Chapter 2
Privacy and the Protection of Personal Data *Avant la Lettre*

> *Ah, whoever it was who invented the idea of privacy, of a privacy, of a private home—was the greatest genius of all time.*
>
> (Mekas 2010)

Rules on the processing of information about individuals originally surfaced in European countries under various labels: in 1970, the German federal state of Hesse adopted a seminal act concerned with the establishment of *Datenschutz* (translatable as 'data protection');[1] in 1973, Sweden approved an act named *Datalag* (or 'Data Act');[2] in 1978, France endorsed a law entitled *informatique et libertés* ('computers and freedoms').[3] The terminological creativity of data processing regulation breaking out in Europe during the 1970s was accompanied by a relative fuzziness in relation with the purpose, or purposes, targeted by these new provisions (Bygrave 2002, p. 8).

Eventually, however, all these norms and similar rules later emerging in Europe were to be formally designated as constituting 'data protection' laws, and officially ascribed to the objective of serving, primarily, something called 'privacy'.[4] This chapter focuses on this word: privacy. It investigates its origins and significance, and its historical connections with the development of European rules on the processing of personal data.

2.1 Introducing Privacy

As a concept, privacy has been described as being 'in disarray' (Solove 2008), or prone to definitional instability (Bygrave 2010, p. 169). Scholars have elaborated many different theories about it, attesting of the multiple clusters of meaning surrounding the word.

[1] See Chap. 3, Sect. 3.1.1, of this book.

[2] Ibid. Sect. 3.1.2.

[3] Ibid. Sect. 3.1.4.

[4] See, for instance: (Bennett 1992, p. 13; Bennett and Raab 2006, p. 19).

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2.1.1 Mapping Privacies

An overview of the literature on privacy reveals the possibility to map out many of the most common acceptations of the term by dividing them into a few basic categories, corresponding to different meanings of the adjective 'private',[5] from which the English noun 'privacy' derives.[6] Schematically:

a. privacy can be understood as protecting what is envisaged as private as opposed to public,[7] be it:
   1. conceiving of public as referring to governmental authority (the State), or the community or society in general (Duby 1999, p. 18); private is thus read as 'not official', or 'not pertaining to the *res publica*', for instance because specifically related to family life, or to the home;[8]
   2. envisioning public as what is shared, exposed, common, open to the other; private is thus read as belonging to a closed space or realm,[9] unexposed, hidden, confidential, concealed, secret (Duby 1999, p. 18), let alone, devoted to introspection,[10] generally inaccessible, or out of reach;[11] but
b. privacy can also be understood as touching upon what is private in the sense of individual, personal, or one's own: from this viewpoint, to claim respect for somebody's 'private life' is to affirm their right to live as they choose, as opposed to controlled, alienated, or estranged (from society and from themselves).

This classification aims to illustrate that the meanings of privacy and private are sometimes construed in opposition to what is public, but not always. As a matter of fact, privacy as a legal notion—and particularly as a legal notion worthy of reinforced protection in certain legal systems—has often been pictured as associated with what is 'private' in the sense of individual, personal, one's own (group B).

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[5] The adjective 'private' derives from the Latin *privatus*. In Latin, *privatus* was typically used in contrast to *publicus* and *communis*, and meant 'private, individual, own' (*Dictionnaire Gaffiot Latin-Français* 1934, p. 1239), as well as 'simple citizen' (ibid.) and 'withdrawn from public life' (Schoeman 2008, p. 116).

[6] The English word 'privacy' was rarely used as such before the sixteenth century (Onions 1966, p. 711).

[7] The adjective 'private' surfaced in English in the fourteenth century, precisely meaning 'not open to the public', and in the fifteenth century with the sense of 'not holding a public position' (ibid.).

[8] The Latin *privatus* represented a particular usage of the past participle of the verb *privare*, originally meaning 'bereave, deprive', and from which stemmed for instance the French *priver*, defined in nineteenth century French dictionaries as referring to taking something away from the wild nature and taking it to the familiar space of the home (Duby 1999, p. 17). The Latin noun *privatum* referred to private assets, including the home, and the idiom *in privato* meant 'inside the house' (ibid. 18).

[9] Sometimes metaphorically. See, for instance: (Serfaty-Garzon 2003).

[10] Alluding to a *ius solitudinis*: (Pérez Luño 2010, p. 339).

[11] According to Gavison, '(i)n its most suggestive sense, privacy is a limitation of other's access to an individual' (Gavison 1980, p. 428).

From this perspective, privacy has notably been connected with freedom: some have described it as the fortress of personal freedom (Sofsky 2009, p. 53), what ensures a freedom to establish individual paths in life, and the potential to resist interferences with this freedom (Gutwirth 2002, p. 2), as individual freedom par excellence (Rigaux 1992, p. 9), or as the protection of freedom itself (Bendich 1996, p. 441). Privacy has also been attached to the notion of individuality, as such the outcome of a historical construction of the person (Lefebvre-Teillard 2003, p. 1151) originated in the early Christianity (Bennett et al. 2001, p. 280), developed through the Middle Ages, and consolidated with the Enlightenment and the advent of modern constitutionalism.[12] Privacy in this light would not just be about any boundaries separating what pertains to the State from the private lives of people, but rather a barrier sheltering individuals against the arbitrariness of State power. Through the idea of individuality, privacy would also be directly linked to autonomy (Bygrave 2002, p. 133).[13]

Privacy in the sense of serving the realisation of individuals' own lives has furthermore been coupled with the notion of human dignity. This view's basic assumption is that it is inherent to human condition to develop freely, and that, therefore, human dignity must presuppose the acknowledgement of a degree of self-determination (Pérez Luño 2010, p. 324). Here, individuality is identified with the full development of personality (Edelman 1999, p. 509), a concept associated with the notion of personhood, or the quality of being a human being. Privacy, full development of the personality and personhood are sometimes also connected to (and through) the concept of identity,[14] a multifaceted notion[15] with several potentially relevant meanings: in particular, identity can be envisioned as personality, or individuality,[16] but also as what allows for identification (or individualisation) (Bioy 2006, p. 74), in the sense of being the sum of personal identifiers.[17] Identity, however, is also sometimes addressed as a key to refine the relation between privacy and freedom (Hildebrandt 2006).

In comparative constitutional law, the recognition of a right to privacy as a unitary right is a late phenomenon (Ruiz Miguel 1992, p. 76). It was preceded by the enshrinement of other notions such as the inviolability[18] of the home, or

[12] In Anglo-Saxon thinking, a major reference in this context is the notion of liberty as individual autonomy developed by John Stuart Mill, in his work *On Liberty* (Stuart Mill 1948). See also: (Ruiz Miguel 1992, p. 7; Pérez Luño 2010, p. 329).

[13] Autonomy is sometimes envisioned as closely related to freedom and self-determination (De Hert and Gutwirth 2003, p. 95).

[14] See, for instance: (Rodotà 2009, p. 22; Kahn 2003).

[15] As attempts to circumscribe it can be mentioned the concepts of identity-in-transformation (Luhmann 1998, p. 37), or the 'ipse' and 'idem' dimensions discussed by French philosopher Paul Ricoeur, highlighting that identity is dependent both the perception of the self as unique, and the continuity of space and time, or what is shared with others (Ricoeur 1990).

[16] See, notably: (Pino 2006).

[17] These two basic facets of identity can be traced back to the writings of John Locke (Locke 1998, pp. 200–202 especially).

[18] Historically sometimes referred to as 'sanctity' of the home. On the origins of legal 'sanctity' as inviolability (and its relation with 'sanction'), see: (Thomas 2011, pp. 62–63).

confidentiality of correspondence, legal notions in some cases later regarded subsumed into a general right to privacy, understood then as an umbrella right.[19]

The conceptual ramifications of different understandings of privacy sometimes overlap. It can be argued, for instance, that for individuals to be effectively able to live freely, they need to be assured that some facets of their lives are to remain undisclosed. In point of fact, features such as the inviolability of the home, or confidentiality of communications (which might appear as prime examples of the significance of the private/public distinction as per group A), have in reality surfaced historically associated with personal freedom (as in group B) (Martínez Martínez 2004, p. 62).[20] Respect of privacy as the individual's own life is also often depicted as requiring that persons are ensured a place, or a time, to be on their own ('in private') in order to allow for personal reflection and for the development of personal attitudes.[21] To be free, individuals would need that some facets of their lives are kept private, out of reach.

Conversely, the conceptual ramifications of different views on privacy can also occasionally conflict. There are conceptions of privacy that warn against granting an excessive emphasis to concrete understandings of what is private as opposed to what is public; some scholars have indeed advanced the idea that for persons to be effectively (free) individuals, they cannot be detached from what is social, and public.[22] To enjoy a private life in the sense of a life of their own, individuals would need more than a 'merely private' life: privacy shall consequently include the dimension of the individual directed towards the exteriority, or towards the other (Ruiz Miguel 1992, p. 5). To be free, individuals must not to be kept apart.[23]

Different conceptions of privacy and related legal notions rely sometimes on coincidental terminology, generating some ambiguities. The term 'sphere' is a prime example of this. Political scholars have often used the image of concentric spheres to describe different degrees of individuals' connexion to the polity: they have depicted the existence of an intimate sphere, a private sphere, a social sphere, or a

[19] Describing privacy as an umbrella term: (Solove 2006, p. 486).

[20] See also: (Hansson 2008, p. 110).

[21] For US sociologist Charles Wright Mills, for instance, privacy 'in its full human meaning' referred to the possibility of individuals to transcend their milieu by articulating their own private tensions and anxieties, and, to the extent that mass media in general, and television in particular, encroached upon such private articulation of resentments and hopes, they were to be regarded as a 'malign force' causing privacy's destruction (Wright Mills 2000, p. 314).

