2009

Constitutional Patriotism and the Right to Privacy: A Comparison of the European Court of Justice and the European Court of Human Rights

Francesca Bignami
George Washington University Law School, fbignami@law.gwu.edu

New Technologies and Human Rights

Edited by
THÉRÈSE MURPHY

OXFORD
UNIVERSITY PRESS

4

Constitutional Patriotism and the Right to Privacy:

A Comparison of the European Court of Justice and the European Court of Human Rights

*Francesca Bignami**

In October 1970, the heads of state of what was known at the time as the European Economic Community proclaimed: '[A] united Europe must be founded upon the common heritage of respect for the liberty and the rights of men.'[1] Decades later, at the celebration of the fiftieth anniversary of the European Union, the heads of state of today's European Union echoed that earlier proclamation:

> In the European Union, we are turning our common ideals into reality: for us, the individual is paramount. His dignity is inviolable. His rights are inalienable. Women and men enjoy equal rights.
>
> We are striving for peace and freedom, for democracy and the rule of law, for mutual respect and shared responsibility, for prosperity and security, for tolerance and participation, for justice and solidarity.[2]

This vision of Europe, one resting not simply upon economic convenience but upon a common tradition of rights and democracy, is a persistent theme in the history of European integration. With the legitimacy crisis of the 1990s, it has also become a pressing theme of European integration. Rights, according to some, might serve as the building blocks of a common European identity.

* Many thanks to Mattias Kumm, Peter Lindseth, Thérèse Murphy, and Ulf Öberg for their comments.

[1] European Community, Foreign Ministers of the Six European Community Countries, 'First Report of the Foreign Ministers to the Heads of State and Government of the Member States of the European Community', Part One, para 5 (27 October 1970), reprinted in C. Hill and K.E. Smith (eds) *European Foreign Policy: Key Documents* (2000) 76.

[2] Declaration on the occasion of the 50th anniversary of the signature of the Treaties of Rome. Berlin, 25 March 2007.

Europe might not have a single cultural, linguistic, ethnic, or religious tradition, as did the nation states of the nineteenth century. But it does, according to constitutional theorists, possess a liberal democratic tradition of self-government and individual rights. Based on this commonality, Europeans might recognize that they inhabit a single society. They might recognize themselves as rights-bearing and duty-owing members of the very same human community.

Constitutional patriotism, as this form of identity has been called, holds tremendous promise.[3] Yet because constitutional patriotism serves to bind a community together, it carries some of the dangers associated with the other, historically dominant form of community—the nation state. Nineteenth and twentieth-centuty nationalism was belligerent, intolerant, and monolithic. Why should we think that twenty-first-century constitutional patriotism will be any different? In other words, in the European search for solidarity, the core principles of liberal democracy might very well be undermined. The practice of constitutional patriotism might very well betray its normative aspirations of tolerance and inclusiveness.

Although the dark side of constitutional patriotism has been remarked by many, there have been few attempts to scrutinize Europe's emerging constitutional culture for signs of intolerance. Such illiberalism can be manifested in many ways. Foreigners might be unreasonably excluded through immigration policies. Ethnic and religious minorities might not be treated fairly. Or diversity among the national communities that constitute the European Union might be suppressed in the interest of greater unity.

This chapter examines attitudes towards national diversity in one piece of the emerging European constitution—the right to privacy. There is a thick constitutional culture of privacy in Europe. The familiar debate of how to balance the right to privacy against freedom of expression, the market, and public security can be heard in many places: before the Court of Justice and the European Court of Human Rights, in the European Parliament and the European Council, and before Europe's numerous data privacy ombudsmen. And in these places, the less familiar problem of tolerance of diversity within Europe, among Europe's different national communities, also arises. These communities all recognize a private sphere that sometimes deserves to be protected and that sometimes must give way to the demands of others. Yet these same communities also differ in their definition of the private sphere and the circumstances under which this private sphere must be sacrificed for the sake of other values such as freedom of expression. Thus the right to privacy poses squarely the dilemma of constitutional patriotism: can a right that is common to all of Europe nonetheless acknowledge and accommodate national diversity?

[3] J.-W. Müller, *Constitutional Patriotism* (2007); Müller and Scheppele, 'Constitutional Patriotism: An Introduction' (2008) 6 Intl J Constitutional L 67; Müller, 'A General Theory of Constitutional Patriotism' (2008) 6 Intl J Constitutional L 72.

The rapid development of a Europe-wide constitutional culture of privacy is due, in no small measure, to the emergence of new technologies. Because of widely available, cheap digital technologies, citizens and government officers of different European nations can communicate instantaneously. This facilitates immensely a breathtaking range of social relations, market transactions, and government policies across national borders. Yet the very same technologies put enormous pressure on the right to privacy. Put simply, today, spying is easy for everyone. A standard, pocket-size camera can take photographs, record conversations, and make video clips. A common flash drive can store vast data sets containing many gigabytes worth of electronic information. With a simple Internet connection, these digital files can be shared with hundreds of thousands of people throughout the world. These digital files can be combined with other files, taken from other sources, to create more complete and intrusive personal profiles. How can the law protect privacy in the dramatically different technological environment of today? Now that our images and personal habits can be captured so easily can we really claim to expect privacy and to expect that the law will defend our privacy? This context of rapid technological innovation—and differing national responses to innovation—is essential to understanding the European right to privacy.

This chapter proceeds as follows. The first section presents the theory of constitutional patriotism and the related concept of constitutional tolerance. The second section moves to the right to privacy. It outlines the legal framework for the right to privacy, with special attention to data protection because of the historically important role of this policy area in the European Union. The third section explores the challenge of diversity for European constitutionalism with two recent judgments involving a similar issue of privacy law but decided by two different European courts: *Criminal Proceedings against Bodil Lindqvist*, decided by the European Court of Justice (ECJ), and *Princess of Monaco*, decided by the European Court of Human Rights (ECtHR). Both cases took on the relationship between privacy and freedom of expression, but while the ECJ deferred to the national court's resolution of the matter, the ECtHR decided the question and did so contrary to the national court's ruling.

Based on the theory of constitutional patriotism, the last section argues in favour of the deferential approach taken by the ECJ. Although the doctrinal tools available to the two courts differ, the same deferential result could be accomplished by the ECtHR through greater resort to its doctrine of margin of appreciation. In doing so, the ECtHR would recognize, as the Court of Justice has done, that the answer to many difficult questions of constitutional law can only be found in the thick institutional and cultural setting of national constitutional orders. The European constitutional order, still, is too thin to settle many of the heated conflicts among rights-holders that emerge routinely at the national level.

This favourable assessment of the ECtHR's margin of appreciation is somewhat controversial. The ECtHR's resort to the doctrine has been criticized by

many human rights scholars as the abandonment of rights, morality, and reason in the face of powerful, oppressive states.[4] Deference to the Member States, according to the critics, represents capitulation to repressive human rights practices. Other commentators, however, have defended the margin of appreciation, both from a principled, moral theory of rights[5] and from a pragmatic position related to the limits of international law.[6] This analysis adds to the earlier defences of the margin of appreciation by revealing the constitutional nature of ECtHR adjudication. Given the frenetic pace of European integration and the ECtHR's role in affirming rights, the ECtHR should be regarded as not simply an international human rights tribunal, but also a constitutional court. The ECtHR, like the ECJ, is entrusted with a critical element of Europe's constitutional self-identity—fundamental rights. In other words, the ECtHR is an institutional guarantor of European constitutional patriotism. In adjudicating rights, therefore, the ECtHR should be conscious of the importance of fundamental rights in their particular geographical and historical instantiations to national self-identities and local solidarities. And before resolving any particular rights conflict—like the clash between privacy and speech in *Princess of Monaco* —the ECtHR should consider whether indeed the best constitutional outcome for Europe would instead be tolerance of national diversity.

1. Constitutional Patriotism

The idea of a constitution as not simply a mode of organizing power within a society but as a source of allegiance that enables the formation of that society is commonly associated with German political theory. As Jan-Werner Müller explains, the circumstances of post-war Germany placed the Basic Law and the Constitutional Court at the heart of German political culture.[7] The Constitutional Court has been immensely successful at resolving highly contentious political disputes. Today, therefore, the Constitutional Court is one of the most highly respected institutions in German political life. At the same time, the Basic Law emerged as the focal point in the struggle to defend the German state against the twin threats of neo-fascism and communism. German citizens were urged,

[4] Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 OJLS 705, at 731–2; Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 NYU J Intl L & Pol 843, at 847.

[5] See eg Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 American J Intl L 38, at 61–3.

[6] See eg Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 Yale LJ 273, at 315–17.

[7] Müller, 'A "Thick" Constitutional Patriotism for the EU? On Morality, Memory and Militancy', in E.O. Eriksen, C. Joerge, and F. Rödl (eds), *Law and Democracy in the Post-National Union* (2006), at 375.

based on their allegiance to the Basic Law's democratic values, to reject political extremism and come to the defence of German democracy.

