



RECOGNISING INFORMATION PRIVACY:
A COMPARATIVE CASE STUDY OF LEGAL
CHANGE IN LATE MODERN SOCIETIES

Alice Schneider
Christ Church

A thesis submitted to the Faculty of Law at the University of Oxford for the degree of

Doctor of Philosophy

Trinity Term 2020

c. 99,700 words

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Abstract

The development of privacy laws is often taken to represent a response to socio-technical changes of modern life. But why, if modern societies were confronted with innovations in information and communication technologies in roughly the same way at the same time, did legal systems develop such different approaches to information privacy?

Inspired by the diversity of the legal encoding of privacy, this thesis pursues two main objectives. The first is to develop a nuanced, empirically informed understanding of why information privacy acquired its respective legal status in the legal systems of Germany and the UK. Secondly, by drawing on privacy law developments in two legal systems during the latter half of the twentieth century as a case study, this thesis aims to contribute to a more general understanding of the phenomenon of legal change in late modern societies.

These objectives are achieved by a combination of theoretical reflections and qualitative empirical inquiries. The theoretical component of this thesis considers the problems we incur in pinpointing specific instances of legal change. A conceptualisation of legal change as acts of legal recognition provides the framework for the empirical component of this study. In particular, this research project develops an understanding of legal change as a meaningful type of social action that takes into account the significance that social agents attribute to their own actions. Empirical investigations thus focus on the *reasons* for recognising privacy that lawmakers express in official lawmaking discourses.

This thesis finds that considerations such as institutional norms and expectations about lawmaking (legal antecedents), dystopian themes in popular culture, and foreign and international legal developments have all prompted lawmakers to afford legal recognition to information privacy in Germany and the UK. These findings illustrate the role of reflexivity, metaphor and globalising pressures in late modern lawmaking.

Acknowledgements

I acknowledge with gratitude the advice and help of my doctoral supervisor, Professor Bettina Lange. I am grateful to the assessors of my transfer-of-status, Dr Naomi Creutzfeldt and Dr Iginio Gagliardone, as well as to my confirmation-of-status assessors, Professor Fernanda Pirie and Professor Denis Galligan.

I am grateful to the Economic and Social Research Council for financially supporting this research project, and to the Oxford Centre for Socio-Legal Studies, as well as to the Oxford Jurisprudence Discussion Group, for providing intellectual stimulation.

I received generous academic and emotional support from my friends and family throughout the different stages of my doctoral research. In particular, I wish to thank Maayan, Stacy, Mikołaj, Jonas, Esra, my parents Birgit and Marc and my sisters Tara, Lynn and Leonie. Thank you, Davin, for being on my team.

To my family.

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1. Introduction

The introductory chapter outlines the doctoral project's aim of contributing towards a socio-legal understanding of legal change in late modern societies. It discusses the scope and limitation of this endeavour and explains the selection of the legal recognition of information privacy in German and UK law as a case study.

1.1 Developing information privacy laws: a case study of legal change

Since the middle of the 20th century, privacy law has been an area of progressively active development in legal systems across the world.¹ It is also a domain of historical and continuing differences across modern legal systems.² These differences have been described as particularly noteworthy in light of the oft-proclaimed late modern post-political liberal consensus.³ They have also been described as surprising, given the growing international and especially inter-European pressures and positive incentives for legal harmonisation. Long before concepts and terms like 'privacy', 'la vie privée' or 'Privatsphäre' were recognised as legally valid concepts and enforceable rights, legal systems were confronted with the same kind of normative conundrums that are central to our contemporary conception of information privacy:⁴ the conflict

¹ Graham Greenleaf, 'Sheherezade and the 101 Data Privacy Laws: Origins, Significance and Global Trajectories' (2014) 23 *Journal of Law, Information & Science*; James B Rule, 'Introduction' in James Rule and Graham Greenleaf (eds), *Global Privacy Protection: The First Generation* (Edward Elgar 2008).

² James Q Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' (2004) 113 *Yale Law Journal* 1151; Philip Leith, 'The Socio-Legal Context of Privacy' (2006) 2 *International Law in Context* 105; Paula Kift, 'Bridging the Transatlantic Divide in Privacy' (2013) 2 *Internet Policy Review* 1; David Cole and Federico Fabbrini, 'Bridging the Transatlantic Divide? The United States, the European Union, and the Protection of Privacy across Borders' (2016) 14 *International Journal of Constitutional Law* 220; Herbert Burkert, 'Privacy - Data Protection: A German/European Perspective'.

³ George Klosko, *Democratic Procedures and Liberal Consensus* (Oxford University Press 2000).

⁴ Much scholarship on privacy specifically concerns *information* privacy but does not acknowledging this focus, even though there may be good reasons for it. Some conceptual approaches distinguish between different kinds of privacy, such as bodily/physical privacy, spatial privacy, decisional privacy and information privacy. See, for example, the distinction drawn by Stefano Scoglio, *Transforming Privacy: A Transpersonal Philosophy of Rights* (Praeger 1998) 1; P Ganley, 'Access to the Individual: Digital Rights Management Systems and the Intersection of Informational and Decisional Privacy Interests' (2002) 10

between one's interest to keep certain aspects of one's life hidden versus other people's interest to access it.⁵ This begs the question of why, if the matter of information privacy violation had always been an implicit legal concern within societies, did information privacy only begin to be endowed with explicit legal recognition and systematic protection within the latter half of the 20th century?⁶

The explanation usually offered by legal historians suggests that the gaps or inadequacies of the legal instruments previously used to protect information privacy interest⁷ became more pronounced and obvious as a consequence of innovations in information and communication technologies.⁸ The legal literature thus generally presents the legal encoding of information privacy as a straightforward and unequivocal institutional response to socio-technical changes of late modern life.

International Journal of Law and Information Technology 241; Daniel J Solove, 'A Brief History of Information Privacy Law' in Kristin Mathews (ed), *Proskauer on Privacy* (New York Practising Law Institute 2006). Others do not make this distinction but view information flows as central to all privacy matters; see, for example, Helen Nissenbaum, *Privacy in Context: Technology, Policy and the Integrity of Social Life* (Stanford University Press 2010).

I subscribe to the second approach. This means that even though I focus on information privacy in this thesis, considerations that some might count as 'spatial' or 'physical' privacy matters feature indirectly, so they are not explicitly excluded from the here contained investigations. Yet, in employing the term 'information privacy', I aim to signal to those who carve up different kinds of privacy that information privacy is the dominant concern of this thesis; a thematic choice designed to privilege what I take to be the most salient privacy matter.

⁵ Stephan Balthasar, *Der Schutz Der Privatsphäre Im Zivilrecht: Eine Historisch-Vergleichende Untersuchung Zum Deutschen, Französisch Und Englischem Recht Vom Ius Commune Bis Heute* (Mohr Siebeck 2006).

⁶ Gloria González Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (Springer 2014); Balthasar (n 5) 5.

⁷ Huw Beverly-Smith, Ansgar Ohly and Agnès Lucas-Schloetter, *Privacy, Property and Personality: Civil Law Perspectives and Commercial Appropriation* (Cambridge University Press 2005); C Rees, 'Tomorrow's Privacy: Personal Information as Property' (2013) 3 International Data Privacy Law 220

⁸ Huw Beverly-Smith, Ansgar Ohly and Agnès Lucas-Schloetter, *Privacy, Property and Personality: Civil Law Perspectives on Commercial Appropriation* (2005) 100; Manuel Castells, *The Information Age: Economy, Society and Culture, Volume 1: The Rise of the Newtork Society* (Second Edi, Blackwell Publishers 2000); P Leith, 'Europe's Information Society Project and Digital Inclusion: Universal Service Obligations or Social Solidarity?' (2012) 20 International Journal of Law and Information Technology 102; Daniel J Solove, *The Digital Person: Technology and Privacy in the Information Age* (New York University Press 2004); J Hornle, 'Making Laws for Cyberspace, by Chris Reed' (2012) 20 International Journal of Law and Information Technology 370.

However, this narrative raises the question of why, if modern societies were confronted with innovations in information and communication technologies in roughly the same way at the same time, did legal systems such as those of Germany and the UK develop diverse approaches to information privacy?

This question touches on the notion - tentatively evident in some of the literature on the topic⁹ - that nature and scope of the legal recognition of privacy in different legal systems is likely to be informed by different values and normative choices. This argument is most expressly advanced by James Q. Whitman's *The Two Western Cultures of Privacy: Dignity Versus Liberty*.¹⁰ By way of introduction, Whitman asks, 'If privacy is a universal human need that gives rise to a fundamental human right, why does it take such disconcertingly diverse forms?'¹¹ He proceeds to propose that differences between approaches to privacy in the US and European context can be traced back to more fundamental cultural differences in conceptions of the meaning of privacy - one supposedly grounded in the American idea of liberty and one in the European idea of dignity. Whitman's point hits a nerve in comparative scholarship on privacy law, which is that privacy remains an island of normative and regulatory relativism at a time of globalisation and increasing legal convergence across states.¹²

To be sure, it is widely acknowledged that changes in media and information technologies have contributed to establishing privacy issues on lawmakers' agendas. This is also confirmed by the findings of this doctoral project. But as pointed out by Whitman, variance in the legal design of privacy forcefully showcases that the legal recognition of privacy is not a straightforward response to an obvious regulatory challenge. Indeed, it is questionable whether we are able to identify a coherent

⁹ Beate Rössler, *The Value of Privacy* (Polity Press 2005); Balthasar (n 5); Hilary Delany, Eoin Carolan and Cliodhna Murphy, *The Right to Privacy: A Doctrinal and Comparative Analysis* (Thomson Round Hall 2008); Hans-Joachim Cremer, *Humans Rights and the Protection of Privacy in Tort Law: A Comparison Between English and German Law* (Routledge 2011).

¹⁰ Whitman (n 2).

¹¹ *ibid* 1151.

¹² Colin J Bennett, *Regulating Privacy: Data Protection and Public Policy in Europe and the United States* (Cornell University Press 1992) 193; Greenleaf (n 1).

‘privacy problem’ across legal systems to begin with:¹³ scholars struggle to define privacy and portray its value as notoriously elusive.¹⁴ Approaches that seek to conceptualise information privacy have presented it as a kind of autonomy¹⁵, as an aspect of human dignity¹⁶ or as control over the access that others have to us.¹⁷ The problem faced by those who theorise privacy is the extensive cross-cultural variability and contextual contingency of privacy as a value.

For such reasons, some scholars have opted for even more generic descriptions of privacy, such as ‘contextual integrity’¹⁸, or simply describe it as a conglomerate of the norms that govern information flows.¹⁹ This is not a merely theoretical issue; as noted by sociological and anthropological research on privacy-practices and norms, understandings of privacy are indeed subject to extensive empirical variation across social groups and even individuals.²⁰ This means that in theory, in practice and in law, privacy remains ‘an unusually slippery concept’.²¹ What exactly privacy *is* and what its value is grounded in remains a live debate to this day.

¹³ Daniel Solove defines concept of privacy through a taxonomy of the threats posed by different types of privacy invasions, see Daniel J Solove, ‘The Digital Person and the Future of Privacy’ in Katherine Standburg and Daniela Stan Raicu (eds), *Privacy and Technologies of Identity: A Cross-Disciplinary Conversation* (Springer 2006).

¹⁴ Nissenbaum (n 4).

¹⁵ David Feldman, ‘Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty’ (1994) 47 *Current Legal Problems* 41; Thomas Halper, ‘Privacy and Autonomy: From Warren and Brandeis to Roe and Cruzan’ (1996) 21 *The Journal of Medicine and Philosophy* 121; Gary Kemp, ‘Autonomy and Privacy in Wittgenstein and Beckett’ (2003) 27 *Philosophy and Literature* 164; Rössler (n 9).

¹⁶ Edward J Bloustein, ‘Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser’ in Ferdinand David Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press 1984).

¹⁷ Barrington Moore, ‘Privacy’ (1985) 22 *Society* 17; Alan Westin, ‘The Origins of Modern Claims to Privacy’ in Ferdinand D Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press 1984).

¹⁸ Nissenbaum (n 4).

¹⁹ Moore, A.D., 1998, ‘Intangible Property: Privacy, Power, and Information Control’, *American Philosophical Quarterly* 35: 365–378

²⁰ Christena Nippert-Eng, *Islands of Privacy* (The University of Chicago Press 2010).

²¹ Whitman (n 2) 1153.

This thesis does not seek to provide a philosophical account of privacy. In particular, I do not wish to commit myself to any particular view on whether and why privacy is valuable. Rather, my focus is on how lawmakers have deliberated and answered these questions in developing legal norms. In this sense, the focus of this thesis is not privacy itself, but privacy laws as products of legal entrepreneurship.²²

Proceeding from the recognition that laws are human artifacts, I examine the social constructions that underpin the making of law. The point is to develop a better understanding of legal change as a social process.²³ That the concept of privacy is afflicted by conceptual and normative puzzles means lawmakers have a wide scope of discretion in picking out what they take to be valuable about information privacy.²⁴ Hence, the development of legal approaches to privacy allows insights into the values and understandings lawmakers hold about society and law's supposed role in it. Due to its famously elusive nature, information privacy is an area of law where purposes, aims and policy objectives themselves are unsettled and up for deliberation, meaning that legal activity in this area likely showcases not only instrumental but also value-rational reasoning and action.²⁵ Furthermore, privacy arises as a consideration in relation to a large variety of key issues at the heart of modern politics, such as the relationship between individuals and the state, the rise of the information society²⁶ and the shifting boundaries between public and private life.²⁷ Additionally, in recent

²² The term 'legal entrepreneurship' is inspired by Sunstein's 'norm entrepreneurship'. Sunstein describes norm entrepreneurs as political participants who are in favour of changes in norms: Cass R Sunstein, 'Social Norms and Social Roles' (1996) 96 *Columbia Law Review* 903, 23.

²³ The term 'legal change' is used here both in reference to the *changing* of existent and the *making* of new law. Not only do these two processes typically involve each other, but they both entail a transformation in the legal status quo.

²⁴ Rössler (n 9); Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford University Press 2010).

²⁵ "The Definition of Sociology and of Social Action", in Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press 1978) 4.

²⁶ Castells (n 8).