[22] German sociologist Norbert Elias, for example, emphasised that what transforms children into specific, distinct individuals are their relations with others, and that the different structures of interiority shaping individual consciousness are precisely determined by the outside world (Elias 1991, p. 58 and 65). The exclusionary effects of the private/public distinction have notably been discussed in relation to the detrimental consequences for women (Bennett and Raab 2006, p. 21). From this perspective, the qualification of what is private emerges as not neutral, but imposing that some issues must be kept hidden, and tends to exclude women from the public life of decision-making or social interactions. See, notably: (Scott and Keates 2005; Halimi 1992, p. xiii and xiv).

[23] Or de-prived of 'public life'.

public sphere.[24] The image of the sphere, however, has also been used to convey the idea of something that is not primarily about enclosing, demarcating or obscuring, but rather about allowing for operations by the outside to take place (Sloterdijk 2007, p. 28),[25] contributing in that way to subjectivity.

The usages of words related to 'spheres' are as a matter of fact numerous.[26] In German constitutional case law, an influential legal theory has emerged since the late 1950s. It is known as the 'theory of the spheres'.[27] On the basis of this theory, the German Federal Constitutional Court envisaged a series of concentric circles, or spheres, delineating different areas based on distinct degrees of the private (Alexy 2010, p. 236): the *Individualsphäre*,[28] the *Privatsphäre*,[29] and the *Intimsphäre*.[30] The term *Intimsphäre* builds upon the German word derived from the Latin *intimus* (Coronel Carcelén 2002, p. 19), which also resulted in the English word 'intimacy' (nowadays rarely used in legal writing),[31] and evolved in other languages to form words more often used as synonymous with privacy, such as the French *intimité* (Bureau de la Terminologie du Conseil de l'Europe 1995, p. 321), or the Spanish *intimidad* (Coronel Carcelén 2002, p. 19).

The German Federal Constitutional Court abandoned the theory of the spheres in 1983, but the doctrine has nonetheless deeply marked both German and non-German literature.[32] In Germany, the doctrine sometimes refers to the right enshrined by Article 8 of the ECHR as *das Recht auf die Privatsphäre* (or 'the right to private sphere') (Frowein 1985, p. 195),[33] even if it can also be called the *Anspruch auf Achtung seines Privatlebens*, or 'right to respect for private life' (Frowein 1985, p. 194). Some other European legal orders have integrated legal notions based on cognates of the word sphere. The Dutch Constitution, for instance, grants individu-

[24] See, notably: (Arendt 1998, p. 38). For Arendt, modernity blurred the old borderline between the private and the public understood as 'political', and actually decisively replaced the ancestral private sphere with something preferably labelled as a 'sphere of intimacy', as well as the long-established public/political sphere with a new sphere of the social, whose content was regarded by the ancients as a private matter. See also: (Habermas 1992, p. 55).

[25] On alleged misconceptions of individuality as including the notion of dreams locked inside the body, or the impenetrability of the self: (Sloterdijk 2007, p. 263).

[26] Their metaphorical extensions are also many. See, for instance: (Beslay and Hakala 2007).

[27] Or '*Sphärentheorie*'. See, notably: (Doneda 2006, p. 67).

[28] Translatable as 'social sphere' (Alexy 2010, p. 236), or '*sphère de l'individualité*' (Robert 1977, p. 266).

[29] That can be translated as privacy, as 'a broader sphere of privacy' (Alexy 2010, p. 236), or as '*sphère du privé*' (Robert 1977, p. 266).

[30] Translatable as 'the innermost sphere', 'inviolable sphere of intimacy', or 'absolutely protected core are of private life' (Alexy 2010, p. 236), or '*sphère de l'intimité'* (Robert 1977, p. 266).

[31] Despite maintaining a sense of 'familiarity' and 'confidence', the English 'intimacy' eventually also acquired an extra meaning, related to sexual intercourse (Coronel Carcelén 2002, p. 19).

[32] Noting its importance for the Italian Frosini: (Martínez Martínez 2004, p. 205).

[33] See, interpreting the case law on the theory of the spheres as the basic German formulation of the right to privacy: (Riccardi 1983, p. 245).

als a *recht op eerbiediging van zijn persoonlijke levenssfeer*, which can be translated as a 'right to respect for their personal sphere of life'.[34]

The German theory of the spheres had been developed in the context of the German Federal Constitutional Court's doctrine on the existence of a general right to personality, or *das allgemeine Persönlichkeitsrecht*,[35] recognised on the basis of a joint reading of German constitutional provisions on the inviolability of human dignity,[36] and on the right to free development of personality.[37] The general right to personality represents what some have described as a fundamental freedom (Rigaux 1990, p. 16), encompassing a right to general freedom of action (Alexy 2010, p. 223), that some regard as a right to privacy (Krause 1965, p. 516). The notion of a general right to personality also generates some disorientation. This general right should not be confused with the notions of civil rights of personality or 'personality rights', sometimes portrayed as a sort of human rights recognised by civil law, and which the literature has also often linked to privacy discussions (Brügemeier 2010, p. 6). Although the legal category of personality rights is apposite in certain legal systems, such as the German[38] and the Austrian,[39] its pertinence to address privacy issues in other legal orders has been powerfully disputed.[40] In this sense, it has notably been argued that reliance on the notion of rights of personality creates normative and normalising effects, problematic for an understanding of privacy as freedom (Gutwirth 2002, p. 40).

The legal relevance of the distinction between what is private and what is public has been contested because of the complexities of distinguishing the private from the public (Turkington and Allen 1999, p. 8),[41] and but also because of the difficulties of ever identifying something that could be regarded as completely, hermetically private (Rigaux 1990, p. 16).[42] While some scholars defend that, despite the lack of general agreement on the dividing line between the private and the public, a division must exist (Blume 2002, p. 1), others have insisted on the fact that even in public contexts a certain privacy should be protected (Nissenbaum 2010),[43] and others prefer to replace the image of a division between the public and the private with the notion of a continuum in which privacy and publicity would be the ideal-typical

[34] Article 10 of the Dutch Constitution (since 1983).

[35] The recognition in Germany of a general right to personality has been linked to the traditionally limited protection granted through civil remedies (Rigaux 1997, pp. 139–140).

[36] Article 1(1) of the 1949 Fundamental Law of Bonn.

[37] Ibid. Article 2(1).

[38] In reality, Germany has witnessed many controversies on rights to personality, since the early nineteenth century (Strömholm 1967, p. 29).

[39] On this subject: (Universidad del País Vasco, Cuatrecases, and Mainstrat 2008, p. 3).

[40] See for instance: (De Schutter 1998, p. 58; Tulkens 2000, p. 28).

[41] Observing that 'for the vast majority of possible conflicts a clear distinction between private and public persons, documents, premises and activities cannot be made' (Strömholm 1967, p. 74).

[42] Concluding that should thus be privileged an idea of privacy emphasising the position occupied by the individual: (Rigaux 1990, p. 696). Echoing this reasoning: (Kayser 1995, p. 15).

[43] Nissenbaum actually refers to the existence of 'powerful moral reasons' obliging to limit the flow of private information in public (2010, p. 217).

endpoints (Nippert-Eng 2010, p. 4). Others still have designated the private/public boundary as an 'impossible distinction' (Derrida 1994, p. 146).[44]

But there is yet an additional important acceptation of the word privacy that is not grounded on any reading of the adjective private, and must be added to the above classification: privacy as control upon personal information.

2.1.2 (Re)defining Privacy in the US

The originality and significance of the conception of privacy as control upon personal information is best understood by taking into account the context of its historical surfacing. This account reveals the importance of the construction in the US of the so-called 'computers and privacy' issue.

2.1.2.1 US Privacy Before Computers

The expression 'right to privacy' entered the world of Anglo-American legal writing in 1890,[45] when US authors Samuel Warren and Louis Brandeis advanced its existence in a now famous article, unambiguously titled 'The right to privacy' (Warren and Brandeis 1890).[46] Warren and Brandeis build up their conception of a US right to privacy partially on English case law of the first half of the nineteenth century, which had indeed witnessed the use of the word privacy, even though only incidentally (Rigaux 1990, p. 13). They also claimed that the right had already found expression in the law of France, namely in the French *Loi relative à la presse* ('Law of the Press') of 11 May 1868, which prohibited the publication of facts related to the *'vie privée'* of individuals[47] unless the facts were already public, or were published with the individual's consent (Warren and Brandeis 1890, p. 214). Warren and Brandeis summarised the content of the right they supported equating it with the formula 'the right to be let alone' (Warren and Brandeis 1890, p. 214).[48]

In 1960, another US scholar, William L. Prosser, published an influential article in which it reviewed the acknowledgement of a privacy tort in common law since the publication of Warren and Brandeis's piece. Prosser described the recognition of four types of privacy tort: the intrusion upon a person's solitude or seclusion; the appropriation, for commercial purposes, of a person's name, likeness, or personality; the public disclosure of embarrassing private facts about a person; and the publicity that places a person in a false light in the public eye (Prosser 1960).[49]

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[44] See also: (Gaston 2006, p. 11).

[45] See among others: (Strömholm 1967, p. 25; Rigaux 1992, p. 139).

[46] The article establishes the need for the legal recognition of the right to privacy by giving reasons largely centring around the practices of newspaper press. See also: (Pember 1972; Glancy 1979, p. 1).

[47] '*Toute publication dans un écrit périodique relative à un fait de la vie privée constitue une contravention punie d'amende de cinq cents francs*' (Warren and Brandeis 1890, p. 214).

[48] The formula is generally attributed to Thomas M. Cooley.

[49] See also: (Emerson 1979).