In the view of many thinkers, a constitution for the European Union would engender a similar form of allegiance, not to any particular national order, but to a Europe-wide political community. Probably the best-known exponent of European constitutional patriotism is the renowned political philosopher Jürgen Habermas. According to Habermas, the democratic deliberation facilitated by the adoption of a constitution would promote identification with the European project.[8] This form of constitutionalism would engender genuinely post-national citizenship. That is, individuals would develop a sense of belonging to a Europe-wide community based on their participation in a democratic process, not based on their blood ties or cultural background.

As many have pointed out, deliberative democracy is a very demanding form of rule by the people.[9] Citizens are called upon to constantly re-examine and revise their values and interests, in communication with the other citizens that inhabit the public sphere. For the normative ideal to be achieved, four key criteria must be satisfied. (1) Deliberation must be inclusive; all citizens should have the opportunity to participate in the deliberation. (2) The citizens who participate in the deliberation must have equality of voice. They must all be heard and considered. (3) In the deliberation, deliberative as opposed to strategic rationality must prevail. Agreement must come from genuine consensus on the political principle under discussion. In other words, decisions must be made through appeal to commonly accepted reasons—what Habermas calls validity claims—not through bargaining among competing interests. Such bargaining is considered harmful to democracy because certain interests, inevitably, are more powerful than others and therefore dominate the bargaining process. Moreover, even if power could be assumed away, collective decision-making based on compromises among particularistic interests is not believed capable of obtaining the common good. (4) Last, deliberation must continue indefinitely until consensus is reached. Given the limits on the time and resources that can be dedicated to deliberation, consensus on every item on the public agenda is unattainable. Therefore, in the absence of consensus, a decision must be taken temporarily, following a commonly accepted decision rule.

Not only is deliberative democracy an extremely ambitious form of democracy, it is also highly universalistic. The society that self-governs under this theory could very well be the world, not simply a particular nation or region of the world. Unlike deliberative democracy in American political theory, rooted in the republican tradition, Habermas's starting point is man's universal capacity for language. The basic similarities underpinning language are the grounds for

[8] See Habermas, 'Why Europe needs a constitution' in E.O. Eriksen, J.E. Fossum, and A.J. Menéndez (eds), *Developing a Constitution for Europe* (2004), 19–34 at 27–8.

[9] See eg Knight and Johnson, 'Aggregation and Deliberation' (1994) 22 Political Theory 277.

claiming that all individuals share the same 'communicative rationality' through which they can reach agreement on matters of common concern.[10] An individual's capacity to recognize others as equals in the deliberative enterprise is rooted in reason, not in geography or history. Thus it should be possible to agree that the essentials of deliberative democracy be extended to all.

For these reasons, the version of constitutional patriotism expounded by Habermas has given rise to deep scepticism.[11] The type of reason and universalism required by Habermas's theory is considered to be too far removed from the realities of human nature for deliberative democracy to be achievable. But the idea of constitutional patriotism has had enormous purchase in Europe—the possibility of European citizenship based on the liberal ideals contained in a constitution and experienced as part of a constitutional culture. This idea spurred the long process that culminated in the Constitution for Europe. Of course, that Constitution failed in popular referenda held in France and the Netherlands. But the possibility of rooting European citizenship in a set of commonly held ideals about the right and good mode of conducting life in a human community has persisted.[12]

The liberal values found in most modern constitutions can only be considered virtuous. Yet building allegiance to a community based on such values is problematic. The act of subscribing to a single set of beliefs—even virtuous ones—carries the danger of suppressing alternative beliefs. In other words, constitutional patriots might not tolerate dissent from their version of the right and good. This intolerance might not be shown only to those extremists bent on destroying liberal values, such as neo-Nazi and militant Communist parties. It might also silence legitimate disagreement about the correct interpretation and application of critical elements of the liberal democratic canon. Jans-Werner Müller incisively frames the critique:

> [C]ivic nationalism—under which one is tempted to subsume constitutional patriotism—is still nationalism, and not automatically less fraught with danger in contrast with cultural nationalism. In particular, it still aims at homogeneity among citizens in a way that would have been recognizable to antiliberals like Carl Schmitt as indispensable for democracy, and that more or less directly endangers values such as inclusiveness, individualism, and diversity.[13]

The irony of intolerant constitutional patriotism is especially acute in the European Union. There, hostility towards diversity not only goes against the

[10] Gehring, 'Communicative Rationality in European Governance? Interests and Communicative Action in Functionally Differentiated Single Market Regulation', in E.O. Eriksen, C. Joerges, and J. Neyer (eds), *European Governance, Deliberation and the Quest for Democratisation* (2003), 57 at 69.

[11] See eg McCormick, 'Habermas, Supranational Democracy, and the European Constitution' (2006) 2 European Constitutional L Rev 398.

[12] Kumm, 'Why Europeans Will Not Embrace Constitutional Patriotism' (2008) 6 Intl J Constitutional L 117.

[13] Müller, 'Three Objections to Constitutional Patriotism' (2007) 14 Constellations 195, at 199.

grain of the values at the core of liberal democracy but also does violence to the constitutional system already in place. Among legal scholars, Joseph Weiler has put forward the most exhaustive analysis of the dangers of constitutional patriotism for the European Union.[14] The most fundamental attribute of the European constitutional system to have emerged over the years, Weiler argues, is constitutional tolerance.[15] In accepting the authority of the pronouncements of the European Court of Justice, national courts allow the views of other political communities to shape the constitutional fabric of their own communities. As Weiler puts it, European law is 'accepted as an autonomous voluntary act, endlessly renewed on each occasion, of subordination, in the discrete areas governed by Europe, to a norm which is the aggregate expression of other wills, other political identities, other political communities.'[16] Likewise, the European Court of Justice defers to the views of national courts in fashioning European law. From this relationship of mutual deference, Weiler draws the conclusion that a written European constitution, adopted by a constitutional convention, is undesirable. Whether such a constitution would indeed undermine constitutional tolerance, as Weiler argues, is debatable. But the important point is that the European constitutional order is intrinsically pluralist, and any effort to impose a hegemonic belief system in the interest of constitutional patriotism would be antithetical to the character of Europe. In fashioning a constitutional identity for Europe, therefore, it is imperative that the courts and other law-making institutions permit legitimate disagreement over the content of that identity. It is essential to preserve constitutional tolerance.

2. The Right to Privacy

The right to privacy is a perfect vehicle for exploring the tension between constitutional patriotism and constitutional tolerance. The right to privacy has long been an element of the European constitutional system. Yet it is an element on which national systems display considerable variation. Privacy is a claim that routinely clashes with other claims: my right to keep certain matters to myself conflicts with the right of others to learn about me for the purpose of public debate, market transactions, public security, and more. How a constitutional system mediates between the right of secrecy and the right to know is a defining feature of that society and one that varies tremendously among political communities. How such pluralism has been handled in Europe can offer guidance on the more general problem of reconciling a single set of—European—constitutional ideals with national diversity.

[14] Weiler, 'In Defence of the Status Quo: Europe's Constitutional Sonderweg', in J.H.H. Weiler and M. Wind (eds), *European Constitutionalism beyond the State* (2003), 7–23.
[15] *Ibid.* [16] *Ibid*, at 21.

The European right to privacy is the product of two distinct but overlapping political systems: the European Union and the Council of Europe. Historically, the Council of Europe came first. The Council of Europe system also has the broadest coverage: the application of the right to privacy in the Council of Europe system was never limited to certain domains of state activity as it was in the European Union, with its focus on the market. But today, especially in the domain of data privacy, the European Union is the more important system. Compared to the Council of Europe, it has a denser framework of laws and administrative instruments with a tighter enforcement system of regulators and courts.

The two political systems overlap because of the influence that the first-in-time has been able to exert over the second-in-time. As is well known, the European Court of Justice looks to the European Convention on Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights to establish new rights. Furthermore, the European Union's legislation on data privacy draws on the earlier Council of Europe Convention in that area.

A. Council of Europe

1. European Convention on Human Rights

The right to private life is protected under Article 8 of the European Convention on Human Rights.