²⁷ John B Thompson, *The Media and Modernity: A Social Theory of the Media* (Polity Press 1995); John B Thompson, *Political Scandal: Power and Visibility in the Media Age* (Polity Press 2000).

decades, privacy has become an increasingly active area of legal development, suggesting it is a salient site of legal norm formation.²⁸ This makes privacy laws a particularly rich source of information about legal change in modern societies.

1.2 Information privacy law in late modernity

In the context of the concept of modernity, the attributes 'late', 'high', 'fluid' and 'post' are used to signify a certain divergence from Enlightenment ideals of progress, scientific reason and rationality that provided the ideological framework for the 'traditional' modern way of life. In the context of the social sciences, the point of using these qualifiers of modernity is two-fold: firstly, sociology as a discipline was originally developed at the time of and in specific reference to the period of human history that is roughly described as 'modernity'.²⁹ The classical sociological theories of Weber, Marx, Durkheim and Simmel betray the central concern with the social changes and phenomena that are emblematic of modern societies, including topics like early capitalism, rationalisation and social fragmentation. Thus, employing the prefix 'post' calls attention to the fact that many of these classical theories and insights are of limited applicability to current social conditions. Secondly, under the heading of the above-mentioned qualifiers, social theorists and scientists have developed a range of descriptions, theories and hypotheses about the features that are central to contemporary social life. Both uses of the prefix 'post' are a matter of continuing debate.

In particular, various voices have proposed that this is a more nuanced question and matter of degree. In particular, the widely employed alternative concept of 'late modernity' implies that we have not yet fully transcended the 'modern era'. In Anthony Giddens' original formulation, 'late modernity' is used to describe a social world trapped between continuity and discontinuity; a situation in which 'the

²⁸ Sunstein (n 22); Ian Brown and Christopher Marsden, *Regulating Code: Good Governance and Better Regulation in the Information Age* (The MIT Press 2013).

²⁹ Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge* (University of Minnesota Press 1984).

consequences of modernity are becoming more radicalised and universalised than before'.³⁰ This characterisation of our contemporary society also features prominently in the works of the social theorists Zygmunt Bauman³¹ and Ulrich Beck.³² While they each stress different social changes or developments as particularly reflective of the late modern era, sociologists broadly agree that late modernity is a period of time in human history that was defined by the transformation of social orders in the context of an increasingly globalised neo-liberalist economic climate and began roughly in the last third of the twentieth century.³³ Legal scholars agree that it is roughly around the same period that information privacy came to be endowed with systematic legal recognition across societies, noting in particular the development of data protection laws that began with the 1970 Data Protection Act of the German state of Hesse.³⁴

Like sociological scholarship on postmodernity itself, legal discourse on the emergence of data protection laws display a tension between identifying the legal recognition of concepts like information privacy and data as a continuation of social developments that can be traced back to the beginnings of modern life,³⁵ and between viewing it as inspired by more recent, radical social changes such as the rise of computerised systems of public administration.³⁶ Given that most instances of legal change analysed here take place somewhere between modern and post-modern frames, this thesis explicitly employs the term 'late modern' to import ambiguity and reflexivity to the application of classical social theory to this phenomenon. The

³⁰ Anthony Giddens, *Modernity and Self-Identity* (Polity Press 1991) 3.

³¹ Zygmunt Bauman, 'Is There a Postmodern Sociology?' (1988) 5 *Theory, Culture & Society* 217.

³² Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage 1992).

³³ Giddens (n 30) 6; Beck (n 32) 10.; Frederic Jameson, *Postmodernism, or, The Cultural Logic of Late Capitalism* (Duke University Press 1991) 92.

³⁴ Bennett (n 12); Colin J Bennett and Charles Raab, *The Governance of Privacy: Policy Instruments in Global Perspective* (The MIT Press 2006).

³⁵ A common tenet is to refer to the continuing salience of the concerns identified in Warren and Brandeis' seminal 1890 piece, see, for example Walter F Pratt, *Privacy in Britain* (Associated University Press 1979) 10.

³⁶ This point is emphasised in Bennett (n 12); González Fuster (n 6).

combination of time/place and subject issue (i.e. information privacy) that constrains the here conducted inquiries into legal change suggests that the here generated insights into the legal recognition are of limited transferability to pre-or early-modern legal systems. This issue is addressed throughout the discussion of findings.

At the same time, employing the lens of postmodern theory to make sense of legal developments situated in this period may be of particular usefulness to understanding how the social reality of law concords with other late and post-modern social phenomena. The salience of information privacy in political and legal discourse is commonly portrayed as either symptomatic of or otherwise linked to social changes that also feature as salient themes in post-modern theory. Examples include the rise of social networks and information systems,³⁷ globalisation,³⁸ the increasing salience of simulacra through mediated communication,³⁹ the increasing commodification of information and aspects of the personality⁴⁰ and the rise of surveillance as mechanisms of control.⁴¹ These thematic entanglements, combined with its temporary occurrence, justify portraying information privacy as a specifically late modern normative idea⁴² and legal concept.⁴³ As outlined above, this research project approaches legal change as a type of social action whose subjective meanings it explores systematically.

³⁷ Castells (n 8); Thompson, *The Media and Modernity: A Social Theory of the Media* (n 27); Dan Schiller, *Digital Capitalism: Networking the Global Market System* (MIT Press 1999).

³⁸ Ralf Michaels, 'Globalization and Law: Law Beyond the State' in Reza Banakar and Max Travers (eds), *Law and Social Theory* (Hart Publishing 2013); François LeSieur, 'Regulating Cross-Border Data Flows and Privacy in the Networked Digital Environment and Global Knowledge Economy' (2012) 2 *International Data Privacy Law* 93.

³⁹ Jean Baudrillard, *Simulacra and Simulations* (Sheila Faria Glaser tr, University of Michigan Press 1994); William Merrin, *Baudrillard and the Media: A Critical Introduction* (Polity Press 2005) 29.

⁴⁰ Dan Schiller, *Digital Capitalism: Networking the Global Market System* (The MIT Press 2000); Paul Rubin and Thomas Lenard, *Privacy and the Commercial Use of Personal Information* (Kluwer Academic Publishers 2002); Beverly-Smith, Ohly and Lucas-Schloetter (n 7).

⁴¹ Lyotard (n 29); Christopher Slobogin, *Privacy at Risk: The New Government Surveillance and the Fourth Amendment* (The University of Chicago Press 2007); Colin J Bennett, *The Privacy Advocates: Resisting the Spread of Surveillance* (The MIT Press 1993).

⁴² Philip Allmendinger, *Planning in Postmodern Times* (Routledge 2001).

⁴³ Jack M Balkin, 'What Is Postmodern Constitutionalism?' (1992) 90 *Michigan Law Review* 1966, 1986.

Other outcomes of cultural production like art, literature or scientific knowledge⁴⁴ are more notorious for exposing the influences of postmodern features and themes. But recent scholarship into postmodern regulation suggests that even constructs like law are not insulated from the influence of intertextuality, irony, value pluralism, contradiction,⁴⁵ paranoia,⁴⁶ globalisation⁴⁷ and a preoccupation with risk.⁴⁸ This thesis is not concerned with laws themselves as much as it is with the meaningful social actions that bring them about. Irrespective of whether the content or form of contemporary laws can be said to exhibit postmodern features, emerging literature on legal and regulatory processes suggests that contemporary regulatory and law-making activities are afflicted by the conditions of postmodernity.⁴⁹

It can thus be summarised that this project's thematic occupation with information privacy and its predominant focus on law-making activities in the latter half of the twentieth century justifies attentiveness to the explanatory insights of postmodern theory. Yet this thesis does not confine itself to verifying or denying that the legal recognition of privacy is just a symptom of postmodernity: I do not treat the afore-mentioned postmodern concepts as hypotheses about law making. Instead, the claims, insights and concepts of postmodern theory are treated as interpretative aids through which this research projects findings on lawmakers' reasons for legal change may be illuminated. In light of the aforementioned focus of empirical investigations, employing postmodern theory in this way seems conducive to drawing out the

⁴⁴ Lyotard (n 29).

⁴⁵ Costas Douzinas and Ronnie Warrington, 'Justice Miscarried: Ethics and Aesthetics in Law', *Postmodern Theory* (1994) 2.

⁴⁶ Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey, 'Law and the Utopian Imagination: An Introduction' in Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey (eds), *Law and the Utopian Imagination* (Stanford University Press 2014) x.

⁴⁷ Brendan Edgeworth, *Law, Modernity, Postmodernity: Legal Change in the Contracting State* (Ashgate 2003).

⁴⁸ Reza Banakar, 'Law and Regulation in Late Modernity' in Reza Banakar and Max Travers (eds), *Law and Social Theory* (Hart Publishing 2013); Reza Banakar, 'Law, Rights and Justice in Late Modern Society: A Tentative Theoretical Framework', *Rights in Context: Law and Justice in Late Modern Society* (2012).

⁴⁹ Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'Etat* (Wiley, John & Sons, Incorporated 2010).

historical situatedness and contingency of lawmaking.⁵⁰ This, in turn, may be helpful in reflecting on the extent to which empirical insights into legal change can be engaged inductively for a more general theory of legal change.

1.3 Chapter summaries

1. INTRODUCTION

This introductory chapter has outlined the doctoral project's aim of contributing towards a general understanding of legal change in late modern societies. I have discussed the scope and limitation of this endeavour and explained the selection of the legal recognition of information privacy in German and UK law as a case study.

2. DEVELOPING PRIVACY LAWS AND LEGAL CHANGE: A CRITICAL LITERATURE REVIEW

Corresponding to this research project's objectives of understanding the development of privacy laws in Germany and the UK while also contributing to a more general understanding of legal change in modern societies, the review of literature in this chapter is divided into two parts (2.1 and 2.2). The first part critically surveys scholarship on the development on the legal encoding of information privacy in German and UK law. It discusses narratives in the literature that explain the development of information privacy and explores the extent to which existing scholarship accounts for commonalities and difference across legal systems. The second part of the literature review focuses on legal change and discusses how legal change has been understood and approached by different disciplines. The second part of the literature review chapter furthermore explains the need for the development of an empirically useful concept of legal change for the purpose of systematic exploration.

⁵⁰ Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G Marshall trs, Continuum 2004) 213.

3. TWO CONCEPTS OF LEGAL CHANGE

This third chapter contains part of the doctoral project's core theoretical contribution. It responds to the problem of how we may identify legal change empirically by developing and contrasting two theories of legal change. The first theory of legal change is underpinned by a more sociologically intuitive understanding of law, while the second theory is jurisprudentially useful because it rests on a conception of legal validity as binary. This chapter critically evaluates the insights into legal change each theory is able to generate. On the basis of this discussion, this chapter describes how legal change is operationalised for the purpose of exploring the legal recognition of information privacy.

4. EXPLORING ACTS OF PRIVACY RECOGNITION: METHODOLOGY AND ANALYTICAL STRATEGY

This chapter describes this study's comparative research design. It explains how the operationalisation of legal change as acts of legal recognition has driven data collection and analysis. This chapter furthermore describes the strategies employed in qualitative data analysis ("coding for reasons"). To elucidate the dataset, this chapter also contains a historical overview over acts of privacy recognition in German and UK law. The chapter furthermore outlines how the inductive comparison facilitates insights into lawmakers' reasons for privacy recognition.

The following three chapters present and discuss empirical research findings.

5. LEGAL ANTECEDENTS AND LAW'S CLAIMS

The fifth chapter focuses on the shaping force of the existing normative and institutional structures of legal systems. In particular, I discuss of how institutional designs of legal systems, as well as intrinsic fundamental features of law that are described as 'law's claims' – particularly laws claims to authority, and to be just – constitute lawmakers' reasons for recognising information privacy.

6. *DYSTOPIAN VISIONS: LAW'S REPRESENTATION OF TECHNOLOGY, THE STATE AND PRIVACY*

A central theme that emerged in the context of coding was lawmakers' preoccupation with a dystopian future ('dystopian visions'), and how it might be prevented. This theme is the topic of chapter six. The salience of dystopian themes in lawmaking has been detected by a variety of scholars who have made the observation that there is a close kinship between legal texts and utopian/dystopian fiction. This similarity is intuitive because legal institutions are inevitably concerned with working towards social ideals that are developed in reference to existing cultural imaginations⁵¹. The present chapter argues that in the context of the legal recognition of privacy, characterisations of the socio-technical status quo as 'dangerous' in a dystopian sense have the role of justifying why legal intervention is warranted.

7. *GLOBAL PRESSURES AND NATIONAL LEGAL IDENTITIES*

This chapter presents the empirical finding that legal discourse on information privacy in both the German and UK systems includes references to norms and concepts from other legal systems, as well as to international law. This is deemed a particularly interesting finding because it indicates that legal change in late modern legal systems is far from insular. This chapter addresses the ways in which deliberations of other legal orders feature in lawmakers' reasons for privacy recognition. German and UK lawmakers tend to view foreign and international law as normatively compelling and, in some cases, as explicitly obligating them to develop the legal recognition of privacy. At the same time, my findings reveal some resistance to these global pressures, usually entailing appeals to cultural distinctiveness. Given that lawmakers tend to discursively frame these considerations within a nationalist paradigm, I propose to interpret them as part of the social

⁵¹ Weber, *Economy and Society: An Outline of Interpretive Sociology* (n 25) 223.

construction of national legal identity.

8. *CONCLUSIONS*

This final chapter highlights this research project's insights and critically considers its empirical and theoretical contributions to the academic literature on privacy developments, as well as on legal change. The final chapter also reflects carefully on the generalisability of the reasons for legal change identified in previous chapters. For this purpose, I address the limitation that empirical insights are confined to legal operations in a late modern context. I also consider whether insights into the legal recognition of privacy can be extended to other areas of legal regulation, and to legal systems beyond Germany and the UK.

2. Developing Privacy Laws and Legal Change: A Critical Literature Review

Corresponding to this research project's objectives of understanding the development of privacy laws in Germany and the UK while also contributing to a more general understanding of legal change in modern societies, the review of literature in this chapter is divided into two parts (2.1 and 2.2). The first part critically surveys scholarship on the development on the legal encoding of information privacy in German and UK law. It discusses narratives in the literature that explain the development of information privacy and explores the extent to which existing scholarship accounts for commonalities and difference across legal systems. The second part of the literature review focuses on legal change and discusses how legal change has been understood and approached by different disciplines. Part 2.2 of this chapter furthermore explains the need for the development of an empirically useful concept of legal change for the purpose of systematic exploration.