Privacy protection in the US was eventually developed not only through tort law, but also through constitutional law, which grants protection of individuals against the government. Although the US Constitution does not mention any right to privacy as such, various aspects of privacy are nowadays regarded as protected by the judicial interpretation of its provisions.[50] Brandeis himself became eventually judge of the US Supreme Court, from where he argued that the drafters of the US Constitution already recognised a right to be let alone in front of the State, and that this particular right was the widest and most esteemed of all.[51]

In 1965, the US Supreme Court explicitly declared that individuals have a constitutional right to privacy, located within the penumbras or zones of freedom created by an expansive interpretation of the US Bill of Rights.[52] From this perspective, the right to privacy can be regarded as a right to be free from government interference, growing out of the idea that there must be some freedoms beyond any State control, even in a democracy (McWhirter and Bible 1992, p. 33). This right to privacy would encompass both a negative or shielding protection, and a right to autonomy and self-determination (Pino 2002, p. 135) (for instance, by ensuring a right to abortion).[53]

By the mid 1960s, the term 'privacy' had thus acquired in the US two major meanings: on the one hand, it was used from the perspective of civil law as a synthetic reference to a system of torts (covering the intrusion in the private affairs of the person, the disclosure of private facts, or the use of a person's image); and, on the other hand, it appeared in the area of constitutional law as referring to the right for individuals to refuse interferences from public authorities (Pino 2002, p. 135).

2.1.2.2 Computers and Privacy

The linkage between computers and privacy as a matter worth of specific official attention, framed as the 'computers and privacy' issue, materialised as such in the US around 1965 (Westin 1970, p. 315). Electronic data processing machines had appeared in the US market a decade before (Westin and Baker 1972, p. 12). Prior to the 1960s, however, there had been practically no mention of any particular connec-

[50] Such as the First Amendment (freedom of speech, religion and association), the Third Amendment (which protects the privacy of the home by preventing the government from requiring soldiers to reside in people's homes), the Fourth Amendment (freedom from unreasonable searches and seizures), and the Fifth Amendment (privilege against self-incrimination), as well as, more occasionally, the Ninth Amendment, which states that the 'enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people'; due process and equal protection clauses also provide shields for privacy interests (Fisher 1995, p. 1172; Solove et al. 2006, pp. 33–34).

[51] See in particular Brandeis' dissenting opinion in the case *Olmstead v. United States* (277 U.S. 438).

[52] In the landmark 1965 judgment for *Griswold v. Connecticut* (318 U.S. 479), on the possibility to obtain birth control information. See: (McWhirter and Bible 1992, p. 59; Solove et al. 2006, p. 34).

[53] The landmark case on this subject is of 1973: *Roe v. Wade* (410 US 113, 1973). See: (Freedman 1987, p. 73).

tion between the deployment of computers and the endangerment of privacy (Westin 1970, p. 298). This was so even though the level of computerisation in organisations was already advancing quickly (Westin and Baker 1972, p. 12), and even if the late 1950s had already witnessed some occurrences of popular resistance to the processing of data related to individuals. For instance, religious and civil liberties organisations had raised protests against a proposal to introduce in a census[54] a question about religious preferences, arguing that it would have constituted a violation of the guarantees of freedom of religion and separation of Church and State, as well as a direct invasion of privacy of conscience (Westin 1970, p. 302). Discussions on the possible deployment of a universal personal identification system had also generated uproar (Westin 1970, p. 304). But it was only in the 1960s when computers began to be highlighted as a potentially important societal threat; more particularly, what was put forward as a threat was the automated processing of information on individuals that computers were capable of sustaining, and of trivialising.[55]

Computer specialists were the first to alert that computers' rapid and inexpensive processing of information, coupled with the increased availability of data to government agencies and private organisations, could carry with them some dangers (Westin 1970, p. 299),[56] notably to privacy. The first computer specialist forewarning of such a possible impact upon privacy might have been the president of a Californian company, Bernard S. Benson.[57] In 1961, Benson warned that more and more disparate information about individuals was being stored in computers without anybody noticing, but that the data could one day be fed into a single apparatus, leaving individual's privacy at the mercy 'of who or what controls the machine' (United Press International (UPI) 1961, p. 8).

In 1964, the American author Vance Packard[58] published *The Naked Society*, a book on the threats of then-emerging technologies, among which he pointed out the menaces of computerised filing. Packard echoed Benson's warnings on the machine's potential impact on individual privacy (1971, p. 49). In his view, however, emerging technologies appeared to endanger not only privacy, but also, and especially, numerous other rights such as 'the right to be different', 'the right to hope for tolerant forgiveness or overlooking of past foolishness, errors, humiliations, or minor sins' (what he described as the Christian notion of the possibility of redemption), or 'the right to make a fresh start' (Packard 1971, p. 23).

It was nonetheless the notion of privacy that increasingly gathered attention. By the beginning of the 1960s, debates had erupted over the impact on privacy of

[54] The 1960 US Federal Decennial Census.

[55] Noting that actually some security actors such as the US National Security Agency (NSA) had been at the forefront of research on computing: (Ceruzzi 2012, p. 38).

[56] Westin also refers to Richard W. Hamming, who had been involved since 1945 as a computer expert in the US research project for the production of an atomic bomb, and had warned since 1962 of some societal threats linked to the advent of computers.

[57] The Benson-Lehner Corporation, of Santa Monica, a company that developed data processing systems (United Press International (UPI) 1961, p. 8); also mentioned in: (Westin 1970, p. 299).

[58] Packard had acquired a relative notoriety in the US in 1957 with a book on the advertising industry, titled *The Hidden Persuaders* (Sawyer and Schechter 1968, p. 812).

various (then) new techniques and technologies—especially, electronic eavesdropping, psychological testing, and the use of polygraphs for lie detection. It was rather common in those days to insist on the idea that any new challenges for privacy were not being raised by vague scientific developments, or by 'esoteric new discoveries', but by very concrete (and increasingly pervasive) items embodying technological progress: for instance, battery-powered microphones, portable tape recorders, telephones that could be connected to a single main line, or high-resolution cameras (Ruebhausen 1970, p. xi).

In the context of this general preoccupation with the likely impact upon privacy of modern gadgets, in 1962 the Special Committee on Science and Law of the Association of the Bar of the City of New York[59] proposed to undertake a formal inquiry into the question (Ruebhausen 1970, p. ix). Noting how advances in electronic, optical, acoustic, and other sensing devices seemed to challenge individual privacy, the Special Committee on Science and Law placed the direction of this inquiry in the hands of Alan F. Westin, an expert on the topic of wire-tapping who had been writing about invasions of privacy for many years.[60] While the inquiry unfolded,[61] debates on privacy flourished across the US, and events and literature on the subject started to proliferate (Westin 1970, p. 312). Many of these manifestations were directly or indirectly attributable to the inquiry (Ruebhausen 1970, p. xi).

Formal support to incorporate the issue of computers into privacy debates arrived during this period: more precisely, in 1965, when a Subcommittee of US Congress, officially named the House Special Subcommittee on Invasion of Privacy of the Committee on Government Operations, chaired by Cornelius E. Gallagher,[62] added to the list of its agenda items the topic of computerisation (Westin 1970, p. 315). What brought the Subcommittee to that specific problem were various proposals envisaging the creation at federal level of 'data banks' centralising information about individuals already in the hands of federal authorities (Westin 1970, p. 316).[63] These proposals embodied the threat of massive quantities of information

[59] The Special Committee on Science and Law had been set up in 1959, following a previous experience in establishing a committee of lawyers to concern themselves with atomic energy (Ruebhausen 1970, p. viii).

[60] As well as Professor of Public Law and Government at Columbia University (Ruebhausen 1970, p. x).

[61] The research included a survey of the privacy-invading capacity of modern science, an exploration of the meaning of privacy, and an analysis of the interaction of the individual's claim to a private personality, society's need to acquire information and to control individual behaviour, as well as of new technology (Ruebhausen 1970, p. x).

[62] Gallagher had been particularly concerned with the impact upon privacy of the use of polygraphs for lie detection, and with personality tests being inflected upon employees and job applicants (Gallagher 1965).

[63] The proposals came from social scientists and government officials. The Executive Committee of the American Economics Association had recommended in 1959 to the US Social Science Research Council that it set up a committee to discuss the preservation and use of economic data. The committee issued a report on the subject in 1965, which it forwarded to the Bureau of the Budget for consideration (Sawyer and Schechter 1968, p. 812). A Budget Bureau consultant, Edgar S. Dunn, Jr., was asked to prepare a report on the matter. He recommended implementation of a national data centre. See: (Dunn 1967).

being easily stored and made readily available to the State for unknown purposes (Westin 1970, p. 312), generating much alarm in the media (Westin 1970, p. 317). In 1966, the Gallagher Subcommittee held hearings to discuss such proposals for federal data banks under the legend 'The Computer and Privacy' (Westin 1970, p. 319). The hearings eventually led to a series of recommendations to keep exploring the topic of 'privacy and the computer'.[64]

In 1967, the results of the research launched in 1962 by the Special Committee on Science and Law of the Association of the Bar of the City of New York were made public, in the form of a book titled *Privacy and Freedom*, by Alan F. Westin. Noting that computers had already been officially framed as a serious privacy problem,[65] Westin argued that, nonetheless, the thinking necessary to tackle the subject had still not been made accessible (1970, p. 323). His book was to contribute to fulfil this concrete gap by providing a new definition of 'privacy'.

Westin's definition supposedly applied to privacy in general, but had been unequivocally conceived in the light of the advent of computerisation. In his words: '(p)rivacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others' (1970, p. 7).[66] This account of privacy placed information at its very core. More particularly, for Westin the key feature of privacy consisted of the ability for individuals (or groups, or institutions) to exercise some control over the use of information about them (1970, p. 8).[67] As such, Westin's contribution was later to be described as a pioneering vision of privacy as information control, of a 'new privacy' (Grenier 1969, p. 253), of 'privacy of information' (Rössler 2004, p. 4), 'information privacy'[68] or 'informational privacy' (Turkington and Allen 1999, p. 75). The author, however, never used such phrases, and consistently referred to the conception of privacy he advanced and supported as being (just) privacy.