Article 8—Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Initially, the European Court of Human Rights interpreted the right of privacy to apply only against the government and only in those situations in which the space or the type of fact fit squarely with commonplace understandings of what counted as private.[17] As with other Convention rights, however, the Court soon acknowledged that the right to privacy applied not just against the government but against other individuals, on the theory that states should be held responsible for all rights violations occurring within their territories. The Court also gradually expanded those categories of information deemed to be private and therefore protected under the right to private life. Today, any information about a person, no matter how banal or how widely known, is considered private as long as it is

[17] I. Cameron, *National Security and the European Convention on Human Rights* (2000), 70–100.

systematically stored and collected.[18] Likewise, even behaviour in a public place is considered private if it is recorded and disseminated in a manner that could not reasonably have been anticipated by the individual concerned.[19]

Under the case law of the Court, an interference with the right to private life must satisfy three conditions to be considered legal. First, if the processing is done by a public authority or for a public purpose, it must be authorized by a law, accessible to the public, with precise enough provisions to curb arbitrary government action and to put citizens on notice of possible incursions into their private sphere.[20] Secondly, the purpose of the interference must be legitimate. Namely, the purpose must be related to one of the categories listed in Article 8. It must be 'in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'[21]

Thirdly, the interference with private life must be proportional. The proportionality inquiry generally consists of three distinct steps. Is there evidence that government action can achieve the stated purpose? Is the government action necessary for accomplishing the stated purpose or would alternative means accomplish the same purpose with a lesser burden on the privacy right? And even though there might be no alternative means for accomplishing the same purpose, is the burden on the right to privacy nonetheless intolerable, requiring the law to be withdrawn? The burden of justification under the proportionality test lies with the government and varies tremendously, depending on the gravity of the interference with the right to private life and the public interest being pursued: the more significant the interference, the higher the burden on the government; the more important the public purpose, the lower the burden on the government.[22]

2. *Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data*

Long before the European Court of Human Rights interpreted the right to privacy to apply broadly to any type of information about a person, a specific set of rules relating to personal data was negotiated by the members of the Council of Europe. The Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data was adopted in 1980 and was opened for ratification in January 1981.[23] As of May 2007, it has been ratified by

[18] *Segerstedt-Wiberg and Others v Sweden*, Application no 62332/00, 6 June 2006, paras 71–2.
[19] *Von Hannover v Germany*, Application no 59320/00, 24 June 2004, para 50.
[20] *Amann v Switzerland*, Application no 27798/95, 16 February 2000, para 50.
[21] ECHR, Art 8.
[22] See Opinion of Advocate General, *European Parliament v Council and v Commission*, Cases 317/04 and 318/04, paras 228–30 (2006).
[23] 28 January 1981, Europ TS No 108. See C.J. Bennett and C.D. Raab, *The Governance of Privacy: Policy Instruments in Global Perspective* (2003) 72.

thirty-eight of the forty-six members of the Council of Europe and it has been signed but not ratified by six more Member States. The rules contained in the Convention apply to all those engaged in personal data processing—market actors, the media, government agencies, and others.

For purposes of understanding the legal rules contained in the Convention, it is useful to divide sequentially personal data processing into different phases: collection, storage, use, and dissemination to third parties. Under the Convention, personal data must be 'obtained and processed fairly and lawfully' (Article 5a). Generally speaking, this is interpreted to mean either that individuals must consent to the collection and use of their information or that a piece of legislation must authorize personal data processing, specifying the public reasons that necessitate personal data processing. The Convention restricts the amount and type of personal information that may be collected: it must be gathered for 'specific and legitimate purposes' (Article 5b), and it must be 'adequate, relevant and not excessive in relation to the purposes for which they are stored' (Article 5c). Certain categories of personal information, if collected, must be treated with special care: 'Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions' (Article 6).

Moving past collection to the storage of information, data protection actors must guarantee personal data is 'accurate and, where necessary, kept up to date' (Article 5d). Safeguards must be put into place, to protect the data from theft and other forms of security breaches: '[A]ppropriate security measures shall be taken for the protection of personal data stored in automated data files against accidental or unauthorised destruction or accidental loss as well as against unauthorised access, alteration or dissemination' (Article 7).

As for use and dissemination, personal data may be used only for those purposes originally contemplated and only by those organizations for whom the data was originally intended. It may be put to other uses and shared with other organizations only if doing so is necessary to fulfil the original purposes of data collection (Article 5b). Lastly, the time during which personal information may be retained is limited: personal information is to be 'preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored' (Article 5e).

The Convention also pays some attention to remedies. It provides that individuals should have a right of access to their personal information. This right guarantees that individuals will know what information about them is held, by which institutions. Moreover, once individuals have obtained access to their information, they have an opportunity to correct any incorrect information. Finally, they have a right to demand that unlawfully processed information—say, information retained for longer than necessary—be deleted.

The basic theory behind these rules is that the less personal the data processing, the better. The objectionable nature of personal data processing can only be comprehended in light of the fundamental rights origins of data privacy. Each time information about an individual is collected, personal autonomy is put at risk. Even though liberal societies disagree as to what is private and what is public, they all acknowledge that, in certain spaces and over certain matters, individuals are entitled to privacy.[24] If they so choose, individuals may bar access by others to their private sphere. This entitlement is rooted in the duty of respect for others. Although certain types of personal information might appear to be far removed from this private sphere of control and autonomy, once such information is combined, manipulated, and disseminated, it might very well be revealing of the private sphere.

Of course, there are other rationales for data privacy. Personal information in the hands of powerful actors can be used for illiberal ends like the suppression of political dissent and discrimination based on religion, race, or ethnic origins. If personal information is wrong, it can lead to all sorts of disastrous consequences for the individuals involved. They might be unfairly detained or wrongly denied a welfare benefit. And if personal information is stolen, individuals can be robbed of their assets or fraudulently charged with onerous debts. Yet, at the root of data privacy is the principle of autonomy. Even in a world in which, thanks to technology, acquiring knowledge about others is virtually effortless, personal autonomy must be respected.

Data protection rules and the fundamental right to privacy are not only related in political theory but also in legal doctrine. Most of the rules reviewed earlier can be conceived as guidance for the investigation required under fundamental rights law. Since every instance in which personal data is collected constitutes an intrusion into private life, personal data must be collected and stored for specific and legitimate purposes and may not be used in a way incompatible with those purposes.[25] To ensure that personal data processing can accomplish the government's purpose—as is required under proportionality—all such data must be 'adequate' and 'relevant' to that purpose.[26] Likewise, such data must be 'accurate and, where necessary, kept up to date.'[27]

Not only must data processing be able to achieve the government purpose, but it must be necessary to achieving that purpose. Hence the requirement that the amount of data processed and the period during which it is stored be no more than necessary to accomplish the purpose.[28] Since the processing of certain types of personal data—revealing racial origin, political opinions, or religious or other beliefs; concerning health or sexual life; or relating to criminal convictions—constitutes a particularly grave interference with privacy, special precautions must

[24] See Benn, 'Privacy, Freedom, and Respect for Persons', in J.R. Pennock and J.W. Chapman (eds), *Nomos XII: Privacy* (1971) 1; A. Margalit, *The Decent Society* (N. Goldblum trans, 1996), 203–4.
[25] Convention 108, Art 5b. [26] *Ibid*, Art 5c. [27] *Ibid*, Art 5d.
[28] *Ibid*, Arts 5c and 5e.

be taken. Finally, as a special safeguard for the privacy right, individuals should have the right to check their personal data to make sure that it is accurate and that, in all other respects, it is being processed in accordance with the law. Most of these limitations on data collection and processing can be conceived as less rights-burdensome means of accomplishing the same government purpose. Each time a personal data processing system is put into place, it must contain safeguards and restrictions that ensure that the privacy interest in personal data is compromised as little as possible. Last, under the Convention, exceptions are permitted in certain classes of cases, but only if the resulting burden on the privacy right is proportionate to the aim being pursued by permitting the exception.[29]

B. The European Union

1. The Charter of Fundamental Rights

Fundamental rights have long been part of the legal and political discourse of the European Union. Until recently, however, such rights were imported into the EU legal order from national constitutions and the European Convention on Human Rights. As the Court of Justice has never tired of repeating:

> It must also be stated that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance.[30]

In 2000, the European Union finally obtained its own statement of fundamental rights with the Charter of Fundamental Rights. The Charter includes a number of rights that reflect the circumstances of modern-day society. The right to privacy is one of them. The Charter dedicates two articles to privacy. The first, Article 7, copies the following language from the European Convention on Human Rights:

> Everyone has the right to respect for his or her private and family life, home and communications.

The second, however, innovates by specifically guaranteeing privacy in the age of electronic technology and the World Wide Web:

> **Article 8** *Protection of personal data*
>
> 1. Everyone has the right to the protection of personal data concerning him or her.
> 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law.

[29] *Ibid*, Art 9.
[30] Case C-305/05, *Ordre des barreaux francophone et germanophone*, 2007 ECR para 29.

Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

Much of the substance of this right of personal data protection should be familiar from the earlier discussion of the Council of Europe Convention on Automatic Processing of Personal Data (Convention 108). The requirement of an independent authority is also familiar to data protection advocates. Independent authorities, established to oversee compliance with data protection rules, have been a fixture of national data protection schemes since the early 1970s. By the mid-1990s, consensus on the desirability of an independent authority had emerged at the European level, first in the EU Directive discussed below and then in a special protocol to Convention 108.[31]

2. The Data Protection Directive

In 1995, the Data Protection Directive was adopted by the European Union.[32] Today, all Member States have implementation legislation in place. The Directive builds on Convention 108 in a number of respects. Although the Directive only sets down rules for activities that come under the market-oriented First Pillar, those rules are far more detailed than those contained in Convention 108. The Directive begins with a restatement of the Convention's core provisions on lawfulness, specific purposes, necessity, accuracy, and limited data retention (Article 6). Like the Convention, the Directive recognizes certain categories of personal information that should receive special protection (Article 8), gives individuals a right of access to their personal information (Article 12), and imposes a duty to adopt security measures to protect personal data (Article 17). These provisions, however, are far more detailed and onerous than the spare principles set down in the Convention. The Directive also elaborates on lawfulness by setting out those circumstances under which collection and use of personal data is permitted (Article 7).