2.1 The Development of Privacy Laws

2.1.1 Introduction

This section introduces and critically reviews the narratives that have been offered to explain how and why the legal recognition of privacy occurred. Some of these narratives are directed at explaining why the legal recognition of privacy was institutionalised during a certain period of western modernity. Other narratives seek to account for variance in the manner and extent to which privacy was recognised across legal systems, such as the fact that German privacy laws have historically been and continue to be more encompassing than those of other European countries in general and the United Kingdom in particular. The section concludes that various themes raised by the literature have encouraged public awareness and debate over privacy matters. But I also point out that there is little explanation of how exactly, in

the making of privacy laws, these considerations were supposedly *translated* into the legal sphere.

2.1.2. The legal protection of privacy interests before the recognition of a right to privacy

A functionalist perspective on the legal history of privacy suggests that even before concepts and terms like ‘privacy’, ‘*la vie privée*’ or ‘*Privatsphäre*’ gained currency in legal discourse, legal orders and systems were confronted with the same conflicts and issues that are still at the heart of law cases involving privacy today: the conflict between one’s interest to keep certain aspects of one’s life hidden versus other people’s interest to access it.⁵² This perspective has served to indicate that such ‘conflicts of privacy’ arose in both academic legal scholarship and in front of courts of law long before privacy was itself a recognised legal value. Furthermore, in his historical analysis of the protection of privacy interests in civil law, Balthasar suggests that certain dimensions of an interest in protecting privacy received rudimentary legal protection by the Roman *ius commune*. Specifically, the delict ‘*actio iniuriarum*’, which contained a general action for infringement of immaterial rights, encompassed aspects of the personality that we associate with privacy today, such as the protection of confidential and sensitive information.⁵³ Furthermore, in the context of English law, the legal protection of interests in what we would now refer to as ‘privacy’ was initially developed as a limitation to the principle of truth as a defence in the context of defamation torts, namely the *action on the case for words*.⁵⁴

However, neither the Roman *actio iniuriarum*, which was discontinued in the 19th century,⁵⁵ nor the English notion of privacy as a limitation to the plea of

⁵² Balthasar (n 5).

⁵³ *ibid* 66.

⁵⁴ *ibid* 76.

⁵⁵ Whitman claims that the Roman law of insult shaped German privacy laws Whitman (n 2) 1184. The 1891 essay by Rudolph von Jhering on which Whitman’s claim is based argued that some aspects of the Roman *actio iniuriarum* had been retained by the German legal concept of the personality. However, as pointed out by Balthasar, Jhering’s position represented a negligible minority view in the legal literature of the time as it was generally

justification in defamation law were carried over into modern legal constructs and structures of privacy protection.⁵⁶ The contemporary paradigms of legally protecting privacy rather represent the solidification of a range of legislative, judicial and policy innovations mostly concentrated in the latter half of the 20th century.⁵⁷ This indicates that the legal recognition of privacy is a feature of late modern legal systems. Therefore, any attempt of portraying current legal concepts of privacy as directly born out of ancient legal constructs would not only exhibit strongly anachronistic tendencies, but it would also divert attention from the more salient recent social, political and cultural events and influences that have shaped the specific legal encoding of the right to privacy over the past decades.

Balthasar's analysis of the legal history of privacy in civil law furthermore describes how claimants attempted to use diverse legal instruments to prevent others' access to their personal spheres. For example, in both Germany and the United Kingdom, versions of established legal concepts such as copyright law and the law of artistic creations (*Urheberrecht*), intellectual property law, trespassing and implied contractual provisions of confidentiality were resorted to by individuals aiming to protect their privacy through the legal sphere.⁵⁸ In a great number of such cases, the objective of plaintiffs was clearly enforcing the interest of keeping information about the self inaccessible to others; interests that would later form the core of modern privacy rights. This was and, to a certain extent, continues to be the case even in modern legal systems, particularly in those that offer only a limited compensation for privacy invasions.

The fact that privacy increasingly appeared in front of courts of law under the auspices of other explicitly recognised legal concepts has led legal historians to advance the narrative that modern legal protection of privacy developed as a

accepted that the newly emerging German law of personality had been established independently from the rationale of Roman injuries, see Balthasar (n 5) 90.

⁵⁶ Balthasar (n 5) 100.

⁵⁷ González Fuster (n 6) 23.

⁵⁸ Pratt (n 35) 38, 39.

response to social conflicts for which the law offered no adequate solution. Specifically, it is suggested that the appearance of these privacy conflicts within the legal-court-paradigm drew attention to a legal lacuna or regulatory gap, and that the legal recognition of privacy is thus an example for how legal systems ‘adapted’ to adequately representing societal values. However, this argument begs the question of why, if the matter of privacy violation had been a social problem – and an implicit legal concern – even within Roman societies, did a right to privacy only begin to be endowed with explicit legal protection and recognition in European countries within the latter half of the 20th century?

2.1.3 Protecting privacy as a response to technological change

The narrative commonly proposed by legal historians suggests that the gaps or inadequacies of the legal protection of privacy and other immaterial aspects of the personality became more pronounced and obvious “as new technologies and the development of mass media allowed violations hitherto unknown”.⁵⁹ In this sense, the rise of a perceived need for a legal protection of privacy is often presented as a natural response to technologically triggered social changes. For example, Busch points out that even Warren and Brandeis’ influential essay *The Right to Privacy*, which is commonly credited with having introduced privacy into the legal agenda in the US, was itself prompted by a new technological development: the hand-held camera and the associated increasing publication of photographs in the press.⁶⁰

It is rarely contested that innovations in information and communication technologies, such as the invention of photography, the rise of mass media, telecommunications and increasing possibilities for the electronic storage and transmission of information, have triggered widespread social concerns about

⁵⁹ Beverly-Smith, Ohly and Lucas-Schloetter (n 8); Stephen Saxby, ‘A Jurisprudence for Information Technology Law’ (1994) 2 *International Journal of Law and Information Technology* 1.

⁶⁰ See, for example, Andreas Busch, ‘Privacy, Technology and Regulation: Why One Size Is Unlikely to Fit All’ in Beate Roessler and Dorota Mokrosinska (eds), *Social Dimensions of Privacy: Interdisciplinary Perspectives* (Cambridge University Press 2015) 304.

privacy.⁶¹ It is also clear that especially in recent decades, privacy has been one of the primary conceptual frameworks through which law has addressed innovations in information and communication technologies.⁶²

However, the assumption that the legal recognition of privacy is a direct response to innovation in media technologies does not account for why countries like Germany and the UK developed such different forms and degrees of privacy protection. Although Germany and the UK were confronted with innovations in information and communication technologies in roughly the same way at the same time, privacy regulations across these countries continue to differ substantially.⁶³ In the early 1990s, divergence across national legal regimes on the topic of privacy used to be attributed to the lack or insufficiency of international privacy and data protection regulation.⁶⁴ In fact, emerging privacy regimes in the US and the EU were even used as test cases for theorizing conditions under which policy convergence occurred.⁶⁵

And yet, as pointed out by Busch, the fact that substantive differences have persisted despite attempts at harmonisation across EU member states⁶⁶ suggests that these differences can be regarded as revealing “a preference for local informational norms at the national level”.⁶⁷ In other words, local variations in privacy regimes can

⁶¹ Bennett and Raab 2006; Mendez and Mendez 2009:618; Nissenbaum 2010)

⁶² Andreas Busch, ‘Die Regulierung von Privatheit: Technische Innovation Als Herausforderung von Datenschutzregimes’ (2011) 4 *Der moderne Staat - Zeitschrift für Public Policy, Recht und Management* 403.

⁶³ Busch (n 60) 304. Significant doctrinal differences include that information privacy torts were only legally recognised in UK law after the introduction of the 1998 Human Rights Act and that UK law does not protect a person’s right to their own image.

⁶⁴ Bennett (n 41).

⁶⁵ Mendez and Mendez (n 61) 619.

⁶⁶ While privacy has become the dominant legal paradigms that regulates storage, exchange and collection of information (or data) in Germany, the UK case law has long lacked an explicit privacy tort (although ‘misuse of private information’ tort has recently received more explicit recognition in the recent case of *Vidal-Hall v. Google Inc* [2015]) and has instead relied on legal instruments like breach of confidence, copyright, false endorsement and intellectual property to prevent the publication of private information Althaf Marsoof, ‘Online Social Networking and the Right to Privacy: The Conflicting Rights of Privacy and Expression’ (2011) 19 *International Journal of Law and Information Technology* 110, 116.

⁶⁷ Busch (n 60) 319.

be regarded as a matter of regulatory choice. But what are the reasons for variation in preference across countries?

It has been suggested that a range of national and local factors have shaped how technological innovation was received and understood in the respective legal systems. In this sense, it may be argued that widespread public fear of privacy intrusions constitutes a specific response to actual surveillance practices of public and private institutions, rather than a response to the technological innovations themselves. As argued by Mellors and Pollitt, the pressure to introduce data protection legislation often originated with proposals for a central population register.⁶⁸ For example, in the context of a population census planned by the German government to be carried out in 1983, the widespread public concern with preserving privacy that culminated in the recognition of a further dimension of privacy by the German Federal Constitutional Court in the case *Volkszählungsurteil* was not a direct result of a new technological invention, but rather a response to a specific government plan.

Similarly, it may be argued that even though privacy concerns are often articulated with reference to media technologies, it is possible that a rise public awareness about privacy in Germany was not the result of actual technological innovations, but rather of the ways in which these technological changes were normatively represented in public discourse. For example, Busch emphasises the role of surveillance scandals as drivers of privacy and data protection legislation in Germany.⁶⁹ On this point, it is noteworthy that the last decades have seen a rise of 'data scandals' such as the employee surveillance practices of the Telecom in 2008 and the Deutsche Bahn in 2009, the intensely mediated controversies about Facebook and Google Street View in 2010 and, more recently, the Snowden revelations about widespread cross-national surveillance practices of government security agencies and secret services. These scandals may have led to the increasing salience of privacy in

⁶⁸ (1984:203)

⁶⁹ Busch (n 62) 403.

German public discourse⁷⁰ and thus may account for some of the divergence in privacy regulation between Germany and the UK.

This clarifies that information technologies are not intrinsically risky when it comes to privacy, but that their dangerousness is socially constructed. These processes of social construction are, as the previous paragraphs have indicated, subject to variation due to local influences. However, at the same time, it is also clear that and the framing of ‘dangerous technologies’ by the media and popular culture sometimes transcends national boundaries. For example, internationally influential pieces of dystopian literature and film such as Orwell’s *Nineteen Eighty-Four* have arguably influenced the agenda for the ways in which various countries approached technological innovation and privacy risks.⁷¹ All this suggests that the common explanation that the legal recognition of privacy is a straightforward response to technological change is overly simplistic. Sure, technology plays a role, but one that is mediated by the social circumstances in which it is perceived. This is something that differences between legal regimes alert us to. The regulatory response to technological change is a socio-technical phenomenon;⁷² one that warrants further empirical investigation

2.1.4 The recognition of privacy as a response to historical experiences with totalitarianism

An additional narrative that is commonly evoked to explain why German privacy laws have historically been (and continue to be) more extensive than those of even other European countries, especially than the UK, assumes that the legal protection of the right to privacy is a response to experiences with totalitarianism and

⁷⁰ *ibid* 405.

⁷¹ References to dystopian themes in the literary works of Orwell, Kafka and Huxley are numerous in the academic and legal literature on privacy. See, for example, Gunasekara 2007:148; Kuhn 2007:6; Solove 2004.

⁷² Bernd Carsten Stahl, ‘The Impact of the UK Human Rights Act 1998 on Privacy Protection in the Workplace’ in Ramesh Subramanian (ed), *Computer Security, Privacy, and Politics: Current Issues, Challenges, and Solutions* (IRM Press 2008) 64.

authoritarian governments.⁷³ This narrative is especially prevalent in German public-law scholarship on the topic, where it is suggested that the comprehensive legal recognition and extensive protection of privacy as a fundamental right is a direct response to concrete historical experiences of injustice.⁷⁴

However, the portrayal of the legal recognition of privacy as a response to totalitarianism has not been without its critics, most notably Whitman, who alludes that the German legal protection of the personality – the legal branch of which *Privatsphäre* forms part – was in fact strongly supported and developed during the Nazi era.⁷⁵ Specifically, Whitman points out that the 1944 standard commentary on the Civil Code (Parlandt) explicitly endorsed the general right to the personality on the basis of “National Socialist legal feeling” (*Nationalsozialistischem Rechtsempfinden*)⁷⁶ and even proposed to codify it in the 1942 draft Nazi Civil Code (Volksgesetzbuch), which was never enacted.⁷⁷ While the high value that is often attributed to privacy in Germany today may well be influenced by the German experience with political totalitarianism, it is clear that the specific legal encoding of privacy as part of personality rights was not itself a reaction against Nazi legal principles.

It is furthermore notable that the narrative that a demand for a right to privacy in order to protect citizens from an authoritarian state can be traced back to a 1909 edition of Wolcke’s *Postrecht*, which states that

‘the disgraceful injuries of the confidentiality of letters, which were committed commonly throughout the 17th and 18th century, often under the impetus and knowledge of the German government, gave rise to the demand for a constitutional legal protection of the confidentiality of letters’.⁷⁸

⁷³ Busch 2015:310)

⁷⁴ “Antwort auf konkrete geschichtliche Unrechtserfahrungen“, in Theodor Maunz and Günther Dürig, *Grundgesetzkommentar* (72. Auflage, Beck Online 2018) Art 10., also BVerfG January 2010, Lfg 5710.

⁷⁵ Whitman 2003:244)

⁷⁶ Whitman (n 2) 1187.

⁷⁷ Whitman (n 75) 244; Whitman (n 2) 1188.