[64] Concrete recommended measures included the creation of a committee on problems of privacy and the computer within the American Federation of Information Processing Societies (AFIPS), which had been established in 1961 to disseminate knowledge in the field of information science, and the holding of a symposium on the subject (Westin 1970, p. 320).

[65] *Privacy and Freedom* granted attention to various techniques perceived as particularly privacy-invasive at the time, such as the use of polygraph and personality testing, labelled as methods of psychological surveillance (Westin 1970, p. 133), but included also a Chapter titled *The Revolution in Information Collection and Processing: Data Surveillance,* on the issue of privacy linked to computerisation (Westin 1970, p. 158).

[66] This is the definition authored by Westin that is quoted more often. He also provided some descriptions not fully consistent with it (for instance, referring to privacy as the voluntary and temporary withdrawal of a person from the general society through physical or psychological means (Westin 1970, p. 7)). Also noting these inconsistencies, see: (Rössler 2004, p. 16). Privacy is additionally depicted by Westin as a right of decision over one's private personality, and as a property right over personal information being processed (Westin 1970, p. 324).

[67] This idea was later further emphasised by Charles Fried: 'Privacy is not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves' (Fried 1968, p. 482).

[68] Noting that 'information privacy' is often opposed to 'decisional privacy': (Solove et al. 2006, p. 1).

The move, interpreted by some as a call to extend the bounds of privacy protection in US law (Grenier 1969, p. 246), was presented by its author, rather, as a (re)discovery of the true sense of privacy. According to Westin, privacy had ancestral roots,[69] and constituted a functional necessity of democratic states (1970, p. 67). Efforts to limit surveillance in the name of privacy were portrayed as a central part of Western societies' struggle for liberty. He warned that surveillance was surreptitiously reaching the US 'as an accidental by-product of electronic data processing',[70] and constructed the insurance of privacy in relation to computers as a crucial element of free societies. This notion of (new/real) privacy as a critical element of modern freedom was further endorsed in another volume he co-authored a few years later, eloquently titled *Databanks in a Free Society: Computers, Record-Keeping and Privacy* (Westin and Baker 1972).

Reflections on individual control over personal information soon started to have a direct influence on the US legislator. In 1970 the US Congress adopted the Fair Credit Reporting Act,[71] for the protection against misuse of personal information held by Credit Reporting Agencies, which established procedures whereby individuals could take action to amend records about them.

In 1971, another authoritative book saw the light: Arthur R. Miller's *The Assault on Privacy* (Miller 1971). Miller further substantiated the link between computers and 'personal privacy' (1971, p. 18) by reviewing different threats of computer-driven intrusion.[72] Following Westin, he argued that the basic attribute of the right to privacy was 'the individual's ability to control the circulation of information relating to him' (Miller 1971, p. 40),[73] the problem with computers being, in Miller's view, that once 'personal information' has been stored, the individual to whom it refers (designated as 'the data subject') loses the capacity to control it (1971, p. 42). He stressed the increasing importance of computers for the setting up of governmental information systems (1971, p. 24),[74] and that individuals were most likely to lose control over their data to the benefit of governments.

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[69] Westin argued simultaneously that claims to privacy derived from man's animal origins, and that the American approach to privacy had to be linked to a tradition of limiting public surveillance powers dating back to the ancient Greeks (1970, p. 7).

[70] The author described surveillance through the use of information as having been for centuries 'the conscious trademark of European authoritarian systems' (Westin 1970, p. 324).

[71] 15 U.S.C. § 1681 et sEq. Enacted as Title VI of Pub.L. 91–508, 84 Stat. 1114, enacted October 26, 1970, originally designed as an amendment to add a title VI to the Consumer Credit Protection Act, Pub.L. 90–321, 82 Stat. 146, enacted June 29, 1968.

[72] Miller identified as major privacy concerns: so-called 'decision-making by dossier', unrestricted transfer of information from one context to another, and surveillance conduct (see also: (Hixson 1987, p. 183)).

[73] He also observed that this attribute of control was in a way already present in the analysis by Warren and Brandeis.

[74] Miller also sensed that eventually computers would facilitate the provision of many services directly to individuals, commenting: 'it seems reasonable to envision some form of national computer "utility" providing a variety of data-processing services to everyone, perhaps through the medium of inexpensive home terminals such as touch-tone telephones or in conjunction with cable television' (1971, p. 33).

The publication of Miller's book is believed to have been the direct cause for a series of hearings celebrated in 1971 on the use of computers for data collection by another Subcommittee of US Congress, the Subcommittee on Constitutional Rights of the Senate (Hixson 1987, p. 207)[75] chaired by Sam J. Ervin, Jr. This Subcommittee had become gradually aware of governmental practices facilitating the accumulation of information,[76] and eventually decided to focus specifically on the exploration of privacy and automated information processing.[77]

2.1.2.3 Fair Information Principles

By the beginning of the 1970s, the depiction of computers as a major threat to *privacy* appeared to be accepted by a significant part of US population.[78] In 1972, the Secretary of the US Department of Health, Education and Welfare[79] established a Secretary's Advisory Committee on Automated Personal Data Systems, charged with analysing the harmful consequences that might result from such systems, and required to recommend safeguards to protect individuals. The Committee, which had among its members Arthur R. Miller, was chaired by a corporate researcher, Willis H. Ware.[80] During its investigation, the Committee explored recent developments in the area of the protection of individuals against 'automated personal data systems' as taking place in the US, but also elsewhere (Secretary's Advisory Committee on Automated Personal Data Systems 1973, sec. Appendix B: "Computers and Privacy": The Reaction in Other Countries). The Committee notably examined two legal instruments adopted in Europe, namely the Data Protection Act of the German federal state of Hesse, of 1970,[81] and the Swedish Data Law of 1973, which was by then still to enter into force. The Committee was also informed about related discussions taking place in France, and in the United Kingdom (UK).

The Secretary's Advisory Committee produced a report in 1973, under the title Records, Computers, and the Rights of Citizens (Secretary's Advisory Committee

[75] The Subcommittee had been established in 1955, and since then it had been interested in individual privacy, notably carrying out hearings on wire-tapping and government secrecy (Kaniuga-Golad 1979, p. 780).

[76] Sam J. Ervin, Jr. had been elected Chairman in 1961, and since then the Subcommittee concentrated on examining governmental infringement on individual privacy: its studies covered for instance the collection of personal information by the federal government through forms and questionnaires required of federal employees and job applicants (Westin 1970, p. 320). See also: (Ervin 1965).

[77] Kaniuga-Golad (1979) op. cit. 780.

[78] A national survey of public attitudes towards computers conducted in 1971 by the AFIPS jointly with *Time Magazine* showed that nearly 40% of the respondents considered the computer to be a real threat to privacy (Hondius 1975, p. 3); see also: (Harvard Law Review's Note 1968, p. 400).

[79] Elliot L. Richardson.

[80] Ware, of the RAND Corporation, had previously chaired a Task Force on Computer System Security (Task Force on Computer Security of the Defense Science Board 1970).

[81] The report also mentions the first activity report of the Data Protection Commissioner of the federal state of Hesse, published in 1972 (and the second one, published in 1973).

on Automated Personal Data Systems 1973).[82] This document put forward an unprecedentedly detailed description of how to address the 'privacy' concerns generated by the automated processing of information. Echoing Westin's analysis of privacy as primarily affected by the use of information about individuals, the report focused on the automated processing of 'personal data', a category defined as consisting of 'all data that describe anything about an individual',[83] and additionally referred to as 'identifiable information', or 'information about an individual in identifiable form'.[84]

In its report, the Secretary's Advisory Committee maintained that there existed many definitions of privacy, which all shared 'the common element that personal data are bound to be disclosed and that the data subject should have some hand in deciding the nature and extent of such disclosure' (Ware 1973, p. 3). Mirroring Westin's analysis, the Advisory Committee maintained that privacy had to be envisioned in terms of 'mutuality': it was necessary to make sure that both organisations holding personal data, on the one hand, and the data subject to which the data referred, on the other hand, shared control over it (Ware 1973, p. 3).[85] Safeguards for personal privacy based on such concept of mutuality required, the report explained, adherence by record-keeping organisations to some fundamental principles, all of them conceived as facets of a basic principle referred to as the principle of 'fair information practice' (Ware 1973, p. 7). The fundamental principles notably included the possibility for individuals to know which information about them has been recorded, and how it is used, as well as the capacity to correct information if necessary.[86] To implement these fundamental principles, organisations maintaining administrative personal data systems should comply with a series of obligations

[82] An explanatory report was published a month later by the Committee's Chairman: (Ware 1973).

[83] The report added: 'such as identifying characteristics, measurements, test scores; that evidence things done by or to an individual, such as records of financial transactions, medical treatment, or other services; or that afford a clear basis for inferring personal characteristics or things done by or to an individual, such as the mere record of his presence in a place, attendance at a meeting, or admission to some type of service institution' (Secretary's Advisory Committee on Automated Personal Data Systems 1973, Chap. IV "Recommended Safeguards for Administrative Personal Data Systems").

[84] See: Section 'A Redefinition of the Concept of Personal Privacy' (Secretary's Advisory Committee on Automated Personal Data Systems 1973, Chap. III "Safeguards for Privacy"). 'Personal information' and 'personal data' are presented as interchangeable also in a 1975 'glossary of frequently encountered terms' in the area of personal privacy (McCarthy 1975, p. 88).