Running throughout the Directive is the proportionality principle familiar from the Council of Europe context. Government actors and private firms that seek to collect and process personal information must demonstrate that their operations satisfy the proportionality principle—that the burden imposed on the right to personal data protection is proportionate to the aim being pursued through their data processing operations (Article 7(f)). Any exceptions to the data

[31] Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows, Strasbourg, 8 November 2001.

[32] Council and European Parliament Directive 95/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data [1995] OJ L281/31.

protection guarantees contained in the Directive must be proportionate to the aims being pursued in taking advantage of the exception (Articles 11, 12, 13, 26). To the extent that other rights—in particular freedom of expression—are permitted to interfere with the right to personal data protection, that interference must be proportional (Articles 9, 13).

The Directive creates three new sets of rights and duties with respect to the Convention. First, at the time that personal information is collected or transmitted to third parties, individuals must be informed of the identity of the data processor, the purposes of the data processing, and a number of other aspects of the data processing operation (Articles 10, 11). Secondly, in a provision drawn directly from French data protection law, an individual is entitled to object to automatic data processing with potentially adverse effects for that individual (Article 15). Thus, for instance, an individual denied credit by a financial institution based entirely on a computerized review of that individual's application may request that the application be reviewed by an employee of the bank. Thirdly, the transfer of personal data to third countries is prohibited unless those countries' data protection schemes are deemed adequate or one of a number of other conditions are met (Articles 25, 26).

Perhaps most importantly, the Directive has the enforcement apparatus that the Convention lacks. It requires that all Member States establish an independent data protection authority (Article 28). These authorities must have the powers necessary to oversee and enforce compliance with data protection law. The Directive anticipates that under certain circumstances firms and government agencies that process personal data will be required to notify the data protection authority of their operations and, occasionally, obtain prior authorization (Articles 18–20). The Directive also requires that national data protection authorities have the power to inspect data users so as to be able to detect data protection violations (Article 28). Data protection authorities must have remedial powers, such as the power to prohibit data processing operations that go contrary to the rules. And they must have the power to sanction those firms and government agencies that break the rules (Article 28).

On the European level, as opposed to the national level, two separate committees have been established to enforce the Directive. One committee is responsible for regulating third-country transfers, in line with privacy principles. The other—known as the Article 29 Working Party—has broad-ranging jurisdiction to promulgate opinions on most data protection issues that arise under the Data Protection Directive. Although the Working Party's opinions are not formally binding, they are generally followed by other EU institutions and national authorities; as a consequence, the Working Party's legal interpretations are treated as if they were binding by most regulatory authorities. In addition to this regulatory apparatus, an EU-level data protection authority has been established. The European Data Protection Supervisor, as this authority is known, is responsible for enforcing data protection rules against EU institutions.

3. Additional EU Data Protection Legislation

The Directive is the European Union's most comprehensive piece of data protection legislation. It applies, however, only to activities that fall under the First Pillar, namely market-based activities. A separate set of data protection instruments cover cooperation on immigration and cooperation on criminal justice under the Third Pillar. Because their essentials largely replicate the terms of Convention 108 and the Directive, only the briefest of overviews is necessary here.

To effectively cooperate on immigration and criminal justice, a number of EU databases have been established. These databases are covered by separate sets of data protection provisions. When national authorities exchange immigration and crime-related information through the Schengen Information System, they are bound by the data protection guarantees in the Schengen Convention.[33] The terms of the Europol Convention apply to the exchange of crime-related information through the Europol Information System.[34] When national prosecutors and courts exchange information through the Eurojust Information System, they are bound by the data protection provisions of the Decision establishing that information system.[35] And the data protection provisions of the basic regulation creating the Customs Information System apply when national customs officers exchange information related to smuggling and other offences through that computer system.[36] Currently under negotiation is a Third Pillar Framework Decision that will replace this complicated, largely overlapping, set of laws with one single legislative scheme.[37] The Framework Decision will also significantly extend the coverage of EU data protection guarantees: when national police, prosecutors, and the courts cooperate to combat crime under the Third Pillar and, in the process, exchange personal information on criminal suspects, they will be bound by the terms of the Framework Decision.

Today, therefore, the only domain of European social life that is still untouched by EU data protection law is intelligence-gathering by national spy

[33] Title IV of the Convention of 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders and integrated into the framework of the European Union pursuant to the Protocol annexed to the Treaty on European Union and the Treaty establishing the European Community, 2000 OJ L239/19.

[34] Convention Based on Article K.3 of the Treaty on European Union, on the Establishment of a European Police Office, 1995 OJ C316/2.

[35] Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, 2002 OJ L63/1.

[36] Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission, 1997 OJ L82/1.

[37] Note from Presidency to delegations on Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, Council of the European Union, Doc No 7315/07, Brussels, 13 March 2007.

agencies. National spy agencies like Germany's Office for the Protection of the Constitution and Federal Intelligence Service generally do not come within the reach of EU law at all. These agencies have been expressly excluded from the ambit of the European Union's Third Pillar. To the extent that spy agencies do come within the jurisdiction of the European Union, they would have to be regulated under the Second Pillar; at present, there are no proposals to do so.

3. The European Constitutional Culture of Privacy

In a series of cases the European Court of Human Rights and the European Court of Justice have grappled with the meaning of these privacy provisions. They have determined the scope of the private sphere protected by European law and the nature of the safeguards afforded under European law. The courts have also decided under which circumstances it might be permissible to intrude upon privacy, to further the legitimate purposes of other members of society. The right to speak, to be safe, and to transact in the marketplace can all come into conflict with the right to privacy. These moral and legal quandaries have become especially difficult with the massive diffusion of new information technologies. Information technologies hold extraordinary promise for human creativity and social communication yet they also pose an immense threat to privacy. Put simply, with the widespread availability of new information technologies, the temptation to spy—on one's neighbours or one's citizens—is extraordinary.

This section examines how the courts have addressed these issues in the unique context of Europe's plural legal order. The focus is on two cases involving the balance between the right to privacy and the right to speech. The first, decided by the European Court of Justice, considered the interference with the right to privacy caused by a personal web page, available throughout the world via the Internet. Although the Court recognized that privacy and speech were protected in the European constitutional order, it left the task of balancing the two values to the national court and the national constitutional order. The second case, decided by the European Court of Human Rights, reached a very different conclusion. That case involved the interference with a celebrity's right to privacy caused by the publication of paparazzi photographs in a weekly magazine. In its judgment, the Court not only recognized the importance of the right to expression and the right to privacy in the European legal order but also decided in favour of the celebrity's right to privacy. The reasoning in these two cases both demonstrates the tension between European constitutionalism and long-standing national legal orders, and reveals the jurisprudential techniques developed by Europe's courts to accommodate national diversity.

A. *Criminal Proceedings against Bodil Lindqvist*

The European Court of Justice had occasion to consider at length the Data Protection Directive in the case of *Criminal Proceedings against Bodil Lindqvist*.[38] Lindqvist volunteered as a catechist in her local parish in Sweden. At the same time, she took a computer class in which she learned how to create websites. She then created her own personal web page, on which she posted information designed to assist her fellow parishioners preparing for catechism. The website also included information on herself and eighteen colleagues from her parish, all identified by name. The information on her colleagues covered a variety of topics: their telephone numbers; their jobs and hobbies; their family circumstances; and, in the case of one colleague, the fact that she had injured her foot and therefore was on half-time medical leave from her job. Lindqvist posted this information without first obtaining the consent of her fellow catechists, although when she learned that some of them objected to the dissemination of their information, she promptly removed it from the website.

Under the Swedish law implementing the Directive, all personal data processors had to register their operations with the Swedish data protection authority. They also had to obtain authorization from the data protection authority if they planned to process sensitive data such as health information or to transfer personal data abroad, to a country outside the European Union. Lindqvist was unaware of this requirement when she first created her website, but subsequently she was informed of the requirement by an acquaintance. She therefore paid a visit to her local police station to inquire about her legal duties, at which point the police referred the matter to the public prosecutor. Lindqvist was prosecuted and convicted for various breaches of the Swedish law. Her punishment was a criminal fine of 4,000 SEK.

On appeal, the Swedish court referred a number of questions regarding the proper interpretation of the Directive—and therefore also the Swedish implementing law—to the European Court of Justice. The Court easily found that uploading personal data onto Lindqvist's website constituted 'personal data processing' covered by the Directive. With a bit more difficulty, the Court determined that Lindqvist's website did not qualify for any of the exceptions to the personal data processing covered by the Directive. Lindqvist invoked two exceptions allowed under the Directive: one for activities which fall 'outside the scope of Community law' and one for data processing 'by a natural person in the course of a purely personal or household activity.' The Court decided that her web page did not qualify for the latter exception because it was accessible to the entire universe of Web users; it was not confined to the home or to the personal realm. The Court went on to interpret the exception for activities 'outside the scope of Community law' as limited to activities falling under the Second and

[38] Case C-101/01, [2003] ECR I-12971.

