpus Iuris Civilis* in the sixth century AD (a legal transfer from Rome to Byzantium). Book I of Justinian's *Institutiones* developed the formalistic understanding of the natural person as a subject of the law (*Rechtssubjekt*; *soggetto di diritto*), of his or her legal capacity and of his or her social status in inter-personal relationships (marriage, parenthood, adoption, guardianship). Most nineteenth-century Civil Code drafters took this conventional notion as a model and a starting point for their own structuring of private law. French and German civil law also share this as a common heritage.

Secondly, another concept of *persona* was then fully worked out by the Enlightenment philosophy and natural law theories at the time of the transition from traditional to modern society in the seventeenth and eighteenth centuries. Building on Christian ethic and Canon law, it was through the works of *Grotius*, *Thomasius*, *Pufendorf* and others that the idea of human dignity as a characteristic feature of the *persona* that must be recognised in every individual came to the fore, as well as the concept of innate human rights and duties belonging to the *persona* as such (*iura connata*).<sup>8</sup> The ways and the extent to which the continental European law of delict tackled the problem of protection of personality interests from the nineteenth century onwards seemingly depended on their adherence to the latter of these two traditions.

The civil law of delict has two distinct but paradigmatic paths concerning the protection of personality interests in nineteenth- and twentieth-century continental Europe – the *French* law and the *German* law.<sup>9</sup> Austria and Italy are examples of civil law systems which shifted between these two regimes before developing their own shape. A path

<sup>7</sup> See Book I (8) of Gaius' *Institutiones*: 'All the law which we make use of has reference either to persons, to things, or to actions. Let us first consider persons.' (English translation available at <http://faculty.cua.edu/pennington/Law508/Roman%20Law/GaiusInstitutesEnglish.htm>).

<sup>8</sup> For this scholastic and natural law legacy in greater detail and from a comparative perspective, see J. Gordley, *Foundations of Private Law*, Ch. 11, and as *locus classicus*: F. Wieacker, *Privatrechtsgeschichte der Neuzeit* (2nd edn., Göttingen: 1967), Ch. 4 (in English: F. Wieacker, *A History of Private Law in Europe* (Oxford: 1995)) with further references.

<sup>9</sup> A different view is presented by the legal historian and comparativist J. Whitman, equalising French and German law in their preferred protection of honour in contrast to the US law focusing on protection of liberty. J. Q. Whitman, 'The Two Western Cultures of Privacy: Dignity versus Liberty' (2004) 113 *Yale Law Journal* 1151.

of their own, in form and content, was pursued by both the *common law of torts* in England, Ireland and the mixed jurisdiction of Scotland, and by the law of the *Nordic States*.

(1) One line of thought is characterised by the reception of natural law's general clause of the law of delict (*neminem laedere*). Together with the heritage of the *actio iniuriarum* of the *Ius Commune*, this reception by the French drafters of the *Code Civil* made the equal treatment of economic and non-economic loss in the law of damages possible, which was alien to Roman law. Under the general law of delict in the *Code Civil*, compensation of non-economic loss in cases concerning the infringement of the personality was awarded from 1804 onwards. The French model was followed in the nineteenth century by Belgium, the Netherlands, Spain, Switzerland,<sup>10</sup> and initially by Austria<sup>11</sup> and Italy.

(2) In nineteenth-century Germany, the Historical School instead wanted to revert to the original sources of Roman law not alienated by Canon and natural law. Scholars worked on a system of private law focusing on freedom of contract, economic rights and compensation of pecuniary loss. The protection of honour and reputation was submitted to criminal law; a civil law remedy of damages was no longer available in this field of law. The *actio iniuriarum* was formally repealed. This German law path was followed in the twentieth century by other states such as Austria, Greece and Italy.

The BGB law of delict was then later forced to recognise these suppressed personality interests and to integrate them into a system which was not suitable for them: monetary compensation was only awarded in cases of severe infringement and where there was no other remedy at hand to resolve the infringement.

(3) In the English common law of torts the protection of a person's honour and reputation by the law of defamation has had a long but intricate history. Beyond defamation law, other personality interests such as dignity, autonomy and privacy are protected by a legal patchwork of common law, equity law and statutory law, if at all. Unlike

<sup>10</sup> Cf. Art. 55 Swiss Law of Obligations (OR) of 1881 and now Art. 28 Swiss Civil Code (ZGB) of 1907 and Art. 49 OR of 1911. Art. 28(1) ZGB affords legal protection to anyone who suffers an unlawful infringement of his/her personality.

<sup>11</sup> Cf. § 16 Austrian General Civil Code (ABGB) of 1811: 'Each human being has inborn rights, apparent from reason, and is accordingly to be regarded as a persona.'

the common law in the United States,<sup>12</sup> English common law has not yet formally recognised a tort of violation of privacy. However, with the influence of the Human Rights Act (1998) things have begun to change.<sup>13</sup> Scots law, being the unique example of a mixed jurisdiction in Europe, intertwining both the Roman law-rooted civil law of delict (*actio iniuriarum*) and the common law of torts (defamation), tries to pursue an independent path.