⁷⁸“Die schmachvollen Verletzungen des Briefgeheimnisses, welche mit Wissen und auf Veranlassung auch der deutschen Regierungen (...) im 17. und 18. Jahrhundert an der

This indicates that a discussion about the protection of informational privacy against government intrusion had arisen long before the human rights violations of German totalitarian regimes in the 20th century.

This reveals that the portrayal of the legal recognition of privacy as a natural – if not automatic – response to experiences with totalitarianism is, again, overly simplistic. To be sure, this does not negate that historical experiences have encouraged the acknowledgement of the importance of privacy as a value in post-war Germany. But the notion that history has this profound effect on late modern legal culture remains speculative; it certainly warrants further empirical investigation.

2.1.5 The legal recognition of privacy and the rise of human rights and liberal political values

The experience with totalitarianism has also been used to ‘explain’ the nature of data privacy regulation throughout Europe, which according to Bygrave reflects ‘traumas from relatively recent, first-hand experience there of totalitarian oppression’.⁷⁹ In a similar trajectory, the solidification of the constitutional and civil legal protection of privacy in liberal democracies throughout the second half of the 20th century is often portrayed as a symptom of the broader rise of the protection of individual and human rights following the atrocities of WW2, and thus viewed as a manifestation of an enlightenment conception of moral and legal progress.⁸⁰ At first glance, an intrinsic connection between the right to privacy and other constitutional and human rights appears persuasive and seems to be supported by the widely recognised fact that in the case of the United Kingdom, the coming into effect of the Human

Tagesordnung waren, ließen die Forderung reifen, daß der Schutz des Briefgeheimnisses eine besondere staatsrechtliche Anerkennung erfahre“ (Wolke, Postrecht, 1909, p. 64, as quoted in Maunz and Dürig 2015:Art 10, Rn. 1–6).

⁷⁹ Lee A Bygrave, ‘Privacy Protection in a Global Context – A Comparative Overview’ (2004) 47 *Scandinavian Studies in Law* 319, 329.

⁸⁰ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2004) 263.

Rights Act in October 2000 with its explicit recognition of the European Convention's right to respect for private and family life, home and correspondence in Article 8 has served as a significant catalyst for judicial recognition of privacy interests.⁸¹

However, the linear narrative of the triumph of human rights over totalitarianism has been challenged by a number of historians, most notably including Samuel Moyn, who emphasises the general global insignificance of the concept of human rights until well into the 1970s and argues that 'rereading World War II and its aftermath as the essential source of human rights as they are now understood is misleading, however tempting.'⁸² Specifically, Moyn argues that the European Convention of Human Rights was more directly influenced by cold war tensions and consecrated 'the basic values of the Western side' rather than being a direct response to the horrors of the Second World War⁸³. Following Hannah Arendt's analysis of the dependence of the granting of 'human rights' on nation-state related concepts of sovereignty and citizenship,⁸⁴ Moyn argues that human rights were historically a means of the nation state to reassert its authority⁸⁵ and that popular accounts which 'see human rights as an old ideal that finally came into its own as a response to the Holocaust [...] might be the most universally repeated myth about their origins.'⁸⁶

Furthermore, following Busch's claim that differences in the legal recognition of privacy exhibit differences in policy preferences, it could be the case that the increasing implementation other fundamental democratic values, such as freedom of speech, was in fact stifling to the recognition of privacy as a right. For example,

⁸¹ Raymond Wacks, 'Why There Will Never Be an English Common Law Privacy Tort' in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law. International and Comparative Perspectives* (Cambridge University Press 2006) 155.

⁸² Samuel Moyn, *The Last Utopia: Human Rights in History* (The Belknap Press of Harvard University Press 2010) 45.

⁸³ *ibid* 79.

⁸⁴ Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace & Company 1976) 293.

⁸⁵ Moyn (n 82) 26.

⁸⁶ *ibid* 6.

Wacks attributes the ‘notorious judicial inertia’ regarding the legal recognition of privacy by UK courts to the dominance of freedom of expression as an object of recognised legal value in the UK.⁸⁷ Similarly, as indicated in Balthasar’s survey of cases involving privacy interests, the principles of freedom of speech and the freedom of the press were often cited as general justifications of why a right to privacy was expressly *not* a recognised principle in UK law.⁸⁸ While the mention of privacy and related concepts in international legal documents and covenants such as the 1948 Universal Declaration of Human Rights may have led the expression ‘right to privacy’ to gain traction,⁸⁹ it is clear that human rights discourse also entailed a range of counter-narratives. This challenges the assumption that the recognition of a right to privacy is a mere symptom of the triumph of human rights in late modernity.

On a somewhat related note, it has been suggested that the increasingly global legal recognition of privacy is a manifestation of the advancement of political liberalism,⁹⁰ as privacy in its influential characterisation as ‘the right to be left alone’⁹¹ has been described as a fundamentally *liberal* principle.⁹² As mentioned earlier, Whitman suggests that differences in the continental European and the Anglo-American legal encoding of privacy can be traced back to different understandings of the concept of freedom as either liberty or dignity: whereas Anglo-American legal formulations of privacy have been justified on libertarian principles, continental Europe has advocated a notion of privacy based on the concept of human dignity,⁹³ which was more concerned with securing the conditions for ‘free self-realisation’,⁹⁴ rather than fending off unwanted intruders.

⁸⁷ Wacks (n 81) 155.

⁸⁸ Balthasar (n 5) 117; Bygrave (n 79).

⁸⁹ Oliver Diggelmann and Maria Nicole Cleis, ‘How the Right to Privacy Became a Human Right’ (2014) 14 Human Rights Law Review 441.

⁹⁰ Bygrave (n 79) 328; Maximilian Hotter, *Privatsphäre: Der Wandel Eines Liberalen Rechts Im Zeitalter Des Internets* (Campus Verlag 2010) 12.

⁹¹ Samuel Warren and Louis Brandeis, ‘The Right to Privacy’ (1890) 4 Harvard Law Review 193.

⁹² Feldman (n 15) 42; Rössler (n 9).

⁹³ Whitman (n 2) 1181.

⁹⁴ *ibid* 1182.

However, the mere fact that some of the defences of privacy's value display a resemblance to certain branches of liberal political thought does not comprehensively establish that a tradition of liberalism can account for the specific legal encoding of privacy. Rather, the reality of contemporary political life indicates that concerns over surveillance and demands for a more robust legal protection of privacy in relation to both state governments and private individuals are voiced across the political spectrum. Any hypothesis of a connection between the legal recognition of privacy and a specific political tradition would have to be subjected to further empirical investigation.

A similar point of criticism can be made regarding various supposed influences and contributing factors that academic literature on the formation of privacy regulation has proposed: the narratives discussed are largely based on the assumption that privacy was institutionalised in legal language as a mere consequence of privacy becoming a more salient matter of public concern. However, salience in the public sphere is hardly sufficient for it to enter the sphere of the law. For example, even though privacy cases did appear with increasing frequency in front of UK courts of law, judges continued to explicitly reject the legal recognition of a privacy tort.⁹⁵ This means that while the existing body of literature on privacy laws offers many explanations regarding the centrality of privacy in public discourse, it lacks nuance when it comes to accounting for whether and how these factors shaped the *legal* recognition of privacy.

2.1.6 Conclusions on the development of privacy laws

The above review has presented a range of narratives regarding factors that may have shaped the formation of privacy laws. Approaching the development of information privacy laws through a comparative outlook that considers both UK and German law

⁹⁵ For example, see Lord Hoffmann in the House of Lords Judgment in the 2003 UK case of *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 AC 406; [2003] 3 WLR 1137; [2003] 3 All ER 943.

has been helpful in developing a critical approach to the existing literature. Various themes like technological innovation, experiences with totalitarianism and human rights consistently surface in scholarship on the development of the right to privacy. But this literature often fails to account for the factors that might explain divergence across legal systems – and how these local factors might play a mediating role when it comes to more global phenomena, like technological innovation.

In the above subsections, I do not doubt that technological change as well as historical experiences with totalitarianism, the rise of human rights and liberalism may well have each contributed to bringing privacy to the forefront of social concerns in various degrees across Germany and the UK. However, while the existing literature on the legal development of privacy laws is informative and helpfully supplies a range of explanatory accounts, these narratives remain speculative. In particular, I have argued that it remains unclear whether and how exactly these broader external social and political facts have led to a specifically *legal* encoding of privacy. This touches on the question of how social concerns are translated into processes of legal change. What role do the internal, lawmaking processes within legal system play in rendering these external factors salient? The absence of answers to these questions prompts a closer investigation into processes of legal change. Thus, the second part of this chapter reviews existing literature that may guide us in conceptualising and analysing legal change.

2.2 Understanding Legal Change

2.2.1 Research objective: making sense of legal change

It is incontestable that the making of privacy laws constitutes a ‘change’ in law. But what exactly do we have in mind when we talk of legal change? One might argue that a precise definition of legal change is not always necessary since we can talk about law and analyse it even on the basis of a rough, heuristic understanding of what ‘a

change in law' entails. Indeed, this is the nature of much doctrinal legal scholarship.⁹⁶ Articulating a theory of legal change is not a preeminent concern in doctrinal scholarship on legal matters, because such scholarship is usually more imminently concerned with the specific legal concepts it investigates, and rarely aims to inquire into the nature of legal change itself. In fact, doctrinal scholarship in law tends to employ highly fictionalised notions of how law is made and changed. Notions like 'lawmaker', 'legislative intent' and 'the courts' are legal fictions that are underpinned by complex socio-political institutions and processes. The questions that doctrinal legal scholars set out to answer rarely probe into these messier social realities; they are instead focussed on exploring how a particular legal idea fits into an (arguably equally fictional) understanding of law as a coherent normative system.

But a social-scientific approach likely benefits from spending some time on operationalizing that which it investigates. Having a coherent notion of legal change allows for more precise identification and more systematic empirical exploration. The heuristics that work for most legal academics might not work for socio-legal scholars who seek to understand, rather than simplify, the social underpinnings of law.

The present section elaborates and justifies the doctoral project's ambition of contributing towards a more systematic understanding of legal change. I address the lack of scholarship on legal change across social and political sciences and General Jurisprudence and suggest that it may be attributable to the presumption that the making of law – *the positing of legal norms* – is too idiosyncratic in its many manifestations to warrant conceptualisation in the form of a general explanation. I challenge this view and propose to move towards more systematic understanding of legal change as a type of social action.

⁹⁶ Much doctrinal scholarship discusses developments and trends in legislation and adjudication; Terry Hutchinson and Nigel Duncan, 'What We Do: Doctrinal Legal Research' (2012) 83 Deakin Law Review 83, 101; Richard A Posner, 'Legal Scholarship Today' (2002) 115 Harvard Law Review 1314.

2.2.2 Jurisprudential perspectives on legal change

That law changes is widely acknowledged in jurisprudence. For example, HLA Hart famously claimed that in order to warrant the label 'legal system', a collection of legal norms would require secondary rules that determine how primary law is to be recognised, adjudicated and, notably, *changed*.⁹⁷ Hart presumes that every legal system possesses such 'rules of legal change'. These rules do not necessarily have to be as elaborate as all the detailed rules that govern legislative processes in contemporary legal systems. But even in autocratic systems where the will of a sovereign ruler counts as law, there inevitably exists a 'rule of legal change' that provides that only the one ruler can change the law, and nobody else. That there are certain constraints placed on how a norm can come to be legally valid in a given legal community is thus inevitable.

However, when it came to articulating the content of these secondary rules, Hart's own account – as well other theorists' efforts to describe rules of legal change – stayed clear of specifications. Instead, Hart emphasised that their content would vary across legal systems. In his dedication as well as in his later *Postscript*, Hart elaborated that secondary rules are grounded in the conventional practices of legal officials within a given legal system⁹⁸ and that the rules of any given legal system may be arrived at through sociological observation of official practices.⁹⁹ This insinuates that the content of secondary rules – including rules on how law changes – may be so varied across different legal systems that hardly anything *in general* can be said about them.

Furthermore, in following Kelsen, HLA Hart famously stated that there is no general substantive limit concerning what may be the content of positive law.¹⁰⁰ This

⁹⁷ HLA Hart, *The Concept of Law* (2nd Editio, Clarendon Press 1994); Scott J Shapiro, 'What Is the Rule of Recognition (and Does It Exist)?' in Matthew Adler and Kenneth Himma (eds), *The Rule of Recognition and the U.S. Constitution* (Oxford University Press 2009).

⁹⁸ Hart (n 97) *Postscript*.

⁹⁹ *ibid* 94.

¹⁰⁰ *ibid* 73, 74; Hans Kelsen, *Pure Theory of Law* (The Lawbook Exchange, LTD 2005) §198.

claim is central to the widely espoused *source thesis* of legal positivism,¹⁰¹ which states that what is legally valid in a given legal system is determined only in terms of law's social sources and not its merits.¹⁰² This *source thesis* argues against natural lawyers' denial that radically immoral law is actually law,¹⁰³ and it doubts that moral virtue or other forms of merit are a necessary feature of valid law.¹⁰⁴ Instead, legal positivists insist, law may well be morally obnoxious, economically inefficient,¹⁰⁵ socially unjust or overwhelmingly irrational – yet such demerits do not necessarily challenge its status as *valid law*.

At first sight, legal positivism's emphasis on social facticity and variability of the content of legal facts seems to leave no room for more specific elaborations. Even if we were to find that, empirically, there exists a rule across all societies with legal systems that to count as legally valid, a norm must satisfy certain substantive requirements (such as publicity, or even minimal semantic clarity¹⁰⁶), a legal theorist may object that such is not necessarily true of all *future* or other *hypothetical* legal systems. Given that analytic jurisprudence aims to articulate propositions that are necessarily true of law *in general*,¹⁰⁷ claims regarding what is *usually* or *typically* the case in legal systems are dismissed as insufficiently 'analytical'.¹⁰⁸

This signals an important difference between the ambitions of General Jurisprudence and social theory: while the former limits its inquiries into necessary,

¹⁰¹ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 48.

¹⁰² *ibid*; John Gardner, *Law as a Leap of Faith* (Oxford University Press 2012) 51.

¹⁰³ Hart (n 97) 208.

¹⁰⁴ Ronald Dworkin, 'Law's Empire' 96.

¹⁰⁵ Richard A Posner, *Economic Analysis of Law* (Ninth Edit, Wolters Kluwer Law & Business 2014).