Third Pillars. The Court therefore held that this exception too was unavailable to her: even though Lindqvist's website did not constitute a classic exercise of one of the four market freedoms—it was religious and charitable in nature—neither did it constitute an exercise of Second or Third Pillar powers. As a result, the Swedish registration system for personal data applied to personal websites, not only to Web operators like large commercial vendors and Internet providers.

It is worthwhile dwelling for a moment on the extraordinary reach of the Data Protection Directive. In narrowly interpreting the exception for activities falling outside Community law, the Court adopted an expansive reading of the Directive. The provision at issue reads, in full:

> This Directive shall not apply to the processing of personal data... in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union [Second and Third Pillars] and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law.

In giving meaning to the phrase 'outside the scope of Community law', the Court relied heavily on the reference to the Second and Third Pillars that immediately followed, as well as on the core subject areas of Second and Third Pillar listed thereafter. It found, using the canon of construction of *ejusdem generis*, that only activities of the same nature as public security, defence, state security, and criminal law were to be considered 'outside the scope of Community law.' In doing so, the Court departed from the opinion of the Advocate General, who had advised that activities should be considered within the scope of Community law only if they entailed the exercise of one of the four market freedoms or if they were regulated under a specific Community law, enacted under one of the Community's competences. The Court's interpretation also departed from the plain meaning of the Directive: the use of the phrase 'such as' suggested that the Second and Third Pillars and the types of operations typical of those pillars should be taken as an illustrative, not exhaustive, list of activities falling outside Community law. It was clear that the Court's interpretation was driven not so much by the text as by the spectre of future litigation. If the Court were to hold otherwise and find that the Directive applied to only market-related activities, how would future courts distinguish between market-related and other activities?

Setting aside the question of whether this interpretation was right, it accentuates the tension between a European law drafted in the early 1990s, before information technology had become a pervasive feature of daily life for the vast majority of citizens, and the application of that same law today. The drafters of the Directive could not have anticipated the incredible democratization of information technologies that has occurred over the past ten years. Because of this democratization, privacy principles today are relevant not only to big economic

and government operators with the capacity to gather large amounts of personal information—banks, telecommunications providers, government welfare agencies. With digital technology and the Internet, everyone can gather and disseminate large amounts of personal information, and therefore everyone is a potential infringer of the right to data privacy. But even though privacy principles should certainly guide individuals like Lindqvist who benefit from the tremendous potential of information technologies, it is doubtful that the same regulatory scheme that applies to large commercial and government operators is also appropriate for individual citizens.

The Court did, however, limit the Directive's scope in one way. It found that the mere act of making personal data available to individuals in third countries through the World Wide Web did not constitute a transfer of that personal data to third countries. Although the Directive nowhere defines the term transfer, the Court found that this interpretation was necessary to prevent a specific set of duties—applicable only to third-country transfers—from becoming a general set of duties—applicable to all operations using the World Wide Web. In the Swedish case, this interpretation relieved individuals like Lindqvist of the duty to obtain regulatory authorization before posting personal information on the Web, and it relieved the Swedish data protection authority of the burden of reviewing and approving applications from thousands of individuals like Lindqvist.

Of greatest interest to the theme of constitutional patriotism was Lindqvist's challenge to her prosecution based on her right to freedom of expression. She claimed that both the requirements of the Directive as well as the application of the Directive in her specific case breached the right to freedom of expression. In her view, the terms of the Directive were not precise enough to satisfy the fundamental rights requirement that any interference with the right to expression be based on a law specific enough to place citizens on notice of the extent and nature of the government interference. (The freedom of expression analysis is identical to the three-step privacy analysis reviewed earlier: any interference with the right must be authorized by law, must seek to accomplish a legitimate purpose, and must be proportionate to the burden placed on the right.) Lindqvist also argued that the Directive failed to satisfy the proportionality requirement: the burden on the right to expression placed by the Directive's various privacy safeguards was disproportionate. And according to Lindqvist, even if the Directive as a whole were to be found lawful, in her particular case the burden on her freedom of expression should be considered disproportionate: the interference with her colleagues' right to privacy was minimal, given that most of the personal information on the web page was already available publicly or was trivial. Under such circumstances, her right to free expression should prevail, not the other way around.

The Court rejected this challenge but, at the same time, directed the Swedish court to take into account Lindqvist's right to freedom of expression. The Court acknowledged that some of the Directive's terms were vague and allowed for

considerable choice at the national level when the Directive was implemented into national law. The Court dismissed these concerns, however, as intrinsic to the policy area: a far-reaching regulatory scheme seeking to cover data protection throughout the economy was necessarily broadly drafted. In addition, the Court found that the Directive took adequate account of freedom of expression by requiring that, in the application of the Directive, the right to freedom of expression always be balanced against the right to data protection as well as the other rights and interests advanced in the Directive. The Court concluded by directing the Swedish court to conduct the balancing exercise:

> Thus, it is, rather, at the stage of the application at national level of the legislation implementing Directive 95/46 in individual cases that a balance must be found between the rights and interests involved.
>
> In that context, fundamental rights have a particular importance, as demonstrated by the case in the main proceedings, in which, in essence, Mrs Lindqvist's freedom of expression in her work preparing people for Communion and her freedom to carry out activities contributing to religious life have to be weighed against the protection of the private life of the individuals about whom Mrs Lindqvist has placed data on her internet site.
>
> Consequently, it is for the authorities and courts of the Member States not only to interpret their national law in a manner consistent with Directive 95/46 but also to make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law, such as inter alia the principle of proportionality.

By sending the fundamental rights question back to the Swedish court, the Court of Justice not only avoided a difficult issue. It allowed for considerable national discretion in deciding the matter. The fundamental rights balance between privacy and speech is by no means a precise science and, by holding that the Swedish court was responsible for the balancing, the Court acknowledged that the outcome would be distinctive to Swedish law. In other words, the Swedish court was required as a participant in the European constitutional order to take into account both privacy and freedom of expression, but the accommodation of these two fundamental values was to be distinctive to Sweden's constitutional order. Of course, in the future, the Court of Justice might choose to give a European solution to the privacy-speech conundrum. Yet for the time being, the Court has decided to recognize that national constitutional cultures are the better site for the resolution of such thorny issues.

This constitutional settlement is reminiscent of many other areas of Community law. In deciding on the public policy exceptions to the fundamental market freedoms, the Court of Justice has always been reluctant to interfere with national legal orders in those cases in which the exception cannot be reduced to science but rather appears to have long-standing moral or religious roots. In a series of cases starting in the mid-1980s, the Court of Justice was called upon by the British courts to decide on the question of whether local

rules prohibiting commerce on Sundays were compatible with the duty to allow for free movement of goods under the EC Treaty. In *Torfaen Borough*, the Court found that such rules could, in theory, reduce trade in goods among Member States and therefore, to use the doctrinal language of European law, be 'caught' by Article 28 of the EC Treaty.[39] The Court also found, however, that the prohibition on Sunday trading might be justified as a legitimate social policy. This social policy has such obvious Christian origins that there was no need for the Court be explicit; Sundays, in the Christian tradition, should be devoted to God, not to the pursuit of worldly, commercial activities. But rather than conduct the proportionality analysis itself, the Court sent the question back to the British court. (As with the right to privacy, before a public policy reason can trump the right to free movement of goods, the proportionality principle must be satisfied: the restriction on the free movement of goods must be necessary for satisfying the public policy end and the burden on free movement of goods must be proportionate to the end being pursued.) Thus the Court recognized that the British court was best placed to address the inordinately difficult challenge of reconciling religion and the life habits that accompany religion with the demands of contemporary economic life and membership in a free trade area. In essence, the Court acknowledged that this was a matter of the British—not European—constitutional order and that only the British court could conceivably resolve the dilemma.

In fact, not even the British courts were up to the challenge. After a number of conflicting rulings in the British lower courts, the matter went to the House of Lords. The House of Lords, rather than decide the issue, referred another question to the Court of Justice: what criteria should it use to decide the proportionality of regulatory restrictions on Sunday trading? Only reluctantly, therefore, did the Court of Justice settle this thorny problem. And rather than answer directly the question put to it by the House of Lords and elaborate on the appropriate proportionality criteria, the Court simply declared that the Sunday trading rules were proportionate.[40] By giving a preliminary ruling in the sparest of terms, the European law on the correct compromise between old mores and new commerce was left as vague as possible.