(4) The Nordic countries encompass legal systems which still adhere to the old tradition of the protection of personality interests (honour and reputation) through criminal law. No civil personality rights are acknowledged. Tort law remedies (damages) are only available in connection with some types of criminal acts regulated by the general Penal Code and by special legislation in respect of the media. Recently, under the influence of the European Convention on Human Rights (ECHR), the legal protection of the personality seems to have developed further.<sup>14</sup>

(5) In the second half of the twentieth century, another dominant, 'neo-natural law' factor entered onto the continental legal stage supporting the development of private personality rights – *constitutionalism*. After the breakdown of the national socialist and fascist political regimes following the Second World War, new democratic constitutions were inaugurated in most continental European states. These contained binding and judicially enforceable constitutional rights for the first time.<sup>15</sup> In addition, an overarching European Bill of Rights, embracing both capitalist and (then) communist countries, was set in motion – the ECHR of 1950, which has been monitored by the

<sup>12</sup> On the development of US law, see the contribution of J. Page, 'American Tort Law and the Right to Privacy' (in this volume) and the collection of articles in R. Wacks (ed.), *Privacy*, 2 Vols. (Aldershot: 1993) and E. Barendt (ed.), *Privacy* (Aldershot: 2001).

<sup>13</sup> See, e.g., J. Wright, *Tort Law and Human Rights* (Oxford: 2001); W.V.H. Rogers, 'Tort Law and Human Rights: A New Experience', in H. Koziol and B.C. Steininger (eds.), *European Tort Law 2002* (Vienna/New York: 2003), pp. 35–64.

<sup>14</sup> See A. Lauer and A. Colombi Ciacchi, 'Sweden', in G. Brüggemeier, A. Colombi Ciacchi and G. Comandé (eds.), *Fundamental Rights and Private Law in the European Union, Vol. I: A Comparative Overview* (Cambridge: 2010 forthcoming), Part 2 § 4 and Part 3 § 3 A.

<sup>15</sup> In France, it was due to the jurisprudence of the Constitutional Council (*Conseil constitutionnel*) and in Italy due to the jurisprudence of the Constitutional Court (*Corte costituzionale*) that non-binding constitutional rights were turned into judicially enforceable constitutional principles from the 1970s onwards. For France, see below Part B I; for Italy, see F. Jorge Ramos, C. Kraus, C. Mak, M.D. Sanchez



European Court of Human Rights (ECtHR) since 1998.<sup>16</sup> The human rights contained therein finally became an integral part of the Law of the European Union. It is due to this process of Europeanisation or constitutionalisation of private law<sup>17</sup> that at the end of the last century the diverse private law traditions of Europe and the adherent national legal systems approximated to a certain extent, at least as far as the protection of personality rights is concerned. Still, in the Nordic countries this approximation process is less visible than in the other Western European countries.

These different paths of private law in Europe – civil law of delict, common law of torts and Nordic law – are sketched below in a four-part analysis covering France, Germany, England and Sweden, supplemented by a section on EU law.<sup>18</sup>

## 2. Two distinct paths of civil law of delict

### A. France<sup>19</sup>

France was the demiurge of civil society in Europe. It delivered the political philosophy, the fundamental rights and the revolutionary practice. However, during its revolutionary process all the atrocities which modern civilised societies would later face in the nineteenth and twentieth centuries were anticipated. The starting point for the protection of privacy and other personality interests can already be found in the *Déclaration des droits de l'homme et du citoyen* of 26 August 1789. Art. 2 of the Declaration states that the first and greatest commandment of any body politic is to protect the 'natural rights' of human

Galera and S. Wunsch, 'Italy', in G. Brüggemeier et al. (eds.) *Fundamental Rights and Private Law in the European Union*, Vol. I.

<sup>16</sup> F. G. Jacobs and R. C. A. White, *The European Convention on Human Rights* (4th edn., Oxford: 2002); C. Grabenwarter, *Europäische Menschenrechtskonvention* (4th edn., Munich/Vienna: 2009).

<sup>17</sup> For comparative accounts, see K. S. Ziegler (ed.), *Human Rights and Private Law. Privacy as Autonomy* (Oxford: 2007); T. Barkhuysen and S. Lindenberg (eds.), *Constitutionalisation of Private Law* (Leiden/Boston: 2006) and D. Friedmann and D. Barak-Erez (eds.), *Human Rights in Private Law* (Oxford: 2001).

<sup>18</sup> For comparative accounts, see G. Dworkin et al., *Die Haftung der Massenmedien, insbesondere der Presse, bei Eingriffen in persönliche oder gewerbliche Rechtspositionen* (Frankfurt/M.: 1972); H. Koziol and A. Warzilek (eds.), *Persönlichkeitsschutz gegenüber Massenmedien/The Protection of Personality Rights against Invasions by Mass Media* (Vienna/New York: 2005); cf. also K. Zweigert and H. Kötz, *Introduction to Comparative Law* (3rd edn., Oxford: 1998), pp. 685–708.