¹⁰⁶ See, for example, Lon L Fuller, *The Morality of Law* (Revised Ed, Yale University Press 1963).

¹⁰⁷ Though it should be noted that there is a certain amount of controversy over how the methods and aims of General Jurisprudence are best characterised; Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing 2001).

¹⁰⁸ Finnis proposes to focus conceptual analysis on 'focal' cases, but has faced much resistance. John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980) 9.

analytical truths about law,¹⁰⁹ the latter may to offer theories and hypotheses about law and legal institutions that make claims with varying degrees of generality and empirical robustness. Such socio-legal theories may include propositions about law in general, or about a particular type of legal norm in a specific legal system at a specific point of time.¹¹⁰ As is the case with theorising in social sciences more generally, it is desirable that propositions are robust, reliable and trustworthy,¹¹¹ but it is not a requirement within social theory that theoretical propositions are true in an *analytically irrefutable* sense. Instead, it is permissible that socio-legal theories – *hypotheses about law's social workings and underpinnings* – may be challenged and amended in light of future contravening empirical findings.¹¹²

Therefore, general descriptions of the content of rules of legal change – even those that claim to apply to all legal systems – seem more suited to being presented as sociological hypotheses, rather than as analytical jurisprudential theories. Such a conclusion leads me to the ambition of working towards a sociological conception of legal change, as this may include empirically ‘falsifiable’¹¹³ generalisations. In fact, it has been suggested that generalised descriptions of law that are *necessarily* true – such as those aimed for by analytical jurisprudence – run the risk of being ‘too vague to be sociologically interesting.’¹¹⁴

However, concluding that there is nothing of analytical-philosophical pertinence to be said about the content of Hartian rules of change seems premature. Firstly, the content of secondary rules across legal systems (albeit not their nature¹¹⁵)

¹⁰⁹ Dickson, *Evaluation and Legal Theory* (n 107) 18.

¹¹⁰ Brian Z Tamanaha, ‘The Third Pillar of Jurisprudence: Social Legal Theory’ (2015) 56 *William and Mary Law Review* 2236, 2267.

¹¹¹ Sharan B Merriam, *Qualitative Research: A Guide to Design and Implementation* (John Wiley & Sons Inc 2009) 14.

¹¹² Tamanaha (n 110) 2271.

¹¹³ Karl Popper, *The Logic of Scientific Discovery* (Routledge 2002) 10.

¹¹⁴ Nicola Lacey, ‘The Jurisprudence Annual Lecture 2013 Institutionalising Responsibility: Implications for Jurisprudence’ (2013) 1 1, 13.

¹¹⁵ Julie Dickson, ‘Is the Rule of Recognition Really a Conventional Rule?’ (2007) 27 *Oxford Journal of Legal Studies* 373; Torben Spaak, ‘Legal Positivism, Conventionalism, and the Normativity of Law’ 1; Andrei Marmor, ‘The Conventional Foundations of Law’ in Stefano Bertea and George Pavlakos (eds), *New Essays on the Normativity of Law* (Hart Publishing

has not been explored much within jurisprudence.¹¹⁶ This gap in scholarship implies that investigations into legal change may well help to build a more general theory of legal change. That the content of ‘rules of legal change’ has not been theorised more in jurisprudence can undoubtedly be attributed to the presumption that the conventional practices of legal officials are too idiosyncratic and varied across legal systems. Describing them in more detail is thus viewed as a task to be tackled by sociologists¹¹⁷ rather than legal philosophers.

But this division between socio-legal and jurisprudential theorising seems artificial: if the main division between these two disciplinary approaches to thinking about law are their varying degrees of generality, it seems at least possible to suppose that there remain socio-legal things to be said about the content of ‘rules of change’ that are analytically interesting.

Secondly, it may be argued that jurisprudential scholarship has generated various theories about the making and changing of law without framing them as concerning legal change. From this vantage point, legal change is an underexplored though nevertheless central topic in modern jurisprudence. Explaining why a theory of legal change is potentially of interest to jurisprudence scholarship justifies the theoretical ambitions of my project, so the following paragraphs elaborate this point.

In fact, the history of General Jurisprudence is centrally defined by disagreement on whether substantive considerations of merit such as those of justice, fairness and moral virtue have a bearing on what counts as legally valid. The most famous proponent of this view is Ronald Dworkin, who insisted that law is ultimately determined not by social facts alone, but by moral facts as well.¹¹⁸ Though Dworkin’s

2011); Grant Lamond, ‘Legal Sources, the Rule of Recognition and Customary Law’ (2014) 59 *American Journal of Jurisprudence* 25.

¹¹⁶ Adam Tucker, ‘Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty’ (2011) 31 *Oxford Journal of Legal Studies* 61.

¹¹⁷ Hart (n 97) Preface, 194.

¹¹⁸ Scott J Shapiro, ‘The “Hart–Dworkin” Debate: A Short Guide for the Perplexed’ in A Ripstein (ed), *Ronald Dworkin (Contemporary Philosophy in Focus)* (Cambridge University Press 2007) 27.

critique of Hart is generally regarded as unsuccessful,¹¹⁹ his view that morality and justice must have a place in a general, jurisprudential concept of law is of continuing appeal to some legal theorists – especially those who are sympathetic to Dworkin’s focus on legal interpretation.¹²⁰ The below description of this aspect of the famous Hart-Dworkin debate illustrates why it may be useful to suggest that considerations of merit are an important component of the *making and changing* of legal norms, instead of – as Dworkin and similarly inclined scholars like Robert Alexy suggest¹²¹ – of the *existence and interpretation* of law.

Dworkin considered interpretive commitments as constitutive of legal norms.¹²² He argued that the content of posited legal rules is necessarily so abstract and indeterminate that we crucially rely on legal interpretation to arrive at legal meaning. Furthermore, in Dworkin’s view, legal interpretation is invariably guided by moral and other merit-based considerations- ‘principles’ – that he deemed a necessary and constitutive element of law.¹²³ Using Hartian terminology, Dworkin’s point may be restated as claiming that the rules that govern how valid law is recognised and applied necessarily include some moral or other merit-related considerations. Gardner points out that Hart and Dworkin are very much in agreement on the fact that judicial decision-making in hard cases often resorts to merit-based considerations. It is common in Anglo-American law that in interpreting the meaning of a legal norm for a particular case, judges consider what kind of outcome would be fair or just. Examples of this kind of judicial decision-making are abundant across legal systems.

Yet the difference is that while Dworkin considered substantive considerations of merit an essential component of law, Hart dismissed them as extra-

¹¹⁹ Gardner (n 102) 18.

¹²⁰ Andrei Marmor, *Interpretation and Legal Theory* (Hart Publishing 2005); Mark Greenberg, ‘Legislation As Communication? Legal Interpretation and the Study of Linguistic Communication’ in A Marmor and S Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press 2011).

¹²¹ Robert Alexy, *Theorie Der Juristischen Argumentation* (Suhrkamp Verlag 1983) 25.

¹²² Dworkin, ‘Law’s Empire’ (n 104) 45.

¹²³ Ronald Dworkin, ‘Taking Rights Seriously’ viii.

legal considerations that go beyond strictly determining what is legally valid.¹²⁴ In case we follow Hart in regarding considerations of the merit as *not* an internal feature of legal systems, it seems we have to concede the fact that in hard cases, judges make decisions beyond the determinate guidance of legal content and thus act as part-time legislators. As pointed out by Gardner, this is a view Dworkin rejected as untenable.¹²⁵ Dworkin's dissatisfaction, Gardner argues, hinges on the fact that Dworkin failed to acknowledge that in deciding hard cases, judges verge into the terrain of *making* rather than just *applying* law.¹²⁶ Legal reasoning in cases that are not yet fully determined by existing law may lead to the creation of new law; not of the *legislated* but rather of the *case-law* kind. Gardner's point is that in drawing too sharp a conceptual distinction between legislative and judicial functions, Dworkin failed to see that judicial reasoning may *also* lead to the creation of legal norms.¹²⁷

Following Gardner's clarification of Dworkin's viewpoint, it may be argued that it is precisely in this creative moment – *the making of new law* – that considerations of merit become salient. In making and changing law, we inevitably digress from the empirical question of *What is the law?*, to the normative question of *What ought to be the law?*. In Dworkin's defence, the distinction between these questions is often obscured and conflated in judicial decision-making in hard cases. In assuming that judges confine themselves to interpreting and applying the law, Dworkin accommodated merit-based considerations or 'principles' as belonging within the discourse on what law *is*, rather than with that of what it *ought to* – and will – *become*.

It does seem more plausible to propose that insofar legal officials invoke merit-based considerations of what law *ought to be like*, they are concerned with norms that are outside of law (i.e. *extra-legal*), or with norms that are not-yet-law;

¹²⁴ Gardner (n 102) 38.

¹²⁵ Gardner notes that Dworkin rejects the view that judges are involved in "doing anything other than applying valid legal norms" *ibid* 39.

¹²⁶ *ibid*.

¹²⁷ *ibid*.

proto-law, so to speak. To say that substantive normative ideas like justice and moral virtue play a necessary role in lawmaking contexts is certainly compatible with the positivist theory of legal validity. In misunderstanding that merit-based considerations surface in judicial activities precisely in the moment when the bridge between applying and changing law is crossed, Dworkin sought to accommodate merit-based considerations as a necessary element of what law *is*. This led him to struggle with the source thesis.

The source thesis, however, only concerns *already valid law*, that is, law that has already passed the process of positing. When positivism claims that what is legally valid in a given legal system is determined in terms of sources and not merits, it does not deny that merit-based or substantive considerations are amongst those factors that drive and constrain *lawmaking activities*. Legal positivism's source thesis is thus entirely reconcilable with the notion that the *act* of changing law (though not its outcome) is necessarily driven and constrained by merit-based considerations.

Given the insistence of legal positivism that legal grounds do not necessarily include considerations of merit, the suggestion that Hartian rules of change may include such notions of what makes law good or desirable seems paradoxical. To clarify: the statement 'rules of legal change necessarily include considerations of merit' does not entail the claim that the law created according to these rules of change is itself necessarily meritorious: lawmaking, as all human activity, is morally fallible. It may thus be the case that lawmakers posit unjust, ineffective or economically inefficient laws, despite better intentions.

Furthermore, to say that lawmaking necessarily entails reflections about what is good, desirable and just does not entail that these considerations prevail. It merely implies that lawmaking, being a type of normative social action, is constrained by certain considerations of merit. It does not imply that rules of legal change are themselves necessarily good or morally valuable. While some law-making rules and

procedures are just and democratic by design,¹²⁸ human history has also seen legal systems in which rules of change determine that law can only be changed by order of an autocratic despot. In short, the claim that the conventional rules that govern law-changing *acts* contain considerations of merit is entirely compatible with the positivist thesis that the content of valid law is not necessarily determined with reference to these merits.

My point here is to emphasise that even though law itself may be valid irrespective of whether it is meritorious, it may still be the case that lawmaking – i.e. ‘legal change’ as a social process – necessarily involves that the agents involved in it concern themselves with considerations of merit. This viewpoint opens the scope for social-theoretical, as well as analytical explorations legal change. In particular, it means that some jurisprudential theories about the nature of law may usefully be recycled as theories about legal change.

For example, one contender for one analytical theory about the content of rules of legal change is that law can never be changed for the reason of making it less fair. This, it may be claimed, is an unwritten, merit-based rule at the heart of most legal systems: it provides that those who change law cannot offer, as a reason for their law-changing actions, that they acted *in order to* make law less just or effective. The existence of such a rule is arguably so deeply entrenched in the communicative rationality of practical law-making discourse¹²⁹ that seems trivially true. It is important to keep in mind that such a rule does not necessarily ensure that the outcomes of acts of legal change are just. Even if I am right and furthering injustice may never itself be a reason for legal change, this would not prevent that laws made with different reasons in mind inadvertently or collaterally turn out to be unjust.

Yet, if merit-based considerations in legal change do not ensure that the content of legal norms necessarily meets a certain minimum of value, what, we may

¹²⁸ See, for example, Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, The MIT Press 1996).

¹²⁹ These claims can be found throughout the socio-legal works of Habermas and Alexy, *Theorie Der Juristischen Argumentation* (n 121).

ask, is their role or relevance in a legal system? This question relates to the more fundamental question of how we might characterise relationships between law and morality. According to Gardner, it is one of the most common misconceptions about legal positivism that it claims there is no necessary connection between law and morality.¹³⁰ On the contrary, legal positivists allow for and even investigate many such necessary connections, such as that law necessarily holds itself out to be morally binding¹³¹, or that due to the way it interferes in social life, it is necessarily morally risky.¹³² Hart himself acknowledged that notions of moral virtue, amongst other considerations of merit, have always supplied accepted reasons for why and how law is made and changed.¹³³ Propositions about the content of rules of legal change may thus constitute another such characterisation of a necessary (though arguably tenuous) relationship between law and morality, and thus fall into one of Jurisprudence's central themes of interest.

Given all these ways in which inquiries into legal change are of potential interest to General Jurisprudence, it may be thought surprising that the topic has not attracted more systematic scholarly attention. One factor that likely plays a role is the fact that General Jurisprudence is centrally concerned with law itself, rather than with a type of *action* like lawmaking. Furthermore, given that the currently most dominant school of thought in General Jurisprudence- legal positivism- is a thesis only about the conditions of legal validity,¹³⁴ it is understandable that most jurisprudential inquiry is concerned with accounting for all that is *already* legally valid and thus law properly so-called. In conceptual analysis, the validity of a given law is synonymous with its *existence as law* and this existence is a binary matter;

¹³⁰ Gardner (n 102) 48.

¹³¹ *ibid* 13.

¹³² Leslie Green, 'The Forces of Law: Duty, Coercion, and Power' (2016) 29 *Ratio Juris* 164.

¹³³ Hart (n 97) 185.: "It cannot seriously be disputed that the development of law, at all times and places, has in fact been profoundly influenced both by the conventional morality and ideals of particular social groups, and also by forms of enlightened moral criticism urged by individuals, whose moral horizon has transcended the morality currently accepted."