Another illustration of the Court's deferential approach to national constitutionalism is the *Omega* case.[41] The contending values in that case were free movement of services and human dignity. Omega owned and operated a laserdrome in Germany. Although Omega was a German company, it operated under a franchise agreement with a British firm, and therefore it was covered by the free movement of services provisions of the EC Treaty. Soon after Omega opened its

[39] Case 145/88, *Torfaen BC v B & Q plc* [1989] ECR 3851, para 14. The Court notoriously reversed itself on this point in Cases C-267 and 268/91, *Criminal Proceedings against Keck & Mithoard* [1993] ECR I-6097. That point, however, is not at issue in this discussion.

[40] Case C-169/91, *Stoke-on-Trent* [1992] ECR I-6635.

[41] Case C-36/02, *Omega Speilhallen* [2004] ECR I-9609.

doors to the public, it was ordered by the local authorities to cease part of its operations—games involving shooting laser beams at human targets. The justification for the order was the offence to human dignity perpetrated by such laser games. According to the German authorities, 'the games which took place in Omega's establishment constituted a danger to public order, since the acts of simulated homicide and the trivialisation of violence thereby engendered were contrary to fundamental values prevailing in public opinion.'[42]

Omega appealed to the German administrative courts. The courts found that, indeed, such games constituted an offence to human dignity and therefore had been banned legitimately. However, the highest administrative court referred to the Court of Justice the question of the compatibility of the German right to human dignity with the European guarantee of free movement of services: Could Germany take advantage of the public policy exception to the principle of free movement of services based on a right that, at least in the specifics, was not common to all Member States, ie a right to human dignity that included a prohibition on laser games?

The Court of Justice answered in the affirmative. It found that respect for human dignity was as much a part of European law as it was of German law and therefore the protection of human dignity qualified as a legitimate reason for restricting free movement. The means or 'system of protection' in favour of human dignity in one Member State did not have to mirror the system of protection in other Member States for it to be considered legitimate. Of course, consistent with the Court's earlier case law, a rights-based restriction on free movement, like any other restriction, had to satisfy the proportionality test. The Court of Justice then concluded by reviewing the German court's holding and finding that it had applied these European principles in a permissible fashion.

Different from *Lindqvist* and *Torfaen Borough*, the Court of Justice in *Omega* did not accommodate national diversity by sending the task of balancing constitutional values back to the national court. Rather, accommodation was accomplished by resort to another judicial technique: the Court reviewed the findings of the German authorities under the deferential standard of 'margin of discretion'. The Court explained this standard of review as follows: '[T]he specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty.'[43] The Court scrupulously applied this standard to the facts of the case. In examining the rationale for the German ban and the proportionality of the ban, the Court deferred extensively to the reasons given by the local administrative authority and the referring court. And in reaching the conclusion that the ban was permissible, the Court took care not to substitute its judgment for that of the German authorities. Instead of concluding that the ban

[42] *Ibid*, at para 7. [43] *Ibid*, para 31.

was justified, the Court found that the ban could not be regarded as 'unjustifiably undermining the freedom to provide services.'[44] Although, on the face of it, this word choice might appear trivial, it is indeed important. It signifies that, under European law, the authority to decide on the balance between the market and the right to human dignity rests primarily with the German courts; the European Court of Justice may interfere only in those extreme cases in which that national authority appears to have been abused. It is for the German courts to determine whether a rights-based restriction on the market is justified and for the European Court of Justice to guarantee that this national determination is not unjustified.

These cases demonstrate that on tough constitutional questions, like the balance between privacy and expression or between human dignity and market rights, the Court of Justice gives precedence to national constitutionalism. By sending constitutional questions back to national courts and employing the deferential review standard of margin of discretion, the Court avoids the pitfalls of constitutional patriotism. It affirms a set of principles common to the entire European Union yet also defers to national constitutional values. In other words, it tolerates constitutional diversity.

Another way to understand these judicial techniques of constitutional tolerance is by reference to the sociology of the European centre. In cases like *Lindqvist* and *Omega*, the Court rightly recognizes that the public sphere of Europe is still too thin to provide an answer to most of the difficult questions of constitutional law. In the language of Rawls, in these areas, there are no terms of fair cooperation to which Europe's gradually emerging society of citizens could agree. To take the privacy example, although European citizens might agree that individuals should be entitled to speak about others and, at the same time, to lead part of their lives in private, the deeper question of how to resolve conflicting claims to speech and privacy has no answer. If the Court of Justice were to attempt to resolve the matter, it would be deciding entirely at random. Of course, courts like the Court of Justice contribute to making a constitutional culture. Yet, they do not do so in a social void. They do so against the background of a thick set of institutions and social practices that serve to enable collective life in a community. There is no objective indicator of the point at which the institutional and cultural fabric of a new society is thick enough that a court like the European Court of Justice can begin giving meaningful answers to constitutional questions like the privacy-speech balance. But if the Court prematurely attempts to resolve such questions, it risks at best, irrelevance, at worst, delegitimation. At best, the Court's judgment will be obeyed but will be entirely marginal to future debates on that constitutional question. At worst, the lack of social foundation for the Court's judgment will justify disobedience in that case or in future cases.

[44] *Ibid*, para 40.

B. *Von Hannover v Germany (Princess of Monaco)*

Because of its history, the European Court of Human Rights (ECtHR) has had many more opportunities than the European Court of Justice (ECJ) to address the right to privacy—and the inevitable conflicts that arise between the right to privacy and the right to free expression. In doing so, the ECtHR has been far less shy than the ECJ about reversing national decisions. It has shown considerably less deference towards national courts and has intervened actively in domestic decision-making, sometimes on the side of privacy, sometimes on the side of speech.

The ECtHR's doctrinal tools for negotiating the relationship between national and supranational constitutionalism are slightly different from those of the ECJ. The system of jurisdiction established under the European Convention on Human Rights does not contemplate preliminary references. Rather, individuals must exhaust their legal remedies at the national level, obtaining a final national judgment, before they may apply to the ECtHR for relief. One consequence of this system of jurisdiction is that the ECtHR cannot send legal issues back to national courts for final resolution. In its judgments, the ECtHR must decide once and for all whether there has been a breach of the Convention. The judicial dialogue made possible in the European Union by virtue of the preliminary reference system has no analogue in the European Convention on Human Rights.

The ECtHR, however, employs a deference doctrine similar to the margin of discretion that was afforded to Germany in the *Omega* case: Member States, in balancing fundamental rights against other fundamental rights or public interest objectives, benefit from a 'margin of appreciation'.[45] The concept does not appear in the European Convention on Human Rights but rather is a creation of the ECtHR. It was first articulated by the ECtHR in the 1970s in a series of cases involving the public emergency derogation to human rights.[46] Later, the concept was extended to a number of other human rights areas, including interferences with the right to privacy under Article 8 and with the right to free expression under Article 10. The deference given to Member States under the doctrine of margin of appreciation can save an interference with a Convention right at two distinct phases of the legal analysis: in assessing the importance of the public policy or competing individual right that serves as the government justification

[45] Indeed, on their face, the doctrines of margin of discretion and margin of appreciation are identical. The linguistic difference is an artefact of different English translations from the same, French term of art '*marge d'appréciation*'. For a comparison of the ECJ's case law with the ECtHR's doctrine of margin of appreciation, see Sweeney, 'A "Margin of Appreciation" in the Internal Market: Lessons from the European Court of Human Rights' (2007) 34 Legal Issues of Economic Integration 27, at 28–36.

[46] Cameron, *supra* note 17, at 28; H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (1996).

for the interference with the right, and in assessing the proportionality of the interference with the right.

The rationale for affording Member States discretion in making a determination on fundamental rights is similar to the one explored earlier in the context of the ECJ: national authorities are tightly integrated into their national social and cultural settings and are therefore in a better position than the ECtHR to give specific effect to the highly abstract commitments of the Convention. As the ECtHR stated in an early case on freedom of expression, 'by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact extent of these requirements [of free expression and the conditions under which a State's interference with free expression is justified]'.[47]

Most commentators agree that as the ECtHR has matured as a court, it has become tougher on defending Member States and more reluctant to defer to them using the doctrine of margin of appreciation.[48] This is certainly evident in the domains of privacy and freedom of expression.[49] And this reluctance to tolerate national constitutional diversity is dramatically at odds with the approach taken by the ECJ, analysed in the preceding section.

The recent case of *Von Hannover v Germany (Princess of Monaco)* illustrates the different approach taken by the ECtHR in resolving conflicting claims to privacy and freedom of expression.[50] At issue in the case were three separate German judgments, involving three different series of photographs of the Princess and her family. These photographs, taken without her consent, were published in a number of different German weekly magazines. At the time of publication of each series of photographs, the Princess of Monaco brought suit before the German courts to enjoin their publication. The litigation concerning the first series of photographs was the most exhaustive: it gave rise to extensively reasoned opinions by both the Federal Court of Justice (the highest court for the system of civil and criminal justice) and the Federal Constitutional Court. The subsequent litigation involving the two other series of photographs was decided based on this precedent and therefore, from a legal reasoning perspective, holds less interest.