<sup>19</sup> This section benefits from both the introduction to the French questionnaire report by A. Lucas-Schloetter (on file with the editors) and the French Report to



beings, especially liberty.<sup>20</sup> Art. 11 guarantees freedom of expression.<sup>21</sup> Nevertheless, it was for the legislator to implement and protect these natural rights and to define their limits through statutory acts. The *Code Napoléon* of 1804 was a civil law masterpiece of this legislative implementation. With its liberal principles on freedom of contract and property, as well as its broad scope of protection through the law of delict, the Code became the civil constitution of French bourgeois society.

As early as the middle of the nineteenth century, the *reproduction of a person's likeness* began to attract the attention of jurists and was soon considered to be the subject of a sort of exclusive right of the individual. The judgment of 16 June 1858 in the *Rachel* case is seen as the 'birth certificate' of the right to one's image in France.<sup>22</sup> It concerned a famous actress who had been photographed on her deathbed. Unauthorised sketches were then made of the photograph and these were commercially marketed. The outcome of the proceedings was the seizure and destruction of the wrongfully produced sketches and the payment of monetary compensation for non-economic loss (*dommage moral*) to her relatives.

The language applied by the court focused much more on property rights discourse than on personality interests. Nevertheless, from the middle of the nineteenth century onwards it was admitted in France that a person's image, name<sup>23</sup> and likeness were subjects of an exclusive

the EU Research Training Network: C. Herrmann and C. Perfumi, 'France', in G. Brüggemeier et al. (eds.), *Fundamental Rights and Private Law in the European Union*, Vol. I.

<sup>20</sup> 'Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté, la propriété, la sûreté et la résistance à l'oppression.' ['The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security and resistance to oppression.']

<sup>21</sup> 'La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi.' ['The free communication of ideas and opinions is one of the rights which is most precious to man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be determined by law.']

<sup>22</sup> Trib. civ. Seine, 16 Jun. 1858, D. 1858, 3, 62. In this judgment, the civil court stated that 'no one may, without the express consent of the family, reproduce and make the features of a person on his deathbed available to the public, however famous this person has been and however public his acts during his life. *The right to oppose this reproduction is absolute*; it flows from respect for the family's pain and it should not be disregarded; otherwise the most intimate and respectable feelings would be offended.'

<sup>23</sup> Trib. civ. Seine, 15 Feb. 1882, D. 1884, 2, 22 note Labbé; cf. Maillard, 'Du droit au nom patronymique' (1894) *Ann. prop. ind.* 345.

right, the violation of which would lead to seizure and interdict as well as general damages for emotional suffering under the general clause of Arts. 1382, 1383 *Code Civil* ('wrongfully inflicted damage'). Many cases of the 'belle époque era' deal with the conflict between the artist's right to his/her work and the person's right to his/her image and private life.<sup>24</sup> The only subject of contention was the question of the legal nature of this 'personality right'.<sup>25</sup>

In relation to private life (*vie privée*), on the other hand, the situation was quite different. The right of every person to have his or her privacy respected was neither discussed by the civil law courts nor in academic scholarship (*la doctrine*). Interestingly though, in 1819, *Royer-Collard*, a supporter of freedom of press legislation under the Restoration (Second Empire), had already advocated a 'wall of private life' (*mur de la vie privée*) as a borderline to press freedom and thereby concisely expressed the long dominant view of a spatial sphere of privacy linked to the domestic arena. The first Press Act was passed in 1868. S. 11 provided that 'every publication about privacy in a periodical is treated as a summary offence punishable with a fine of 500 francs'.<sup>26</sup> Only thirteen years later, under the Third Republic, was the Press Act repealed by a Freedom of the Press Act dated 29 July 1881.<sup>27</sup> On the contrary, the new Act (Art. 35) provided that only a deliberate infringement of the honour or esteem of another person would be a wrongful act: the crime of defamation (publication of offensive statements) and insult (*injure*). The Act introduced very restrictive procedural requirements, particularly the three-month term of prescription. The remedies for violation were monetary fines. A right of reply (*droit de réponse*) was introduced. The general law of delict is excluded from the scope of application of the Press Act 1881. In this respect, the protection of the persona against any form of defamatory and revelatory publication remained limited. However, this had no implication for the protection of other personality interests founded on the general rules of the law

<sup>24</sup> Cf. thereto J. Q. Whitman, 'The Two Western Cultures of Privacy', at 1175 *et seq.* with references.

<sup>25</sup> Trib. civ. Seine, 16 Jun. 1858, *Rachel*, D. 1858, 3, 62.

<sup>26</sup> This criminal law focus is also to be found in the *Constitution du 3 septembre 1791*, Title III, Ch. V, Art. 17: '*Les calomnies et injures contre quelques personnes, que ce soit relatives aux actions de leur vie privée, seront punies sur leur poursuite.*' ['Calumnies and insults against any persons whomsoever relative to their private life shall be punished in legal proceedings.']

<sup>27</sup> *Loi du 29 juillet 1881 sur la liberté de la presse*, Bull. Lois no. 637 p. 125.