[85] Any unbalance of control would generate information asymmetries, to be corrected; typically, the data subject is in a position of inferiority (Solove et al. 2006, p. 578).

[86] The principles identified by the Secretary's Advisory Committee were five: (1) no personal-data record-keeping system can be secret; (2) there must always be a way for individuals to find out what information about them is in the record and how it is used; (3) there must always be a way for individuals to prevent information obtained for one purpose from being used or made available for other purposes without their consent; (4) there must always be a way for individuals to correct or amend a record of identifiable information about them, and (5) any organisation creating, maintaining, using or disseminating records of identifiable personal data must assure the reliability of the data for their intended use, and must take reasonable precaution to prevent any misuse.

(Ware 1973, p. 6); a public notice requirement should be approved, and individual data subjects should be granted a series of rights (Ware 1973, p. 7).

According to the 1973 Secretary's Advisory Committee's report, by then existed already a substantial number of US statutes and regulations that could be labelled as 'law of personal-data record keeping', such as the Fair Credit Reporting Act adopted in 1970.[87] Existing instruments, however, were portrayed as failing to configure a comprehensive and coherent body of law.[88] The main conclusion of the Committee's report was that it was consequently imperative to establish a code of 'fair information practice' for all automated personal data systems maintained by agencies of the federal government, or by organisations within reach of its authority (Ware 1973, p. 5).

2.1.2.4 Privacy Act

In January 1974, the President of the US, Richard Nixon, announced that before the end of the year the US government would 'make an historic beginning on the task of defining and protecting the right of personal privacy for every American' (Nixon 1974a).[89] In February 1974, he established in the White House a Domestic Council Committee on the Right of Privacy (Lane 2009, 190 ff). Chaired by the US Vice-President, Gerald Ford, the Committee on the Right of Privacy was instructed to examine the issue of the collection, storage, and use of personal data by the federal government, and to come up with recommendations, which could include legislative proposals, in a 4 months period (Nixon 1974b).[90] By then, however, the US Senate had already been investigating for almost a year various revelations on the illegal use of tape-recording systems by Nixon, in the context of the Watergate Scandal.[91] On 9 August 1974, Nixon resigned, and Ford became the President of the US.

On 31 December 1974,[92] the US Privacy Act was adopted, with the formal purpose of safeguarding individual privacy from the misuse of federal records,[93] and

[87] The report also mentioned the Federal Reports Act (44 U.S.C 3501–3511), and the Freedom of Information Act (5 U.S.C 552).

[88] Section 'Personal Privacy, Record Keeping, and the Law' (Secretary's Advisory Committee on Automated Personal Data Systems 1973, Chap. III "Safeguards for Privacy").

[89] Holding that '(m)odern information systems, data banks, credit records, mailing list abuses, electronic snooping, the collection of personal data for one purpose that may be used for another' had left millions of Americans deeply concerned with privacy, Nixon stated that time had come 'for a major initiative to define the nature and extent of the basic rights of privacy and to erect new safeguards to ensure that those rights are respected' (Nixon 1974a).

[90] Wiretapping and electronic surveillance were excluded from the Committee's mandate, officially because they were being studied by another Commission (McCarthy 1975, p. 86).

[91] The US Senate had set up a Select Committee on Presidential Campaign Activities, chaired by Sam J Ervin, Jr., particularly versed in privacy as attested by its prior inquiries.

[92] Effective since 27 September 1975.

[93] 'Records' were defined as 'any item, collection, or grouping of information about an individual' (Section 3 of the Privacy Act of 1974. The Act also included references to the category of 'identifiable personal information', which was not defined (see Section 2, point (b)(4) of the Privacy Act of 1974).

providing individuals access to them. The Act was substantially indebted to the 'fair information practice' doctrine as distilled by the Secretary's Advisory Committee in 1973. It provided safeguards for privacy by declining eight principles applicable to the use of records: the principles of openness, individual access (Kirby 1980, p. 7), individual participation, collection limitation, use limitation, disclosure limitation, information management, and accountability (Kirby 1980, p. 8). The Act applied to records in general, and thus not specifically to computerised records.

Despite its substantial link with the principles of 'fair information practices', the 1974 Privacy Act never mentions such phrase. It systematically refers to the safeguarding of privacy, described as a 'personal and fundamental right protected by the Constitution of the United States' directly affected by the collection, maintenance, use, and dissemination of personal information.[94] By doing so, the Privacy Act inscribed in US positive law the (then) fresh conceptualisation of privacy as 'new'/'information(al) privacy', and did so under the name of (just) privacy.[95]

This phenomenon, described as heralding a 'serious debasement' of the term 'privacy' (Clarke 2006), soon generated some ambiguity inside US law, especially concerning the interaction between the Privacy Act and other previously adopted acts such the Freedom of Information Act (FOIA) of 1966, which was also applicable to information possessed by federal agencies, and also alluded to privacy, but not in the same (modern, novel) sense.[96] The FOIA allowed for the disclosure of information controlled by the US Government, but provided for various exemptions, two of which were 'privacy' exemptions.[97]

At first, it was expected that the Privacy Act would set up an ad-hoc oversight board for the implementation of its provisions. Eventually, the Act only established a Privacy Protection Study Commission,[98] which in 1977 published a report on the problems of private and public sector record keeping systems. Titled *Personal Privacy in an Information* Society, the report advanced concrete policy recommendations (The Privacy Protection Study Commission 1977), implying major changes for private companies. The report was to be known as the final Privacy Protection Study Commission report, as the body was dissolved after its publication.

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[94] See Section 2 (and in particular points (a)(1) and (a)(4) of the Congressional Findings) of the Privacy Act of 1974.

[95] Noting that the doctrine of 'fair information practices' was presented as privacy: (Piñar Mañas 2009, p. 86).

[96] Also echoing the confusion in the US literature and courts that is sometimes generated by the coexistence of different 'privacies' in US law: (Chemerinsky 2006, p. 650).

[97] A first concerned personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; the second, records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy (Solove et al. 2006, p. 529). See also: (Relyea 1980, p. 148).

[98] See Section 5(a)(1) of the Privacy Act of 1974. As originally drafted, the Privacy Act would have created a Federal Privacy Board to act as an oversight and enforcement mechanism (Rotenberg 2001, 39).

2.2 Privacy from an International Perspective

The writings by scholars such as Westin, the mentioned US Congress hearings, or the US Privacy Act of 1974 had significant repercussions, not only in the US,[99] but also in the rest of the world (Hondius 1975, p. 6). In Europe, awareness of the surveillance capacity of computers as a threat to society was gradually increasing (Flaherty 1989, p. 373), and an interest in the re-definition of privacy in the US was soon perceptible. The interest, however, generated initially primarily only tentative explorations of the linkage between computers and European approaches to 'privacy'.

2.2.1 Europe and the Search for (Modern) Privacy

Assessing the existence in Europe of privacy as a legal notion with any of the meanings described above engages a series of difficult challenges of comparative law. Revealingly, at the end of the 1960s this kind of comparative exercises was repeatedly undertaken both at national and international level, as the increasing use of the word privacy in the US to frame concerns related with modern information processing attracted more and more attention.

International law supplied some basic points of reference for discussions on privacy. The Universal Declaration of Human Rights (UDHR), proclaimed by the General Assembly of the United Nations (UN) in 1948, in Paris, establishes in the English version of its Article 12 that '(n)o one shall be subjected to arbitrary interference with his *privacy*,[100] family, home or correspondence, nor to attacks upon his honour and reputation'.[101] In its French version, Article 12 of the UDHR proscribes interferences with the *vie privée* of individuals; the Spanish version refers to the safeguarding of their *vida privada.*[102] The UDHR, however, does not define any of these notions. In 1966, the UN General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR),[103] whose Article 17 mirrored the

[99] In 1977, the US Supreme Court extended constitutional privacy protection to information(al) privacy. Holding that the 'zone of privacy' protected by the Constitution encompasses the 'individual interest in avoiding disclosure of personal matters': *Whalen v. Roe*, 433 U.S. 425 (1977) (Solove et al. 2006, p. 34).

[100] Emphasis added.

[101] And that '(e)veryone has the right to the protection of the law against such interference or attacks' (Article 12 of the UDHR).

[102] English, French and Spanish have the status of official languages of the UN together with Arabic, Chinese (Mandarin), and Russian.

[103] Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966.

content of Article 12 of the UDHR, repeating it almost word by word,[104] although still failing to provide any definition of privacy, *vie privée* or *vida privada.*[105]

The European Convention on Human Rights (ECHR),[106] signed on 4 November 1950, builds upon the UDHR, but, insofar as privacy is concerned, does not sustain exactly the same terminological approach. Although it mirrors Article 12 of the UDHR in its Article 8, the English version of the ECHR does not refer to any privacy, using instead the notion of 'respect for private life'; in addition, in contrast to the UDHR, it does not include any mention of 'honour' and 'reputation' (Velu 1973, p. 42), words allegedly dismissed by the drafters of the ECHR due to their vagueness (Ruiz Miguel 1992, p. 99). The French version of the ECHR—the only other authentic linguistic version—prohibited interferences with the *respect de la vie privée.* Eventually, the European Court of Human Rights' case law on Article 8 of the ECHR had a powerful influence on securing a wide understanding of the notion of 'respect for private life'/*respect de la vie privée* across Europe, but in the 1960s its case law had yet to develop in that direction.