The first series of photographs captured the Princess in a variety of situations. She was shown with Vincent Lindon, the French actor and her boyfriend at the time, in a secluded restaurant courtyard. She appeared together with her children in various public places, such as the market. And she was shown alone, horseback riding and shopping. Both the German court of first instance and the German

[47] *Handyside v The United Kingdom*, Application no 5493/72, 7 December 1976, para 49.

[48] See Sweeney, *supra* note 45, at 42; Yourow, *supra* note 46, at 56.

[49] In other areas, however, the movement away from the margin of appreciation is less clear. Indeed, according to some commentators, the ECtHR continues to rely heavily on the doctrine to decide a wide variety of cases. See Benvenisti, *supra* note 4, at 846; Carozza, *supra* note 5, at 57.

[50] Application no 59320/00, 24 June 2004, para 50.

court of appeals took the conventional view of privacy and held against the Princess. They found that as an 'absolute figure of contemporary history' the Princess could not protest the publication of her photographs. Because of their importance to contemporary debate, such figures could only claim a right to privacy when in the home, not when in public spaces. The highest court—the Federal Court of Justice—was more sympathetic to the Princess. It found that a concept of privacy limited to the home, even in the case of public figures like the Princess, was too narrow. Such figures should be able to prevent the public from prying even outside the home, in other spaces of 'seclusion'. In the Court's view, the restaurant courtyard in which the Princess was photographed eating with Vincent Lindon was precisely such a space of seclusion. The Court, therefore, enjoined the publication of the restaurant photographs but permitted publication of the remaining photographs since they involved entirely public places.

That, however, was not the end of the matter. The Princess of Monaco filed a constitutional complaint with the Federal Constitutional Court. In one respect, the Constitutional Court expanded her right to privacy. It found that children's privacy should receive special constitutional protection. Children, the Constitutional Court reasoned, were especially vulnerable to the autonomy harms caused by privacy violations because their personalities were still developing. Unless a public figure like the Princess of Monaco intentionally took centre stage at a public event with her children, the interest of the press and the public in knowing about the children must give way to the children's privacy. The Constitutional Court therefore enjoined the publication of all those photographs in which the Princess's children appeared. Remaining in the public eye were only those photographs in which she appeared horseback riding and shopping.

Based on this reasoning, the German courts rejected two later lawsuits brought by the Princess, seeking to enjoin the publication of two other sets of photographs. The first series of photographs showed the Princess enjoying different sports together with her husband, Prince Ernst August von Hannover. The second showed her stumbling at the pool of a private country club. Both series of photographs, according to the German courts, involved places fully visible to the public eye. They did not objectively demonstrate an effort, by the Princess, to create a place of seclusion. Nor were they taken of her together with her children. Therefore, before the German courts, the public interest in the photographs of the Princess prevailed.

The Princess had better luck before the European Court of Human Rights. The Court found that the publication of all the photographs at issue in the three German proceedings violated the Princess's right to private life. The Court first elaborated on the value of the right to private life. In doing so, it sought to identify, in abstract terms, the values underpinning the right to private life, and, in concrete terms, the circumstances under which the Court would recognize the right:

> [P]rivate life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings... There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'.

How would the Court recognize that zone which fell within the scope of 'private life'? The Court said that it would consider 'whether the material thus obtained was envisaged for a limited use or was likely to be made available to the general public.' Since the photographs showed the Princess in her daily life, not engaged in public functions, the Court found that the photographs belonged to her private life.

The Court then turned to the competing right of freedom of expression. It emphasized the importance of free expression and the press to a democratic society: the press had a duty to impart 'information and ideas on all matters of public interest.' Yet, at the same time, the Court underscored the duties and responsibilities of the press: 'it must not overstep certain bounds, in particular in respect of the rights of others.'

The balance between the two rights, however, was struck in favour of the Princess and the right to privacy. The Court reached this conclusion based on the low value it attached to the speech involved in the case. The Court employed an implicit hierarchy of speech. At the bottom of this hierarchy, the Court placed the photographs of the Princess and declared them unworthy of protection, at least when in conflict with the right to privacy. The Court drew three distinctions. First, according to the Court, words were superior to images because words generally communicated ideas whereas images could convey very personal information. Secondly, expression concerning politicians was considered more valuable than expression concerning private individuals. In the view of the Court, the Princess was a private individual because she did not exercise official functions on behalf of the State of Monaco. The third distinction employed by the Court was between information on an individual's public life and information on that same individual's private life. Only in special circumstances did the public have the right to learn of the latter. These photographs combined the worst of all categories: as photographs of a private figure and of the private life of that figure, they deserved no protection. Thus the Court held that Germany, in permitting publication of the photographs, had violated the right to privacy under the European Convention on Human Rights. In reaching this decision, the Court made only passing reference to Germany's margin of appreciation on the rights question.

The purpose of this chapter is not to assess the correctness of the Court's balance between privacy and expression in the *Princess of Monaco* case. This consideration of the Court's reasoning is simply designed to show that there is ample room for disagreement on the matter. It would not be unreasonable to

attach greater value to the photographs than was done in the case and, consequently, to find that the right to know about the Princess's activities trumped the Princess's right to privacy. This, in essence, is the conclusion that was reached by the German courts. And yet the European Court of Human Rights failed to take heed of Germany's constitutional settlement.

4. Tolerant and Intolerant Constitutional Patriotism

The contrast between the case law of the two courts is striking. While the ECJ deferred to national law on the privacy-speech question, the ECtHR handled the matter directly under European law. In this instance, given the circumstances of the two cases, the ECJ followed the better path. The *Lindqvist* judgment both affirmed a European commitment to privacy and free expression *and* made room for diverse moral orderings of public life at the national level. In the future, the ECtHR would do well to make heavier use of the legal doctrine of margin of appreciation so as to negotiate a similar compromise between European universalism and national particularism.

Certainly there are reasons for European courts to intervene directly in privacy cases. A national court's resolution of the right claims might be so clearly one-sided—in favor of the government's interference with privacy or a competing rights claim—that the decision constitutes a breach of European law. Furthermore, as a matter of institution-building, supranational courts must sometimes intervene. If supranational courts always hold for defending states, against complainants, they risk appearing to be mere puppets of those states, not independent lawgivers. But neither of these reasons was present in the *Princess of Monaco* case. The German courts carefully considered the Princess's claims and, in the course of the litigation, progressively limited access to the Princess's private life. The remaining right to know—the photographs of the Princess in non-secluded places by herself or in the company of other adults—had a plausible relationship to public debate. The Princess of Monaco is a member of a ruling royal family. She does not govern herself, but she does benefit directly from a system of public authority that, like all other such systems, should be subject to scrutiny, debate, and criticism. Germany's resolution of the privacy-speech conflict in favour of the press was not so biased as to constitute a breach of European law. Neither was the ECtHR at risk of appearing to be a tool of powerful sovereign states. Set against the Court's long track record of deciding cases against defending states, a judgment in favour of Germany would not have had the appearance of capitulation to national interest.

Instead, in the *Princess of Monaco* case, the countervailing consideration of tolerance for constitutional pluralism should have prevailed. The German courts were expounding a national view of the right and good organization of public debate. That view was consistent with the constitutional law of certain other

national systems and at odds with others. In the *Princess of Monaco* litigation itself, the lower courts acknowledged that, had French instead of German law applied, the case would have come down in favour of the Princess.[51] But the German decision in favour of the press was in line with the law in other European countries. For instance, under English law, the press would also have prevailed.[52] Given this diversity and the absence, still, of a thick European public sphere, the ECtHR should have deferred to Germany's constitutional settlement.

This, of course, was the outcome of the *Lindqvist* case. In that case, the ECJ deferred to national constitutionalism by deliberately not deciding the privacy-speech conflict. Instead, the ECJ sent the legal question back to the Swedish court. This move was made possible by the preliminary reference system, a system of jurisdiction unavailable to the ECtHR. But the ECtHR's long-standing doctrine of margin of appreciation can serve a similar end. Based on the margin of appreciation enjoyed by Member States, the ECtHR could have deferred to the privacy-speech balance struck by the German courts.

Many scholars take a dim view of the doctrine of margin of appreciation. The ECtHR's resort to the doctrine is cast as the abandonment of rights, morality, and reason in the face of powerful, oppressive states.[53] Yet, as demonstrated by this chapter's review of the ECJ's use of analogous doctrines, the margin of appreciation can serve good purposes too. It is not just a face-saving device for a supranational court opposed by powerful Member States. With deference doctrines, courts can construct a supranational constitutional order and, at the same time, recognize and respect national constitutionalism. Deference doctrines like the margin of appreciation can be used to safeguard constitutional pluralism even as a single, European constitution is being built.

