PART I  MAPPING THE LEGAL LANDSCAPE
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 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.

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.

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

---

which qualify as ‘rights’ in some legal systems are protected in the legal systems which do not recognise this qualification. Following Sacco’s approach, 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’ 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:

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.

2 Protection of personality rights in the law of delict/torts in Europe: mapping out paradigms

Gert Brüggemeier

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 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: 3

---

1 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).

2 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).

(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. 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. 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’).
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,7 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).8 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.9 Austria and Italy are examples of civil law systems which shifted between these two regimes before developing their own shape. A path

---

7 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).

8 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.

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, and initially by Austria 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

---

10 *Cf.* Art. 55 Swiss Law of Obligations (0R) of 1881 and now Art. 28 Swiss Civil Code (ZGB) of 1907 and Art. 49 0R of 1911. Art. 28(1) ZGB affords legal protection to anyone who suffers an unlawful infringement of his/her personality.

11 *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, 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. Scots law, being the unique example of a mixed jurisdiction in Europe, intertwining both the Roman law-rooted civil law of delict (actio injuriarum) 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.

(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. 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


15 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. 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 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.

2. Two distinct paths of civil law of delict

A. France

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
beings, especially liberty. Art. 11 guarantees freedom of expression. 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. 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 and likeness were subjects of an exclusive

---

20 ‘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 sureté et la résistance à l’oppression.’
21 ‘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.’
22 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.’