¹³⁴ Gardner (n 102) 103.

either a given law exists or it does not. Given this disciplinary ambition, it is no surprise that Jurisprudence lacks conceptual room for that which is merely *law-in-the-making* and has not quite met the threshold of legal validity or existence-as-law. The processes of changing and making law take place at the very shore of the lands that legal positivism seeks to conquer through its concepts. *Future* or '*proto*'-law is not valid law yet and hence does not belong on the jurisprudential worktable, or so one may be inclined to conclude.

A focus on legal change places a spotlight on the activity at the centre of legal positivism: that of positing law. Positing law is a type of social action in that it hinges on meanings that lawmaking agents attribute to it. Being a kind of human behaviour, the act of changing law is, if not always, then at least typically¹³⁵ informed by normative aims and purposes. When we explore such kinds of human action, what are the things we take into account? Crucially, social ontologists and social theorists agree that actions must be explained in terms of *intentions*; the agent's own *reasons* for acting.¹³⁶ Thus, exploring the act of making law must take into account the *reasons* lawmakers have in mind when they engage in legal change. Positing law can therefore be characterised as a type of normative social action in which individuals, groups and institutions coordinate behaviours in pursuit of various types of reasons.

Jurisprudential literature is rich on topics that bear a close relation to legal change such as legislative intention, legal reasoning and judicial decision-making. It also supplies theories of how considerations of merit affect the content of law; such as by being amongst the reasons for which lawmakers engage in legal change.¹³⁷ However, little consideration has been afforded to the question of whether there is something more generally shared across different forms of law that take place at different types of institutions through differently structured forms of communicative

¹³⁵ Luka Burazin, 'Can There Be an Artifact Theory of Law?' (2016) 29 Ratio Juris 385.

¹³⁶ Max Weber, who is typically credited with developing an interpretive approach that privileges subjective understandings, is famously cited by Geertz who agrees that "man is an animal in webs of significance he has himself spun" Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973) 5.

¹³⁷ See, for example, Hart (n 97) 185.

engagements. Indeed, so far, it has been assumed by positivist legal theorists that there are no general legal limitations of legislative power. True, it has been acknowledged that legal systems harbour certain rules or conventions that define and thereby limit how law can be made and changed. But the content of these ‘secondary rules’ is widely viewed as contingent and idiosyncratically dependent on social dynamics, so it is presumed that nothing in general can be said about the content of rules of change or reasons for legal change.

Is it possible to devise general theories about the reasons for which lawmaking agents change law? Without insisting on an affirmative answer at this stage, I have here made a case for this avenue of inquiry by pointing out the ways in which it feeds into established interests of General Jurisprudence. I have also proposed that such a theory of legal change may be achieved by focusing inquiries on a particular type of social action – ‘legal change’ – rather than ‘law’ itself.

This thesis aims to contribute to a more general understanding of legal change. Thus, in the discussion of my findings, as well as in section 8.5 of the conclusion chapter, I evaluate the explanatory scope and limitations of the empirical and theoretical insights achieved throughout the doctoral project. My purpose in the present subsection has been to make a case for why developing a theory of legal change is *prima facie* interesting to various branches of legal theory, including General Jurisprudence. I have here proposed one illustrative example for what an analytical theory about reasons for legal change might look like (i.e. that such reasons cannot include the aim of making law more unjust). This suggests that theorising about legal change on a high level of abstraction and generality is not futile.

2.2.3 Legal change as meaningful social action: reasons for legal change

The previous subsection has already outlined that legal change is usefully conceptualised as a type of social action. This entails that in exploring acts of legal change, one must take into account the reasons lawmakers had in mind when they changed law. This approach to studying human behaviour is characteristic of the

tradition of interpretive sociology. Indeed, in laying the foundations for this tradition of sociological inquiry, Max Weber identified social action as ‘the central subject matter’¹³⁸ of sociology, advancing the following famous characterisation:

‘We shall speak of ‘action’ insofar as the acting individual attaches a subjective meaning to his behaviour- be it overt or covert, omission or acquiescence. Action is ‘social’ insofar as its subjective meaning takes account of the behaviour of others and is thereby oriented its course.’¹³⁹

The changing of law is a type of human action that is invariably oriented towards others.¹⁴⁰ Insofar law is changed through institutions like courts or parliaments, officials’ actions are socially coordinated: their actions are shaped by the institutional norms they conventionally accept.¹⁴¹ The changing of law is usually addressed to society at large, meaning that those who change law typically have social concerns as part of their motives. Since it is typically the purpose of law as a regulatory tool to guide human behaviour, the changing of law is necessarily and inevitably concerned with the behaviour of others. Even if a law were to be of mere declaratory or symbolic significance – like a preamble, for example – the act of formulating it is necessarily a communicative act addressed to the wider legal community. This means that actions involved in the making of law are invariably concerned with conveying meaning to others and thus are oriented towards others’ behaviours and understandings. In this sense, legal change is a type of activity that paradigmatically fits Weber’s account of social action.

Despite the fact that since Weber, various alternative and arguably more nuanced social ontologies have been proposed for sociological inquiry,¹⁴² his account

¹³⁸ Weber, *Economy and Society: An Outline of Interpretive Sociology* (n 25) Chapter 1, Page 24.

¹³⁹ *ibid* Chapter 1, Page 4.

¹⁴⁰ *ibid* Chapter 1, Page 7.

¹⁴¹ This is how Hartian secondary rules, particularly the rule of recognition, are often characterised, see Hart (n 97) 95.

¹⁴² Examples include critical theory, field theory, network theory, phenomenology, functionalism, postmodernism, structuralism, post-structuralism and conflict theory. For an

of social action remains relevant today because of the prescient importance he attached to *meaning*. The whole point of sociology, Weber argued, was to distinguish the study of human agents from purely physically reactive beings and objects by acknowledging that humans have some important degree of decisional autonomy. Subjective meaning and understanding – the *reasons* that agents have in their actions – to Weber was “the specific characteristic of sociological knowledge”.¹⁴³ The insight that human actions are not predetermined but that they are at least partially the result of human agency is both pillar and Achilles heel of the social sciences. Insofar sociologists are interested in rendering visible the general social laws or structures¹⁴⁴ that determine human action, the fact that human beings have the reflective capacity to change their actions on the basis of thought and intention is a frustrating caveat.¹⁴⁵ A core ambition of sociological theory – and one explicitly advocated by Weber himself – is to inquire more deeply into such manifestations of agency in action and to reveal the extent to which meaning-making is mediated by socially held values, norms and understandings.¹⁴⁶

Contemporary conceptual approaches to the study of social life have developed refined notions of the intricate ways in which agency and social structure are related,¹⁴⁷ suggesting that a binary distinction between social structure and agency was flawed to begin with. Weber’s proposition of formulating ‘ideal types’ of meaningful action was undoubtedly an early effort to study how seemingly distinct categories like the individual and the social and structure in fact coalesce.¹⁴⁸ Weber’s

overview over different ontologies, see Alex Callincos, *Social Theory: A Historical Introduction* (New York University Press 1999).

¹⁴³ Weber, *Economy and Society: An Outline of Interpretive Sociology* (n 25) Chapter 1, Page 15.

¹⁴⁴ Claude Lévi-Strauss, *Structural Anthropology* (Basic Books, Inc 1963) 33.

¹⁴⁵ Rob Stones, ‘Theories of Social Action’ in Bryan S Turner (ed), *The New Blackwell Companion to Social Theory* (2009) 84.

¹⁴⁶ Weber, *Economy and Society: An Outline of Interpretive Sociology* (n 25) Chapter 1, 8.

¹⁴⁷ Pierre Bourdieu and Loic Wacquant, *An Invitation to Reflexive Sociology* (Polity Press 1992) 94.

¹⁴⁸ Giddens challenges the reception of Weber as a ‘structuralist’: Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration*, vol 20 (Polity Press 1984) 213.

work is widely credited with developing the foundations of *interpretive* qualitative social research, which holds as its central purpose the interpretation and explanation – *Verstehen* – of meaningful human behaviour.¹⁴⁹

That meaning plays a central role in law-changing activities is indisputable. But ‘meaning’ is also somewhat oblique; the question is how we might analyse such ‘meaning’ to arrive at a better understanding of the phenomenon of legal change. Synonyms and handles for meaning that agents attribute to their social action include ‘understandings’, ‘purpose’, ‘aim’, ‘motive’, ‘reason’ and ‘intention’. While these terms tend to be used somewhat liberally in the social sciences, some of them have a technical significance in philosophy, where they are associated with specific kinds of mental states.¹⁵⁰ For example, in jurisprudence, the role of intention in law making – specifically in legislation – has been the subject of much academic debate. In particular, it has been questioned that the creation of law is necessarily always intentional, especially in cases where lawmakers hold many different and possibly conflicting intentions.¹⁵¹ Though cases of unintentional law making are likely rare and of marginal sociological significance, it certainly seems *possible* that law is sometimes changed accidentally. For example, a judge, failing to realise that due to *stare decisis* part of her verdict counts as valid law, might accidentally posit a new legal norm in his judgment. Such a law may count as created ‘unintentionally’.

However, such acts of ‘unintentional’ lawmaking do not necessarily occur without any subjective meaning whatsoever: just because the judge may not have intended to make law by acting in the relevant way, it does not exclude that she had other reasons in mind for which she acted. For the purpose of inquiring into the meanings that subjectively inform law-changing actions, the possibility that actors may lack the awareness that their actions may in fact result in the creation of valid

¹⁴⁹ In using the term, Weber follows Dilthey, who employed it to refer to an internal participatory perspective on culture; Wilhelm Dilthey, *Introduction to the Human Sciences* (Rudolph Makkreel and Frithjof Rodi eds, Princeton University Press 1989) 465.

¹⁵⁰ See, for example, Gertrude Elizabeth Margaret Anscombe, *Intention* (Harvard University Press 1963).

¹⁵¹ In defence of this view, see Burazin (n 135).

law is unproblematic since there likely is a multiplicity of other meanings and motives they attribute to their actions. Clearly, the concept of meaning employed by Weber is broader than that of philosophical understandings of intention as purposive:¹⁵² in addition to *instrumental-rational* action, Weber further includes *value-rational*, *affective*, and *habitual* action as categories that account for attributed meaning even of the symbolic or irrational kind.¹⁵³

Furthermore, the concept of intention in lawmaking is often problematised because in many legal systems, the notion of legislative intent (specifically termed ‘parliamentary intention’, or ‘Wille des Gesetzgebers’ in UK and German legal discourse) is evidently a category of legal fiction.¹⁵⁴ In interpreting the meaning of legal text, jurists commonly refer to this supposed ‘intent’, but it is clear that such reasoning is speculative and typically makes no effort to unearth actual empirically held intentions of lawmakers at the time of legislating.¹⁵⁵ When it comes to the social realities of intentions at play in legislative processes, academic literature commonly emphasises that these empirically involve a wide range of diverging and possibly even conflicting individual mental states, suggesting that there may be no such thing as a coherent and collective legislative will.¹⁵⁶

Thus, to avoid confusion with the narrower technical meanings that ‘legislative intention’ has in dogmatic and jurisprudential scholarship, I have opted in favour of the term ‘reason’. This terminological choice is already evident in the previous subsection. In this thesis, *subjective reasons* are taken to be a more useful handle for exploring the kinds of ‘meaning’ agents have in mind when they change law.

¹⁵² See, for example, Anscombe (n 150).

¹⁵³ Weber, *Economy and Society: An Outline of Interpretive Sociology* (n 25) Chapter 1, Page 6.

¹⁵⁴ Max Radin, ‘Statutory Interpretation’ (1930) 43 *Harvard Law Review* 863, 870.

¹⁵⁵ Richard Ekins, *Nature of Legislative Intent* (Oxford University Press 2012) 5., in discussing Radin.

¹⁵⁶ *ibid* 143.

The term ‘reason’ equally has a variety of potentially confusing philosophical meanings.¹⁵⁷ But once it is clarified that the reasons we are concerned with here are of the *subjective* kind – synonyms in philosophy include *motivational*¹⁵⁸ and *agential reasons*¹⁵⁹ – they reliably refer to the considerations that agents have in mind as weighing in favour of certain actions. This understanding of ‘reason’ is also consistent with how the term is employed in interpretive sociology.¹⁶⁰ Thus, in conceptualising legal change as a type of social action, the focus of here conducted enquiries is on the *subjective reasons* of agents who change the law: *lawmakers’ reasons*.

This prompts the question of who are those law-changing agents, here referred to as ‘legal officials’ or ‘lawmakers’? Answers regarding who is to be included in this group are bound to vary from legal system to legal system. It is conceptually possible that in a given society, *all* members are involved in lawmaking processes. But in modern legal systems, the changing of law is typically a highly professionalised activity that is carried out under specific procedural constraints, such as in the context of the legislative process. And yet it continues to be an eponymous ambition of democracy that a broader slice of the ‘demos’ is involved in lawmaking processes, even if only sporadically and through more indirect means like elections and referendums.¹⁶¹ From the perspective of involvement, it seems questionable whether

¹⁵⁷ Thomas M Scanlon, ‘Reasons: A Puzzling Duality?’, *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (2006); Veronica Rodriguez-Blanco, ‘Reasons in Action v Triggering-Reasons: A Reply to Enoch on Reason-Giving and Legal Normativity’ 3; David Enoch, ‘Reason-Giving and the Law’, *Oxford Studies in Philosophy of Law: Volume 1*, vol 1 (2011).

¹⁵⁸ Susanne Mantel, ‘No Reason for Identity: On the Relation between Motivating and Normative Reasons’ (2013) 17 *Philosophical Explorations* 49; Rebecca Stone, ‘Law’s Motivational Landscape’ (2017) 3313 *Jurisprudence* 1; Stephen Finlay and David Plunkett, ‘Quasi-Expressivism about Statements of Law: A Hartian Theory’, *Oxford Studies in Philosophy of Law: Volume 3* (Oxford University Press 2018).

¹⁵⁹ Peter Hacker, ‘Agential Reasons and the Explanation of Human Behaviour’, *New Essays on the Explanation of Action* (Palgrave Macmillan 2009).

¹⁶⁰ Weber uses the term *Grund* (reason), i.e. ‘Bestimmungsgründe sozialen Handelns’) Max Weber, [1921] *Wirtschaft Und Gesellschaft: 5. Auflage* (Mohr Siebeck 1980) I, §2.