To understand the contribution that such doctrines can make to constitutional pluralism, it is important to appreciate the difference between ordinary appellate review and review by one court of another court's determination of law based on a deferential standard of review. In an ordinary judicial system, higher courts generally do not give any special consideration to the determinations of law made by lower courts. In other words, if a determination of law is appealed to a higher court, the higher court will decide the legal question *de novo*.[54] To take an example familiar from the earlier discussion of the *Princess of Monaco* case, even

[51] See Judgment of the Federal Court of Justice, BGHZ 131, 132, 19 December 1995, translated in B. S. Markesinis and H. Unberath, *The German Law of Torts: A Comparative Treatise* (4th edn, 2002), 449.

[52] See Neill, 'Privacy: A Challenge for the Next Century' in B.S. Markesinis (ed), *Protecting Privacy* (1999), 1; *Naomi Campbell v MGN Limited* [2004] UKHL 22, 6 May 2004.

[53] See Letsas, *supra* note 4, at 731–2; Benvenisti, *supra* note 4, at 847.

[54] This discussion does not address appellate review of questions of fact. On questions of fact, higher courts generally defer to lower courts because lower courts are better equipped to establish the facts in a particular case. Moreover, a question of fact is, by definition, limited to the particular case before the court and therefore a lower court's determination will not reverberate throughout the legal system.

though the German lower courts had already decided that a public figure like the Princess of Monaco could not assert a privacy right outside the home, the German Federal Court of Justice and then the Constitutional Court each decided the question anew. This is because the courts in a single judicial system all share in the same judicial power and the courts at the apex of the system stand in a hierarchical relationship to the courts at the bottom of the system. In the interest of coming to the best resolution of a question of law—questions which, by definition, have implications for an entire legal system—a court of last resort is bound to give fresh consideration to the various interpretive possibilities.

By contrast, deferential standards of review carry an acknowledgment of the independent power of the government body under review. Such standards are employed routinely by national courts tasked with reviewing parliamentary laws and executive decisions.[55] The judicial branch recognizes that, under traditional separation of powers principles, the legislative and executive branches are vested with independent lawmaking and administrative powers. Courts are not supposed to legislate or to execute, just to adjudicate. In other words, judicial intervention is warranted only if the decision of the legislature or the executive appears to be so misguided as to violate a command set down in the constitution or, in the case of an administrative decision, the applicable legislation. Judicial deference is the doctrinal recognition of this system of separate powers.

Deference in supranational judicial systems signifies the same type of institutional relationship but between courts rather than branches of government. Each court—European and national—is vested with independent powers. National courts are authorized to interpret their national constitutions, the two European courts to interpret the emerging European constitutional order. Deferential review by the European courts represents an acknowledgment of the extensive set of moral commitments set down in national constitutions and the privileged role of national courts as interpreters of those moral commitments. Only if national constitutional authority is abused, should the European courts intervene. In other words, only if national adjudication violates the minimum standards set down in Europe's still-fledgling constitution, should the European courts decide.

This argument in favour of the ECtHR's resort to the margin of appreciation does not take lightly the human rights critique of the doctrine. Human rights, undoubtedly, contain a universal, moral core.[56] And because human rights inhere in individuals as human beings, not as citizens of one nation or another, they should not vary depending on geography. They should give rise to the same

[55] See R.J. Pierce Jr, 1 *Administrative Law Treatise* 137 (4th edn, 2002).

[56] The debate on universalism versus diversity in the human rights arena and the implications for the ECtHR's margin of appreciation is extensive. For the universalist position and a critical view of the doctrine of margin of appreciation, see Benvenisti, *supra* note 4, at 847; Letsas, *supra* note 4, at 731–2.

treatment everywhere. Yet defending a universal set of human rights is not incompatible with recognizing constitutional diversity. As the European Court of Justice did in the *Lindqvist* case, it is possible both to affirm a common, European privacy right and to hold that certain, morally repugnant interferences with the right will constitute a human rights violation but that otherwise, depending on the national context, the privacy right might be trumped by competing rights or public policies. The recognition of such pluralism, of course, narrows the reach of human rights law. Yet if Europe truly values its different traditions of social organization and political contestation, it does not seem that it could be otherwise.[57]

In the human rights world, the doctrine of the margin of appreciation has been the subject not only of critique but also praise. The praise comes, essentially, in two varieties: the first casts the doctrine as advancing certain principles that are part and parcel of the moral architecture of human rights[58] whereas the second treats the doctrine in pragmatic terms, as a necessary judicial tool in an international realm of sovereign states reluctant to accept the dictates of international institutions.[59] The constitutional patriotism analysis in this article contributes to this literature by advancing a separate reason for the normative desirability of the margin of appreciation: because the ECtHR defends a Europe-wide constitution it should be sensitive to the imperatives of tolerance that are part of that constitution.

In essence, this analysis treats the ECtHR as a constitutional court, not simply an international human rights tribunal. The rights that are defended by the Court are not simply universal moral standards but individual entitlements that arise because of citizenship in a particular social community and political order—Europe. The ECtHR's stature as a constitutional court is not a matter of explicit design but rather is a by-product of the intertwined nature of rights in the European Union and the Council of Europe and the incremental, yet spectacular, success of European integration. This chapter's earlier description of the many norms and institutions that guarantee a European right to privacy is but one example of the overlapping and self-reinforcing nature of rights in Europe today. The European Union's court—the ECJ—is widely recognized as a constitutional court. When the ECJ interprets the treaties and establishes fundamental principles of law, it gives shape to public power and individual rights throughout the European Union. It makes very little sense to deny this same status to the ECtHR when both the positive instruments and the judicial precedent that serve

[57] Weiler, 'Human Rights, Constitutionalism and Integration: Iconography and Fetishism', in E. O. Eriksen, J.E. Fossum, and A.J. Menéndez (eds), *supra* note 8, 59–68, at 66.

[58] Carozza defends the margin of appreciation based on subsidiarity. Carozza, *supra* note 5, at 46–50, 56–63. Mahoney argues that the doctrine is based on subsidiarity, democracy, and cultural diversity. Mahoney, 'Marvelous Richness of Diversity or Individious Cultural Relativism?' (1999) 19 Human Rights LJ 1, at 2–3.

[59] See eg Helfer and Slaughter, *supra* note 6, at 282–91.

as the basis for their decisions are inextricably interwoven. Thus, under the theory of constitutional patriotism, both courts should be self-conscious of the importance of fundamental rights in their particular geographical and historical instantiations to national self-identities. And before reaching a European determination on any particular rights dilemma—like the privacy versus speech conflict in *Lindqvist* and *Princess of Monaco*—both courts should consider whether such a determination is truly warranted or whether, indeed, the best constitutional outcome is tolerance of national diversity.

5. Conclusion

The emerging European right to privacy reveals both the identity-creating potential and the diversity-suppressing dangers of constitutional patriotism. The right has spread to virtually every corner of European governance. Under the European Convention on Human Rights, privacy has been construed broadly to protect individuals against most types of observation—even in public places—and to protect individuals against the collection of most types of personal information—even if that information is considered banal or widely available. In addition to the European Convention on Human Rights, the Council of Europe has Convention 108. Convention 108 sets down a series of guarantees specific to *data* privacy that have been enacted domestically throughout Europe.

In the European Union, the Charter of Fundamental Rights recognizes not simply a general right to privacy but also a right to the protection of personal data. This more specific privacy right is also guaranteed throughout the common market by the European Union's detailed Data Protection Directive. And when national police, customs officers, and courts cooperate on law enforcement and immigration policy, they are covered by a similar set of EU data protection laws.

Already the European Court of Human Rights and the European Court of Justice have been called upon to interpret this legal framework for privacy. These cases raise hard questions of constitutional law since individual claims to privacy routinely come into conflict with the right of others to know—to engage in public debate, transact in the marketplace, or pursue public ends. Just by examining one subset of this case law—the privacy-speech balance—it is possible to catch a glimpse of the community-building possibilities of a shared, European commitment to rights. In both the *Lindqvist* case and the *Princess of Monaco* case, the ECJ and the ECtHR proudly declared Europe's respect for free expression and privacy. And they explained the importance of these rights to the—European—understanding of the morally good ordering of life in a human community. Quite obviously, for the ECJ and the ECtHR, liberal values constitute a source of European unity.

But the ringing judicial affirmation of liberal European rights in the *Lindqvist* and *Princess of Monaco* cases also carried illiberal undertones. Because with a court's declaration of rights comes the imperative to protect rights and decide

cases, regardless of another court's resolution of the very same rights claim. In an intrinsically pluralist political order like Europe, this admittedly noble commitment to rights can become the illiberal imposition of a uniform, hegemonic constitutional identity. Thus sometimes the impulse to defer to national courts on difficult questions of constitutional law, such as the privacy–speech balance in the *Lindqvist* and *Princess of Monaco* cases, can be the normatively superior outcome. In essence, the ECtHR and the ECJ are not like any ordinary set of constitutional courts. Their constitutional order is founded upon historically rooted, radical diversity. It is a nascent constitutional order, lacking the social and institutional infrastructure that would enable a genuinely European solution to many of the constitutional conflicts that emerge daily before national courts. Deference, for the European courts, is an essential instrument of tolerant—and patriotic—constitutionalism.