Another example of the convoluted relations between the terms privacy, private life and *vie privée* in international law can be found in the American Convention on Human Rights signed in San José, Costa Rica, on 22 November 1969, by the Organization of American States.[107] The American Convention on Human Rights represents the most important human rights instrument of the inter-American system (De Schutter 2010, p. 27). It recognises in the English version of its Article 11 a right to privacy that prohibits interferences with the 'private life' of individuals.[108] The French version of the same article, however, establishes not a right to *vie privée*, but to the '*protection de l'honneur et de la dignité de la personne*' (translatable as 'the protection of honour and dignity of the person'), which forbids interferences with the *vie privée* of individuals.[109]

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[104] Article 17 of the ICCPR reads: '(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation; (2) Everyone has the right to the protection of the law against such interference or attacks' (cf. Article 12 of the UDHR: the word 'unlawful' has been added).

[105] In 1988 was adopted General Comment No. 16 on Article 17 ICCPR, referring to an explicit mandate to regulate by law the gathering and holding of personal information on computers, databanks and other devices (Human Rights Committee, General Comment No. 16 (Twenty-third session, 1988), in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.1 at 21 (1994)).

[106] Formally the Convention for the Protection of Human Rights and Fundamental Freedoms.

[107] Headquartered in Washington, D.C. (US).

[108] Article 11 of the American Convention on Human Rights: 'Right to Privacy: (1) Everyone has the right to have his honor respected and his dignity recognized; (2) No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation; (3) Everyone has the right to the protection of the law against such interference or attacks'.

[109] A similar phenomenon can be perceived in other official linguistic versions. The official languages of the Organization of American States are English, Spanish, Portuguese, and French. See also: (Rigaux 2000, p. 126 and 128).

2.2.1.1 The 1967 Nordic Conference

By the end of the 1960s, the International Commission of Jurists (ICJ), a non-governmental organisation devoted to the promotion of human rights, started to consider necessary to investigate more deeply the notion of privacy, and its safeguarding. In May 1967, the organisation's Swedish section hosted in Stockholm a special meeting on the topic, named the Nordic Conference of Jurists on the Right to Respect for Privacy. An extensive working paper with a comparative study specifically prepared for the Conference noted that there were major terminological discrepancies in the field, and that many countries appeared to provide what some regarded as 'privacy protection' through different notions and mechanisms (Strömholm 1967, p. 21).

The comparative study was signed by the Swedish lawyer Stig Strömholm, who noted that although the facts giving rise to privacy-related legal concerns where similar everywhere, there were notable differences in the approaches and techniques of the Anglo-American, German and French lawyers (1967, p. 20). Strömholm identified as major reference in Continental Europe, as a concept akin to privacy, the notion of rights of the personality, which was presented as paradigmatic of the German approach (1967, p. 21), and somehow also of the French perspective. He classified perceived commonalities between the US notion of 'invasions of privacy' and violations of rights of the personality into three basic categories: intrusions into an area that people have an interest in keeping for themselves; collecting material about somebody by any method felt to be unfair, and using material about a person for some specific purpose (1967, p. 60).

Strömholm's study embraced the use of the term privacy only reluctantly, noting that it was 'practically inevitable in a paper written in English', and emphasised it should not be read as implying the adoption *a priori* of 'the Anglo-American way or ways or defining the subject under consideration' (1967, p. 21). Despite these warnings, the Nordic Conference went ahead with a discussion focused on privacy, using this term as encompassing also related legal notions developed in Europe under other names, and eventually concluded by encouraging the adoption of laws establishing a general right to privacy. Thus, *a posteriori* it endorsed the framing of the subject through English terminology. The right to privacy, in the view of the participants to the Conference, had not only to be explicitly recognised in law, but also broadly configured[110] in the light of technological developments, ensuring in particular the protection against interferences with correspondence, misuse of private communications, or disclosure of information received in circumstances of professional secrecy (A. Warren and Dearnley 2005, p. 240). No particular reference was made to computers as a possibly relevant technological development in the area.

[110] The Nordic Conference's final declaration included under the notion of 'privacy' Prosser's torts, but went beyond them (Michael 1994, p. 13).

2.2.1.2 From Recording Techniques to Computers

Shortly afterwards, the UN similarly resolved to start exploring the possible impact of technological progress on the protection of the individual. In 1968, an International Conference of Human Rights organised by the UN in Tehran[111] recommended that UN institutions scrutinise the problems with regard to respect for privacy in view of the evolution of recording techniques.[112] As a follow up, the UN General Assembly asked the UN Secretary General to undertake a study of the problems for the respect of human rights, and especially the respect of privacy, in the light of general technical and technological advances.[113] In 1970, discussions emerged also under the auspices of the UN Educational, Scientific and Cultural Organisation (UNESCO), which convened an expert meeting to examine the impact of developments in science and technology believed to have created a threat to the individual's right to privacy and related human rights and fundamental freedoms.[114] Subsequently, UNESCO entrusted the ICJ with the preparation of a (new) comparative international investigation (ICJ 1972, p. 417).

Still in 1970, the British Section of the ICJ, called JUSTICE, published its own study on privacy. Titled *Privacy and the Law*, it incorporated a whole appendix specifically on the issue of *Computers and Privacy*, which described the threat that computerisation might pose to the privacy rights of individuals (Littman and Carter Rusk 1970). This report by JUSTICE and Westin's *Privacy and Freedom*[115] became the two main sources used by the ICJ to complete the study for UNESCO (ICJ 1972, p. 417).

The final ICJ study, published in 1972, noted that the Nordic Conference of 1967 had failed to discuss with enough detail what was already considered by then, in the view of many, the most serious of all threats to privacy: the collection, storage and disclosure of personal data using computers (1972, p. 420). According to the ICJ, this particular threat required not laws on a general right to privacy, but rather ad-hoc legislation, which should guarantee the right of individuals to know which data about them are being processed, and to have them rectified if necessary, as well as strict control

[111] International Conference on Human Rights, 22 April to 13 May 1968.

[112] Resolution XI concerning human rights and scientific and technological developments, adopted by the International Conference on 12 May 1968, para 2. The International Conference culminated in the adoption of a general Proclamation stating that scientific discoveries and technological advances could endanger the rights and freedoms of individuals (Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, United Nations Document A/CONF. 32/41, paragraph 18).

[113] General Assembly of the United Nations, *Resolution 2450 (XXIII) on Human rights and scientific and technological developments*, 1748th plenary meeting, 19.12.1968 (see especially paragraph 1(a)). Paragraph 1(c) also mentions uses of electronics that may affect the rights of the person, and the limits which should be placed on such uses in a democratic society.

[114] Developments such as the miniaturisation of recording devices, wiretapping and eavesdropping mechanisms and similar devices (Commission on Human Rights of the United Nations Economic and Social Council 1970, p. 23).

[115] The 1972 report classified the nature of technical threats to privacy using Westin's tripartite division into physical surveillance, psychological surveillance, and data surveillance.

of the access to information, compliance with a general purpose limitation principle, and the existence of an authority analogous to an ombudsman with technical means allowing it to monitor the observance of the rules, and which would have the power to receive and examine complaints (1972, p. 578).

The study thus illustrated two notable changes in thinking about privacy, compared to the outcome of the 1967 Nordic Conference. Five years before, the Nordic Conference had not even considered computers among the (many) technological developments that (dangerously) threatened the right to privacy. Now, the ICJ was unambiguously marking out computerisation as the major threat. In 1967, the organisation had backed up the recognition in law of a broadly constructed general right to privacy. In 1972, it explicitly advocated instead for the adoption of specific regulation focusing on the automated processing of data about individuals, to encompass a series of individual rights over data concerning them, obligations upon those using the data, and a monitoring authority. In its search for a modern approach to the protection of privacy, the ICJ had encountered privacy as (shared) control over the use of personal data, and had embraced this notion as the concrete desired target.[116]

The spread of the influence of (post-Westin) privacy as control upon personal information was manifest not only in Europe. Canada, for instance, also supported similar investigations. In 1968 the Ontario Law Reform Commission, which had been attempting to determine the nature of the problems 'in the area referred to compendiously as the "right to privacy"' (Ontario Law Reform Commission 1968, p. 1) taking into account both the results of the 1967 Nordic Conference and of Westin's research, published a report indicating 'a serious and growing concern by distinguished jurists, scholars and men in public life throughout the Commonwealth and throughout the world with the grave threat that is posed to all free men and democratic institutions by modern technology and well-intentioned government and commercial practices that expose the individual to public and institutional scrutiny' (1968, p. 1). Therefore, it recommended a federal-level study to be undertaken by a Task Force (Ontario Law Reform Commission 1968, p. 3).

In 1971 a Canadian Task Force on *Privacy and Computers*[117] was thus asked to consider the rights and values of the individual clustering around the notion of privacy, and to examine the effects on these rights and values of computerised information systems containing personal data about identifiable individuals.[118] In its final report, the Canadian Task Force suggested among other things that a commissioner

[116] The UN adopted Guidelines for the Regulation of Computerized Personal Data Files in 1990 (adopted by the General Assembly Resolution 45/95 of 14 December 1990).

[117] Emphasis added.

[118] In this sense: (Secretary's Advisory Committee on Automated Personal Data Systems 1973, sec. Appendix B "Computers and Privacy": The Reaction in Other Countries). In May 1970 a conference jointly sponsored by the federal Departments of Justice and Communications and the Canadian Information Processing Society was held at Queen's University on the topic 'Computers: Privacy and Freedom of Information'; the Task Force had its origin in the deliberations of that conference (Task Force established by the Department of Communications and Department of Justice (Canada) 1972, p. 2).

or ombudsman be established, that carefully prepared test cases be brought before the courts, and that the operation of government data systems be made to serve as model (Task Force established by the Department of Communications and Department of Justice (Canada) 1972).[119] The Canadian Task Force also concluded that privacy was in a sense too limited a word to encompass all the concerns created by massive and pervasive information systems, and observed that it was used in part as a synonym for political grievances about the use of information systems by institutions to enhance their power to the potential detriment of individuals, and for fears that information systems may be used to manipulate individuals or enforce conformity (Task Force established by the Department of Communications and Department of Justice (Canada) 1972, p. 183).