¹⁶¹ Scott Veitch, “‘Unconstituted Publics’?” in Claudio Michelson and others (eds), *The Public in Law: Representations of the Political in Legal Discourse* (Ashgate 2012).

we can neatly carve up modern societies into professional lawmakers on the one hand, and laypeople or legal subjects on the other.

Additionally, the specific ways in which human individuals participate in lawmaking processes may vary according to degrees. A paradigm case for a 'lawmaker' might be a member of a legislative assembly or a judge, acting in their official capacity. But the authoritative works of a legal academic, a scientific evaluation supplied by an expert committee member, or the lobbying influence of the law commission could equally proclaim norms that end up counting as valid law. When it comes to accepted sources of law,¹⁶² it is hard to draw a distinction between those who 'make' the law and those who merely influence lawmaking.

Furthermore, law oftentimes affords a sphere of discretion to executive and other agents who colour in the contours of legal norms with their own executive choices. For example, the campus rules set out by a university may be legally binding to those who enrol in it. This means that when it comes to legal norms on issues such as student surveillance, university governing bodies assume an additional quasi-legislative function insofar their policies contribute to the content of legal rules.¹⁶³ Such examples indicate that who counts as a lawmaker strongly depends on context and subject matter.

For these reasons, it seems more apt to focus on lawmaking actions, rather than on professional status, as a way to determine who are the lawmakers involved in legal change. Even when it is the subjective lawmaking reasons one aims to explore, such reasons – and the agents who pursue them – are more readily identifiable in lawmaking contexts than by surveying a select group of legal professionals. In particular, a focus on lawmaking discourses¹⁶⁴ allows taking account of the

¹⁶² Lamond (n 115); Alan Watson, 'Legal Change: Sources of Law and Legal Culture' (1983) 131 *University of Pennsylvania Law Review* 1121.

¹⁶³ For example, the 2015 Counter-Terrorism and Security Act affords discretion to educational institutions in deciding how they discharge their *PREVENT* duty under section 26 (1). The practical choices universities make in discharging this duty are arguably constitutive to campus surveillance laws.

¹⁶⁴ This thesis proceeds from the view, elaborated further in section 3.2, that lawmaking is an essentially *communicative* activity.

occasional contributions of experts and other agents who have some authority on the specific subject matter, but who do not usually assume a legislative role.

A further consideration concerning the identification of reasons in lawmaking is whether we take ‘lawmakers’ to be human individuals. Classical social theory has claimed that only individual human beings can hold the mental states we may refer to as ‘subjective reasons’. Thus, groups and institutions can at most compile aggregates of such states.¹⁶⁵ This view was shared by Weber himself, who proposed that subjective meaning was only intelligible at the level of human individuals.¹⁶⁶

But scholarship in social theory has since challenged the view that the agency is best conceptualised at the level of human individuals. Embedded in a variety of theoretical frameworks, various theoretical accounts of society propose that social action can be meaningful at the group level. Contrary to Weber’s focus on individual persons, the social sciences have broadened the category of ‘actor’ to range from mere parts of a human individual¹⁶⁷ to groups, institutions¹⁶⁸, and even spaces¹⁶⁹ and inanimate objects¹⁷⁰. The perspective that it is really *the court as a whole* rather than the sum of individual judges on its panel who creates the law does chime well with the way we ordinarily talk about legal institutions. Notably, from a jurisprudential perspective, Richard Ekins’ discussion of the nature of legislative intent makes a case for conceptualising institutional action as a form of concerted

¹⁶⁵ For a critical perspective, see Ekins (n 155) 47.

¹⁶⁶ Weber, *Economy and Society: An Outline of Interpretive Sociology* (n 25) Chapter 1, Page 14.

¹⁶⁷ Such as, *bodies*: Judith Butler, *Bodies That Matter: On the Discursive Limits of Sex* (Routledge 1993).

¹⁶⁸ Thomas B Lawrence, Roy Suddaby and Bernard Leca, ‘Introduction: Theorizing and Studying Institutional Work’ in Thomas B Lawrence, Roy Suddaby and Bernard Leca (eds), *Institutional Work: Actors and Agency in Institutional Studies of Organizations* (Cambridge University Press 2009).

¹⁶⁹ Pierre Bourdieu, ‘Physical Space, Social Space and Habitus’.

¹⁷⁰ Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford University Press 2005) 54; John Law, ‘Actor Network Theory and Material Semiotics’ in Bryan S Turner (ed), *The New Blackwell Companion to Social Theory* (Blackwell Publishing Ltd 2009) 141.

agency that is not reducible to the sum of actions of its members.¹⁷¹ The presumption that institutions such as legislative assemblies or courts of law can *act meaningfully* is thus no longer controversial.¹⁷²

Particularly in lawmaking contexts, it is presumably the case that the reasons for which lawmakers act are of an embedded, institutional nature; they concern the question of what a court, a government, or the legal community in general aims to achieve. Sure, the personal convictions of judges and members of parliament likely play some part in their professional behaviour.¹⁷³ But sometimes, legal officials will be asked to determine the content of laws in which they have no personal stake, and it seems unlikely that the way lawmakers act can always be accounted for by solipsistic motives. Even when more specific personal ambitions do play a role, it would appear that in the context of lawmaking discourse, officials are under pressure to package their individual considerations in institutionally accepted reasons. The proposition 'law ought to be changed because it would contribute to my personal satisfaction' is unlikely to be effective or even count as acceptable in lawmaking discourse. This means that when individual officials make law, their actions are better interpreted not merely, or even mainly, personally motivated, but as accountable to a set of reasons held by the institutions on whose behalf individual persons act. When law is changed, the agent who is 'acting' is thus the respective parliament, court, judge or committee, rather than merely the human persona(s) involved. It is those institutional lawmaking reasons for legal change that this thesis seeks to understand and systematise in the context of a theory of legal change.

Importantly, the analysis of legal change pursued in this thesis does not confine its focus to legislation but, as will be clarified in the following chapter, includes judicial and other forms of lawmaking.¹⁷⁴ An inquiry into the reasons

¹⁷¹ Ekins (n 155) 71.

¹⁷² Neil MacCormick, 'Norms, Institutions, and Institutional Facts' (1998) 17 *Law and Philosophy* 301, 332.

¹⁷³ This is convincingly argued by Duncan Kennedy, *A Critique of Adjudication* (Harvard University Press 1997).

¹⁷⁴ Gardner (n 102) 54.

lawmakers have for acting in ways that bring about legal change is capable of unveiling institutionally shared values, self-understandings, knowledge, norms and emotions. In this sense, the reasons that motivate and constrain engagement in law-making action transcend the more narrow regulatory purposes that the juridical definition of 'legislative intent' refers to. In illuminating the thicker social basis of the reasons operative at official-institutional level, an inquiry into legal change may even serve to complicate the notion of legislative intent. In fact, as chapters 5-7 of this thesis will proceed to illustrate, the rational regulatory objectives that are commonly presumed to constitute legislative intent are only the conscious tip of an iceberg of meaning and symbolism that informs law-making action.

2.2.4 Generalising about reasons for legal change

Beyond the above-mentioned debates concerning reasons for lawmaking, there is another caveat to consider regarding the development of a general understanding of legal change. It is the concern – mentioned already in subsection 2.2.1 – that the reasons for which law is changed are simply too diverse to be described in general terms. Indeed, in light of the large variety of themes and topics that may feature in the content of law, the reasons for which legal norms are made and unmade are undoubtedly *infinitely* varied. By way of example, the introduction of the 1998 UK Human Rights Act and the introduction of the 2017 A487 Trunk Road Order are acts of parliament that each represent instances of legal change in the UK. Yet, they concern entirely different areas of social life, evidently have different purposes, and undoubtedly occurred for different reasons. Given the vast variety of areas of social life that may be the subject of law, the number of reasons at play in the making of law is likely unlimited.

Furthermore, even with regard to the changing of an individual legal norm, it is evident that a whole variety of levels of explanation can be invoked: we may contend that the norm was formulated to achieve concrete regulatory ends, to implement a certain policy programme, or to embed a political ideology.

Alternatively, we may see it as representing a response to social and political demands and pressures, or as constituting the successful outcome of the activist and lobbying efforts of certain social groups or individuals. The determinants and variables that we may refer to in explaining why a given change of law occurred are numerous and multidimensional- ranging from the personal intentions of individual lawmakers¹⁷⁵ to large-scale cultural shifts in modern society.¹⁷⁶

Similarly, the question of why actors afforded legal recognition to information privacy in the UK may be answered equally in reference to the compelling force of legal scholarship, such as Warren and Brandeis' famous 1890 article *The Right to Privacy*,¹⁷⁷ or with reference to the normative force of the implementation of the explicit protection of private life as a human right in Article 8 of the 1950 European Convention of Human Rights and in the 1998 UK Human Rights Act. Conversely, the absence of a comprehensive privacy tort in UK law may be explained with reference to the institutional constraints on judges regarding the development of new legal principles, or in relation to UK legal culture more generally.¹⁷⁸ Alternatively, the progressive legal recognition of privacy in the UK may be considered the effect of a general liberal political trajectory in legal institutions,¹⁷⁹ or as a response of the state apparatus to broader socio-cultural shifts in the information society.¹⁸⁰ In light of the wide variety of potentially competing explanations, one might worry about the possibility of identifying general reasons for why privacy laws were developed, let alone why law changes *in general*.

¹⁷⁵ See, for example, Jeffrey A Segal and Albert D Cover, 'Ideological Values and the Votes of U. S. Supreme Court Justices' (1989) 83 *The American Political Science Review* 557.

¹⁷⁶ Banakar, 'Law and Regulation in Late Modernity' (n 48); Eugen Ehrlich, *Grundlegung Der Soziologie Des Rechts* (Duncker und Humbolt 1913).

¹⁷⁷ Warren and Brandeis (n 91). The arguably immense influence of this article in UK privacy law is stressed in Bennett (n 12).

¹⁷⁸ Whitman (n 2); Hans-Joachim Cremer, *Human Rights and the Protection of Privacy in Tort Law: A Comparison Between English and German Law* (Taylor & Francis, Inc 2012).

¹⁷⁹ Beate Rössler frames privacy as a core liberal value.

¹⁸⁰ Castells (n 8).

But to give into these concerns seems overly pessimistic. To be sure, one must anticipate that empirical explorations of acts of privacy recognition may reveal that privacy laws were made for a whole variety of reasons. Social life is complex and therefore, a wide variety of competing explanatory narratives may validly be referred to in explaining complex social phenomena. *Why*-type questions – especially if they concern complicated social facts – give rise to a multiplicity of answers and thereby typically import and emphasise complexity, rather than reduce it.¹⁸¹ This is invariably the case with any type of human action: the fact that a person drinks coffee in the morning may be explained on the basis of taste preference or caffeine addiction; it may alternatively be explained on the basis of how the 16th century British East India Company's trading practices have influenced modern consumption, or by the simple fact that one was out of tea on that day. In other words, the reasons for which any given legal norm is created are not any more or less complex than the reasons for which many other types of social action and practice occur.

If it is true that *why*-type questions regarding a specific topic of information privacy laws already yield as broad a pool of responses as hinted to above, one may be forgiven for thinking that the reasons that may be cited in response to the question of why legal change occurs *in general* seem boundless and ultimately dependent on idiosyncratic circumstances. The attempt to articulate an explanation of law-changing acts that accounts for *all* types of (heterogeneous) instances of legal change might thus strike us as dubious or at least condemned to vagueness. From this vantage point, it may be considered unsurprising that there have been few attempts to offer general explanations for why law changes.

But as stated in subsection 2.2.1, legal change is certainly not the only social phenomenon that is prone to being influenced by a complex variety of factors. Regarding various other social phenomena, social scientists and theorists have not

¹⁸¹ Florian Kohlbacher, 'The Use of Qualitative Content Analysis in Case Study Research' (2006) 7 *Qualitative Social Research* 1, 4.

been deterred by complexity – and by the fact that the theories and interpretations they offer are unlikely to exhaustively explain the social fact at hand. Sociology as a discipline has traditionally been committed to articulating generalised responses to *why*-type questions that concern complex aspects of social life. A meaningful early example is Émile Durkheim’s inquiry into the social causes of suicide. The empirical study of occurrences of suicide led Durkheim to advise a taxonomy of the types of reasons for which individuals commit suicide. According to Durkheim’s taxonomy, suicide may be of the egoistic, the altruistic, the anomic, or the fatalistic type.¹⁸²

Durkheim’s social theory of suicide is undeniably vulnerable to a range of caveats, including oversimplification and blindness towards alternative levels of explanation. But to articulate a sociological explanation is not to deny that there may well be a variety of idiosyncratic, biological, economic, historical or psychological factors at work in motivating an agent to commit suicide *in situ*. Instead, social-scientific analysis is better described as placing a strong *focus* on social dynamics and their relevance in explaining these phenomena. The mere fact that acts of legal change likely involve a myriad of subjective meanings does not *per se* exclude the possibility that something more general and sociologically meaningful can be said about legal change. In fact, Robert K. Merton describes Durkheim’s study on suicide as “perhaps the classical instance of the use and development of a middle-range theory”¹⁸³ that advances our understanding of macro-sociological phenomena in a piecemeal way, by investigating micro-sociological facts.

It is true that untenable generalisations about social facts may impede the progress of sociological knowledge and understanding. This supports the general case for parsimonious conclusions and modest theorising in social research. At the same time, going beyond the purely descriptive lens by building theories and generating new hypotheses is as central to the social sciences – including socio-legal

¹⁸² Emile Durkheim, *On Suicide* (Robin Buss tr, Penguin Books 2006).

¹⁸³ Robert K. Merton, *Social Theory and Social Structure*. New York: The Free Press Table of Contents in Word (The Free Press 1968) 60.

studies – as it is to other academic disciplines.¹⁸⁴ This research project therefore engages in both qualitative empirical research and in theorising to contribute towards an understanding of legal change that focuses on lawmakers’ reasons for effecting legal change.