2.2.1.3 The United Kingdom and the Quest for Privacy

In their famous 1890 article putting forward the existence of a right to privacy, Warren and Brandeis had argued that the right's roots could be traced back, *inter alia*, to references to privacy in English and French law. The possible existence of a right to privacy in the United Kingdom was nevertheless vividly debated during various decades. In England and Wales, the common law did not develop a general right to privacy, nor did Parliament introduce one. In the absence of a general law on privacy, the common law developed a fact-specific approach, protecting privacy through, for instance, the law of confidentiality, or breach of confidence (Lord Neuberger of Abbotsbury 2012, p. vii). The protection granted was typically described as arising 'almost by accident, as an incidental effect of a variety of laws established for other purposes' (ICJ 1972, p. 457), unable to evolve towards a more general privacy protection (Colvin and Cooper 2009, p. 17). During various decades, the idea of privacy as an encompassing notion was viewed as a theoretical concept merely adopted by writers under American influence (Strömholm 1967, p. 26).

Echoing the conclusions of the 1967 Nordic Conference, the report prepared in 1970 by the British Section of the ICJ, JUSTICE, had championed the recognition of a general right of privacy in the UK (Littman and Carter Rusk 1970). JUSTICE had also drafted a Privacy Bill, officially submitted in November 1969 by Brian Walden, and which similarly called for the creation of a general right of privacy, as well for the establishment of civil remedies for some infringements (Warren and Dearnley 2005, p. 241).[120] Actually, by the beginning of the 1970s there were in the UK multiple privacy-related bills: also in 1969, a Data Surveillance Bill was put forward,[121] calling for the registration of computerised personal data banks;

[119] See also: (Secretary's Advisory Committee on Automated Personal Data Systems 1973, sec. Appendix B "Computers and Privacy": The Reaction in Other Countries).

[120] See also: (Younger 1972, p. 1).

[121] By Kenneth Baker in the House of Commons, and by Lord Windlesham in the House of Lords.

and an unsuccessful Control of Personal Information Bill was introduced by Leslie Huckfield in 1971.

As a response to the 1970 JUSTICE report and Walden's Privacy Bill,[122] the UK government announced its intention to carry out a detailed examination of the subject of privacy. In May 1970 a Committee on Privacy was appointed for this purpose, with Sir Kenneth Younger as chairman. Younger's Committee on Privacy (as it was generally known) was however not particularly interested in the possible recognition of a general right of privacy by statute.[123] The Committee, noting that privacy had been generating a large literature in the US, and that the aspect that had attracted by far the most attention was the 'privacy' of computerised personal information (Younger 1972, p. 3), decided to concentrate on discussing the use of computers for the processing of information, and more concretely their use in the private sector—even if the subject had not been listed among its tasks. As Younger's Committee on Privacy was exploring these issues, a Workshop on the Data Bank Society[124] brought to London selected US experts,[125] and highlighted the need for legislative control of computerised data banks (Younger 1972, p. 179).

Younger's Committee on Privacy published its final report ('the Younger Report') in 1972. The report formulated a series of principles for the computerised handling of personal information[126] to be taken into account by the data-processing industry, and urged the industry to voluntarily adopt them as a code of good practice. The report also recommended the setting up of a Standing Committee to consider the use of computers and their impact on individuals (Jay 2007, p. 5).

In 1973, after debate in Parliament of the Younger Report, the UK government announced that it would respond with the publication of a White Paper.[127] 1973 was also the year when the UK joined the European Economic Community (EEC). In the end, the UK government published not one but two White Papers, both in 1975,[128] and subsequently set up a Data Protection Committee[129] under the chairmanship of

[122] More precisely, during the second reading debate in the House of Commons of the Right of Privacy Bill introduced by Brian Walden (Younger 1972, p. 1).

[123] Its final report stated it was relevant to note that England had traditionally not chosen that way as its way to protect the main democratic rights of citizens (Younger 1972, p. 10).

[124] Organised in November 1970 under the title 'Privacy, Computers and You'.

[125] Including Alan F. Westin and Cornelius E. Gallagher (Hanlon 1970).

[126] The principles were: the purpose of holding data should be determined; there should only be authorised access to data; there should be minimum holdings of data for specified purposes; persons in statistical surveys should not be identified; subject access to data should be given; there should be security precautions for data; there should be security procedures for personal data; data should only be held for limited relevant periods; data should be accurate and up to date; and any value judgments should be coded (Warren and Dearnley 2005, p. 242).

[127] The Younger report had concrete repercussions in the UK 1974 Consumer Credit Act, which included provisions to allow individuals to access the information related to them, and a mechanism to facilitate the expression of disagreement.

[128] One titled *Computers and Privacy* (CMND 6353), announcing the government's intention to consider legislation and its supplement, *Computers: Safeguards for Privacy* (CMND 6354), dealing with computer use in the public sector.

[129] Describing this Data Protection Committee as a 'forerunner of a permanent authority': (Flaherty 1979, p. 53).

Sir Norman Lindop,[130] which in 1976 was commissioned to look at the operation of computer systems in the public and private sectors, and to advise on the most suitable means of ensuring appropriate safeguards for the protection of individuals (Jay 2007, p. 5).

The Report of the Committee on Data Protection ('the Lindop Report') was issued in 1978 (Committee on Data Protection 1978). Targeting the insurance of both privacy[131] and data protection, it recommended the adoption of legislation covering the public and private sectors, the setting up of an independent authority to ensure supervision (Jay 2007, p. 5), and the mandatory registration of some computer users in order to process data (Critchell-Ward and Landsborough-McDonald 2007, p. 518). The Lindop report failed to generate any concrete response. It was only in 1984, after the Council of Europe approved a legally binding Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ('Convention 108'), that the UK passed its first Data Protection Act (Roos 2003, p. 260). And it was only in 1998, with the enactment of a Human Rights Act that brought about the integration of Article 8 of the ECHR into UK law, that the protection of privacy in the UK definitely entered a new phase.[132]

2.2.2 Privacy in Other Words?

The UK was not alone in Europe reflecting on privacy and the regulation of data processing. Other European countries were carrying out similar investigations precisely using the same term, privacy. And still others chose instead other legal framings to consider fairly similar issues.

2.2.2.1 Privacy in Other Languages

If the salience of privacy in US discourse strongly contributed to the notion's prominence in English-speaking countries and organisations (Bygrave 2010, p. 167), its hold was also soon perceptible in non-English speaking countries. Some of them even integrated into their own languages the word privacy as such.

One of the first languages to adopt the word 'privacy' from English in the context of a reflection on the legal reaction to the advent of computers was Dutch. The phenomenon occurred in the two European countries where Dutch is an official language, namely Belgium and the Netherlands. In 1970, an International Colloquium

[130] Initially Younger was to be made Chairman of this Committee, but he died in May 1976 (Warren and Dearnley 2005, p. 259).

[131] As noted also in (Critchell-Ward and Landsborough-McDonald 2007, p. 518).

[132] In what has been described as a 'seismic shift' (Lord Neuberger of Abbotsbury 2012, p. vii), or a sort of 'mini-revolution' (O' Cinneide et al. 2006, p. 554).

took place in Brussels, celebrated with support of the Council of Europe.[133] Its title had three linguistic versions: English, with 'Privacy and Human Rights'; French, as in 'Vie privée *et droits de l'homme*'; and Dutch, which referred to 'Privacy[134] *en Rechten van de Mens'*.[135] The reference in Dutch to 'privacy' illustrates an accelerating integration of this term in Dutch-speaking literature as a loan word.

In the Netherlands, the announcement of a General Census in 1970 functioned as a catalyst for a massive sense of anxiety among the population on the collection and use of personal information (De Graaf 1987, p. 1). In 1971, a Governmental Committee on Privacy and Personal Registers was established under the chairmanship of Thijmen Koopmans, and entrusted to explore the issue. The Koopmans Committee published in January 1974 an Interim Report titled *Privacy en persoonsregistratie,* where it proposed the adoption of data protection legislation for the public and the private sector (Hondius 1975, p. 39).[136] As in the UK, the adoption of concrete rules suffered nevertheless a great delay, materialising only in 1989 (Overkleeft-Verburg 1995, p. 571). In the meantime, a major revision of the Dutch Constitution inscribed in it in 1983 a general *recht op eerbiediging van zijn persoonlijke levenssfeer* ('right to respect of the personal sphere of life')[137] accompanied by a mandate to legislate on its protection in relation to the recording and dissemination of personal data,[138] and on the rights to access to and rectification of such data.[139] None of these provisions used the (by now also Dutch)[140] term *privacy*, which is nonetheless still widely employed by the doctrine (Koops 2011, p. 168). In Belgium, the Constitution enshrines since 1994 a right to the protection of what its Dutch version refers to as *privé-leven*; *Privatleben* in the German version, and *vie privée* in the French one.[141]

2.2.2.2 Vie Privée or Libertés?

According to Warren and Brandeis, the right to privacy had found an expression in the law of France already in the nineteenth century, taking the shape of the notion

[133] The Conference took place from 30 September to 3 October 1970. It was organised jointly by the Belgian government and the Council of Europe, and was the third edition of a series of Conferences supported since 1965 by the Council of Europe on different aspects of the protection of human rights, with special focus on the application of the ECHR. For the presentations in English: (Robertson 1973).

[134] Emphasis added.

[135] The event devoted special attention to computers and Westin's definition of privacy (Ganshof van der Meersch 1974, p. 5 and 147 (contribution by R. V. Jones)).

[136] The Committee's final report was published in 1976.

[137] Article 10(1) of the Dutch Constitution.

[138] Ibid. Article 10(2).

[139] Ibid. Article 10(3).

[140] (Van Hoof et al. 2001, p. 765).

[141] Article 22 of the Belgian Constitution (adopted in three official languages: Dutch, French and German). The terminological choice was possibly linked to the fact that previously the judiciary had established the direct applicability of Article 8 of the ECHR on the right to respect for private life (Electronic Privacy Information Center (EPIC) and Privacy International (PI) 2007, p. 262).

of *vie privée*.[142] The idiom *vie privée* had as a matter of fact made a remarked appearance in France already in 1819, when the essayist Pierre Paul Royer-Collard, discussing a proposal on crimes committed by the press at the *Chambre des députés*, alluded to the *vie privée* as something to be protected by a fortress, walled against attacks by the outside world.[143]

The English privacy and the French *vie privée* are configured as equivalent in a number of international instruments, such as the UDHR, even if in 1950 the ECHR privileged 'private life' as its corresponding idiom.

Debates on the notion of *vie privée* were particularly vivid in France by the beginning of the 1970s.[144] The Act of 17 July 1970[145] introduced a new Article 9(1) into the French Civil Code, explicitly stating that everybody has the right to respect for their privacy/private life ('*Chacun a droit au respect de sa vie privée*').[146] This provision, which added up to existing mechanisms guaranteeing related protection,[147] did not define the meaning of *vie privée*, which nonetheless eventually came to be described as covering both the protection of individuals' *intimité* ('intimacy')[148] and autonomy (in the sense of the legitimacy for individuals to be free to live their lives as they wish with a minimum of external interferences) (Détraigne and Escoffier 2009, p. 14).[149] This broad understanding of the notion of *vie privée* found further support in Article 8 of the ECHR, ratified by France in 1974,[150] and in its reading by the ECtHR.

Also in the early 1970s, France experienced a key change in its constitutional case law. In 1971, the Constitutional Council *(Conseil constitutionnel*) recognised a whole body of binding constitutional rules (the so-called *bloc de*

[142] See above, Sect. 2.2.1 of this chapter.

[143] That mention was however somehow fortuitous (Rigaux 1992, p. 139), as Royer-Collard's main concern was to promote freedom of press (Brügemeier 2010, p. 12).

[144] Illustrating interest on the subject since the end of the 1960s: (Malherbe 1968, 1968).

[145] With the Law 70/643 of 17 July 1970.

[146] The provision reads: '*Chacun a droit au respect de sa vie privée. Les juges peuvent sans préjudice de la réparation du dommage subi, prescrire toutes mesures, telles que séquestre, saisie et autres, propres à empêcher ou faire cesser une atteinte à l'intimité de la vie privée ; ces mesures peuvent, s'il y a urgence, être ordonnées en référé'*.

[147] Such as the *loi du 29 juillet 1881 sur la liberté de la presse*, or Article 1382 of Code Civil (Nerson 1971, p. 739).

[148] Respect for private life concerns most importantly intimacy if one focuses on the second paragraph, describing the nature of interference with private life that can lead to judicial measures (aiming at '*empêcher ou faire cesser une atteinte à l'intimité de la vie privée'* (Abravanel-Jolly 2005, p. 63).

[149] *Conclusions Cabanes prises dans CA Paris, 7ème chambre, 15 mai 1970* (Détraigne and Escoffier 2009, p. 14). The duality of *vie privée* is sometimes portrayed in terms of a distinction between the *secret de la vie privée* (or the secrecy of privacy) and the *liberté de la vie privée* (or privacy as freedom). See for instance: (Kayser 1995, p. 11; Abravanel-Jolly 2005, p. 63).

[150] France ratified the ECHR on 3 May 1974, through the authorisation given by loi n° 73–1227 of 31 December 1973. In France, the ECHR has supremacy over national legislation (Brügemeier 2010, p. 16).

constitutionnalité),[151] which notably includes the 1789 Declaration of the Rights of Man and of the Citizen, and in which are regarded as constitutionally entrenched a series of *libertés publiques*, or public freedoms. Individual freedom, a constitutionally protected freedom, came eventually to be considered as including protection for the *vie privée* of individuals,[152] and the *Conseil constitutionnel* judged that the notion has its foundation in Article 2 of the Declaration of 1789, which mentions freedom as one (as a matter of fact, the first) of the natural and imprescriptible rights of citizens (Sudre 2005, p. 404).

When at the beginning of the 1970s French authorities started to inquiry on the impact of emerging technologies, and in particular computers, on the rights of the individual, they framed the issue in terms of a relationship between *l'informatique* (computers) and *libertés* (or public freedoms).[153]

2.2.2.3 Swedish as a Language Without Privacy

Other European countries also addressed around the same time similar issues, in not dissimilar ways, through still different terminological lenses. A clear example of this phenomenon is the Swedish case.

In Sweden, computerization of the public sector began comparatively soon, in the early 1960s (Söderlind 2009, p. 270), and was relatively well advanced by the end of the decade. Popular uproar followed the announcement of a census in 1969, as part of the population realised that the gathering of information had been specifically designed to facilitate automated data processing. In reaction to these concerns, the Swedish Government entrusted the task of studying the problems of computerised record keeping to an official commission already in place,[154] the Parliamentary Commission on Publicity and Secrecy of Official Documents.[155]

The Swedish Parliamentary Commission on Publicity and Secrecy of Official Documents published in June 1972 its own report on computerised record keeping. Its title was *Data och integritet*, and it rapidly came to be known in English-speaking circles as 'Computers and Privacy':[156] the Swedish word *data* specifically denoted information automatically processed (Hondius 1975, p. 84), which seemingly justified its translation as 'computers', and Swedish appeared to lack

[151] *Décision n° 71–44 DC1, relative à une loi "complétant les dispositions des articles 5 et 7 de la loi du 1er juillet 1901 relative au contrat d'association"*. See also: (Brügemeier 2010, p. 15).

[152] This position was explicitly adopted by the French *Conseil constitutionnel* decades later, in its decision 99–416 DC of 23 July 1999, by declaring that *'la liberté proclamée par (l'article 2 de la Déclaration des droits de l'homme et du citoyen) implique le respect de la vie privée'* (Détraigne and Escoffier 2009, p. 14).

[153] See Chap. 3, Sect. 3.4, of this book.

[154] (Secretary's Advisory Committee on Automated Personal Data Systems 1973, sec. Appendix B "Computers and Privacy": The Reaction in Other Countries).

[155] Offentlighets- och sekretesslagstiftningskommittén.

[156] See, for instance: (Flaherty 1979, p. 112; Working Party for Information Security and Privacy (WPISP) 2011, p. 74).

any other word closer to 'privacy' than *integritet*—which explains why *integritet* and privacy are often regarded as synonymous (Flaherty 1989, p. 104), despite the fact that *integritet* is sometimes also translated into English as 'personal integrity' (Flaherty 1989, p. 105). In its report, the Parliamentary Commission highlighted the importance of *integritet* as a problem of trust and confidence between the State and citizens, while emphasising the benefits of the use of computer technology in public administration (Söderlind 2009, p. 272). Swedish discourse surrounding the regulation of data processing still focuses nowadays on the notion of *integritetsskydd* ('protection of (personal) integrity') (Bygrave 2002, p. 322).

2.3 Summary

This chapter has carried out an exploration of the reputedly elusive notion of privacy. It has underlined that there exist many conceptions of the notion, embodying multiple entanglements with concepts such as freedom, dignity, or personality, but also one vision standing out due to its relatively clear content, and its substantive concern with the processing of information about individuals: privacy re-defined as information(al) privacy, a modern, post-Westin notion which can be summarised as 'control upon personal information'. This meaning of the word was distilled by the US literature since the end of the 1960s in the context of discussions on the development of computers and the protection of individual freedom, and which led to the development in the US of the doctrine of 'fair information practices'. The doctrine stressed the need to impose obligations on those who process information about individuals, but also to grant a set of rights for the individuals whose information is processed—in particular, a right to know about such processing, and to rectify inaccuracies. At its core was the possibility for individuals to know what information about them was held by other parties.

The 1974 Privacy Act consolidated a connection between the word privacy and the doctrine of 'fair information practices', and notably the principle of individual access, as well as the principle of use limitation. The Privacy Act applies to information about individuals stored in records held by some public authorities (federal agencies), regardless of whether it is processed electronically or not. Access to such information had been also previously regulated through the lens of freedom of information. From that perspective, privacy had traditionally played a different role: it functioned as a possible ground justifying refusal of access. The appearance of redefined notion of privacy by the end of the 1960s, thus, added an extra layer of meaning to the word, but did not replace previous understandings.

As those developments unfolded, a number of European countries were also attempting to refine their own approach to the protection of the individual in the light of technological progress. Explorations of the notion of privacy soon surfaced in this context, which gradually circumscribed threats linked to technological progress to the advent of computers. International organisations such as the ICJ documented the absence of the recognition of a general right to privacy in international law, and

called for its enshrinement. Eventually, however, the ICJ dropped this ambition, and refocused its efforts towards the promotion of instruments specifically dealing with the regulation of the automated processing of data.

Similarly, the UK destined much effort to discussing the possible acknowledgement of the existence of a right to privacy, but from there, and through the concrete consideration of the issue of computers, shifted towards deliberations on statutes on what it started calling by the mid-1970s 'data protection'. The usage of the word privacy in the US did not find an exact equivalent in the UK, or elsewhere in Europe.

This chapter has shown that the increasing global popularity of the term 'privacy' led to some non-Anglophone European countries to borrow the word and use it in the context of their own investigations on the protection of individuals and data processing. In others countries, nonetheless, debates turned around different terminology, as the French *libertés*, or the Swedish *integritet.* France and Sweden were precisely, together with Germany, among the first European countries to adopt special legal instruments to regulate the processing of personal data in order to reinforce the legal protection of individuals.

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