Furthermore, section 2.1 of this chapter has demonstrated that large parts of the literature on the legal development of privacy lack empirically grounded references to the motives of lawmakers – the reasons they had for changing law. Particularly legal academic literature is rife with accounts that claim that information privacy acquired its respective legal status in Germany or the UK simply *because it is good or otherwise defensible that it did*, thus offering a normative rather than empirical genealogical explanation. Given that the reasons for which we may currently regard privacy as a valuable good did not necessarily play a part in the social circumstances of its legal creation, such responses at most normatively *justify* the existence of said legal norms, but do not *explain* it in an empirically relevant way. It is a noteworthy feature of legal scholarship that it often conflates the two, quietly presuming that because legal change is typically the result of deliberate human action, the status of what *is* currently valid law is a direct consequence of what *ought* to be legally recognised.

Exposing these narratives to empirical scrutiny may already count as a valuable contribution, even though this research project may unearth a complicated plethora of reasons for which lawmakers afforded recognition to information privacy and thus do little to simplify things. It is a central objective of this doctoral project to contribute to a more nuanced, empirically sound and historically informed understanding of why information privacy acquired its respective legal status.

¹⁸⁴ Kuhn views inductive theorising as central to the puzzle-solving of ‘normal science’: Thomas S Kuhn, *The Structure of Scientific Revolutions* (Otto Neurath ed, University of Chicago Press 1970) 34.

2.2.5 Conclusions on understanding legal change

Section 2.2 of this chapter has considered theoretical contributions of jurisprudence and social theory to the phenomenon of legal change. I have proposed a sociological perspective that takes into account the fact that making law typically involves formulating an answer to the normative question of what ought to be the content of law. Subsection 2.2.3 has presented this type of legal norm-entrepreneurship as a type of social action. This means that those who engage in legal change attribute certain meanings to their law-changing actions. Correspondingly, I have outlined the present research project's ambition to inquire more deeply into these meanings by considering the *reasons lawmakers have*¹⁸⁵ for engaging in actions that change law.

Section 2.2 of this literature review has also scrutinised various objections that may be raised about the theoretical feasibility and scientific usefulness of this approach. I have indicated that an inquiry into lawmakers' reasons for legal change is useful because of its relevance to core jurisprudential debates – particularly concerning the role of merits and normative reasoning in law – and because it contributes to the further development of socio-legal theory.

This literature review has also probed into possible overlaps and continuities between socio-legal and jurisprudential theory. Even though I am more concerned with contributing to a general, socio-legal understanding of legal change, I have argued that exploring the reasons for which lawmakers engage in legal change may also be interesting to analytical jurisprudential theorising. To illustrate this point, I have proposed that some controversial claims in jurisprudence – such as the view that law depends on considerations of merit – may usefully be re-worked into a

¹⁸⁵ Weber uses the terminological term of *causal motive* to refer to these unit-factors and describes them as “a complex of subjective meaning which seems to the actor himself or to the observer an adequate ground for the conduct in question” Weber, *Economy and Society: An Outline of Interpretive Sociology* (n 25) 11. However, as Weber himself acknowledges, the extent to which we can establish the motivational force of such motives – in other words, whether we can establish that they are truly causal to our actions – is highly limited. I thus employ the term ‘reason for action’ for explorations of institutionally held meanings, but do not make a claim to causality.

theory about law-changing acts.¹⁸⁶ This, of course, is only one example for the shape that an analytical theory of legal change might take. But it suggests that the theoretical focus on lawmakers' reasons for engaging in acts of legal change may be a useful theoretical lens for thinking about law across different disciplines.

Throughout the discussion of my findings, as well as in the concluding chapter of this thesis, I critically consider whether and to what extent the insights of the comparative case study of information privacy allow for articulating more general insights about the reasons that lawmakers have for engaging in acts of legal change.

¹⁸⁶ See the exposition of legal positivism above. For a critical view, see Matthew Kramer, 'How Moral Principles Can Enter Into the Law' (2000) 6 *Legal Theory* 83.

3. Two Concepts of Legal Change

This chapter contains part of the doctoral project's core theoretical contribution. It responds to the problem of how we may identify legal change empirically by developing and contrasting two concepts of legal change. The FIRST CONCEPT OF LEGAL CHANGE is underpinned by a more sociologically intuitive understanding of law, while the SECOND CONCEPT is jurisprudentially useful because it rests on a conception of legal validity as binary. This chapter critically evaluates the insights into legal change each theory is able to generate. On the basis of this discussion, this chapter describes how legal change is operationalised for the purpose of exploring empirically the legal recognition of information privacy.

3.1 Introduction

'For a rule to become law it must be institutionalized. It must go through the stages required for achieving the status of law'¹⁸⁷

Law changes. New laws are constantly being introduced and old ones are abolished and amended. Yet, while change is an incontestable feature of modern legal systems, it can at times be difficult to pinpoint what constitutes an instance of legal change and when it occurs.

The boundaries between acknowledging the legal status of a norm and broadening its scope are often blurry. Particularly in the context of adjudication, what is often couched an act of merely stating the law can- especially if proposed by an authoritative institution such as a high court or an influential legal academic-itself changes the way a legal principle is defined or applied. Thus, insidious innovations in law sometimes surface as innocuous descriptions of already-valid law. The inverse scenario is equally familiar: a decision in a 'leading case' may be cited as legal authority for a given norm even though it merely confirms a principle whose

¹⁸⁷ Watson (n 162) 1153.

validity was without doubt even before the judgement. This issue may equally arise in relation to legislative change: it is possible that an act of parliament in large parts only collates and clarifies legal norms that were live and valid before the act. In such cases, authoritative judgments or legislative acts have the semblance of changing law but arguably do not effect any substantive legal change. These examples, which are discussed in more detail in section 3.2, caution us not to trust law's 'official story' of the origin of legal norms.

But what is the reality of legal change? This chapter responds to the difficulties we encounter in empirically locating instances of legal change. In particular, by drawing on jurisprudential scholarship and social theory, I develop two concepts of legal change that aid the task of identifying moments when law changes. On the basis of an understanding of legal change grounded in Hartian secondary rules, the FIRST CONCEPT OF LEGAL CHANGE proposes that legal change occurs in virtue of acts of recognition. This concept is able to comprise the more covert or implicit¹⁸⁸ official ways of changing law outlined in the first above example. In attributing transformative power to every act of recognition, it supposes that legal norms are continuously perpetuated and solidified through the engagements of actors in the legal sphere. It thus glosses the existence of legal norms as cumulative.

While this FIRST CONCEPT is sociologically intuitive, it conflicts with the orthodox jurisprudential understanding of the existence of a norm as law – its legal validity – as a binary matter. On that view, a norm has either been posited as valid law or it has not. Correspondingly, I develop an alternative concept of legal change that distinguishes more clearly between merely declarative and transformative acts of recognition. This SECOND CONCEPT OF LEGAL CHANGE is more apt at picking out cases of a mere semblance of legal change described in the second above example. However, in favour of the FIRST CONCEPT, it may be objected that every

¹⁸⁸ Christoph Hönnige, Sascha Kneip and Astrid Lorenz, 'Formen, Ebenen, Interaktionen- Eine Erweiterte Analyse Des Verfassungswandels' in Christoph Hönnige, Sascha Kneip and Astrid Lorenz (eds), *Verfassungswandel im Mehrebenensystem* (VS Verlag für Sozialwissenschaften Springer 2011) 11.

authoritative mention of a legal norm has at least a minimally transformative effect because it contributes to the norm's salience and thereby cements its standing, possibly raising confidence in future claimants. In critically contrasting both concepts of legal change, this Chapter discusses the conceptual and sociological merits of conceiving of the validity of legal norms as binary or liminal.

3.2 Identifying legal change: 'law in the books' versus 'law in action'

As mentioned in the introduction to this chapter, we sometimes encounter difficulties in distinguishing moments where the legal status of a norm was acknowledged from moments where it is extended or otherwise changed. This is especially true of adjudication in so-called 'hard cases'.¹⁸⁹ Regarding the legal development of the right to privacy, an obvious example is the 1954 judgement of the German Federal Supreme Court (Bundesgerichtshof) in the *Leserbrief* case¹⁹⁰ and its relevance for the legal recognition of privacy. The facts of the case merely concerned the publication of the distorted content of a confidential letter, but the Federal Supreme Court used the opportunity to offer its opinion on the question of the extent to which the personality was legally protected from infringement.¹⁹¹ Specifically, the court purportedly deduced a general right to personality (Allgemeines Persönlichkeitsrecht) – and a constitutional right to privacy as a dimension of this general right to personality – from combination of Article 2 (1)¹⁹² and Article 1¹⁹³ of the Basic Law. Although the wording of these Articles notably lacks any mention or reference to the concept of *Privatsphäre* and the judgement clearly displays elements of active constitutional construction or 'creative law-

¹⁸⁹ Ronald Dworkin, 'Hard Cases' (1975) 88 Harvard Law Review 1057.

¹⁹⁰ *Leserbrief/Veröffentlichung von Briefen*, Urteil vom 25.5.1954, BGHZ 13, 334

¹⁹¹ Balthasar (n 5) 107.

¹⁹² 'Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.' Article 2 (1) GG.

¹⁹³ 'Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.' Article 1 (1) GG.

making¹⁹⁴, it states in ostensibly declaratory and descriptive terminology that this right to personality *was to be found in*¹⁹⁵ Articles 1 and 2.

Today, these articles of the Grundgesetz are commonly cited as the basis of the constitutional protection – the *legal authority* – of privacy in German law; conspicuously without reference to the tradition of judicial interpretation that began with the *Leserbrief* judgement.¹⁹⁶ Thus, in German law, the constitutional recognition of privacy was coined by the court in the 1950s and retroactively read into two articles of the 1949 Constitution. When legal norms are referred to, it is common practice across legal systems to cite the basis or legal grounding of these norms – their legal ‘authority’ or ‘basis’. Typically, this includes the article, paragraph or section in the piece of legislation that contains the norm in question, or the judicial precedent that established it.

This focus on the origins of law is unsurprising, since the validity of positive legal norms is determined in relation to how the norms were made; they must have been validly posited according to the respective law-making rules of the system.¹⁹⁷ Yet, as the *Leserbrief* case demonstrates, the legal authorities cited by lawyers do not reliably track legal change. Even though modern law typically displays a high degree of reflexivity¹⁹⁸ and tends to consciously monitor its own changes, we cannot always trust doctrinal narratives of legal development.

The tendency to look back in time to anchor legal norms in already existing legal facts is a common feature of legal systems as it is the inherent nature of legal application that a generalised normative order from the past is applied to a specific

¹⁹⁴ Beverly-Smith, Ohly and Lucas-Schloetter (n 7).

¹⁹⁵ BGH 25. Mai 1954 I ZR 211/53: “Aus Art.1 und 2 GG ergibt sich ein Persönlichkeitsrecht, dessen Abgrenzung sich aus den Rechten anderer, aus der verfassungsmäßigen Ordnung und dem Sittengesetz ergibt.“

¹⁹⁶ Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, USA 2002) 241.

¹⁹⁷ This is the consensus in General Jurisprudence. Even natural law theorists do not doubt that law is at least also identified in relation to its social sources. David Plunkett and Scott J Shapiro, ‘Law, Morality and Everything Else: General Jurisprudence as a Branch of Metanormative Theory’ (2017) 128 *Ethics* 37, 38.

¹⁹⁸ Reza Banakar, *Normativity in Legal Sociology: Methodological Reflections on Law and Regulation in Late Modernity* (Springer 2015) 268.

present case or conflict. It is with reference to this inherently conservative orientation that Eugen Ehrlich famously described law as ‘the government of the living by the dead’.¹⁹⁹ It is clear that the nature of legal interpretation is intrinsically anachronistic in that it is primarily concerned with using law to make sense of present and future social scenarios, rather than the historical context in which these texts were written and articulated. This has the adverse effect of confusing those who seek to trace legal development or change and find themselves confronted with layers and layers of supposed meaning that the words of constitutions and other legal texts can, from a historical perspective, hardly be read to contain. What is often couched an act of ‘merely’ stating or recognising what is law may- especially if uttered or articulated by a legal agent or body of authority such as a high court – or even an influential legal academic – itself might change the way a legal principle is defined or applied, and thus may have a transformative effect.

The opposite scenario is equally conceivable: a decision in a ‘landmark’ or ‘leading’ case is sometimes cited as authority for a given legal norm, even though it merely confirmed a norm or principle whose legal validity was uncontested even before the judgement occurred. In such cases, we may question whether such a judgment amounts to an instance of legal change. This issue may equally arise in relation to legislative change: although it is intuitive to presume that the enactment of a piece of legislation is always also an instance of legal change, it is possible that a parliamentary act merely serves to collate and organise legal norms that were live and well before its introduction. In these cases, legislation arguably does not contribute to any substantive legal change. On the other hand, it may be argued that even a seemingly innocuous *declarative* mention of a legal norm might have some substantively transformative effect because it always contributes to the norm’s salience and thereby solidifies its standing, possibly raising confidence in future claimants and thus giving rise to new court actions.

¹⁹⁹ ‘Das Recht (...) ist stets eine Form der Herrschaft des Toten über den Lebenden.’ Ehrlich attributes the origin of the phrase to Goethe: Ehrlich (n 176) 323.

This point illuminates an additional difficulty we may encounter in trying to identify legal change empirically: the judgment of whether or not a legal change occurred may vary according to different actors' perspectives. For example, as revealed in Balthazar's study, before information privacy was widely recognised in German civil law, individuals who sought to protect private letters from being published in newspapers were able to rely on the principle of copyright law (Urheberrecht) to prevent such publications.²⁰⁰ Similarly, English courts historically allowed injunctions against the publication of photographs and other pieces of information on the basis of the legal protection of property rights.²⁰¹ From the perspective of legal scholarship and of legal professionals in Germany and the UK, the later explicit recognition of privacy marks a notable change of law. The law student whose syllabus now includes the legal concept of privacy likely agrees.

But it may be objected that from the perspective of the respective claimant who seeks to prevent their information from publication, whether the law provides an avenue to secure their interest via the explicit legal recognition of privacy or via a different legal principle is simply a matter of packaging – and ultimately of little substantive importance. Conversely, from this consumer perspective, access to justice, civil procedure or laws of evidence as well as more general practices of enforcement may have a more discernible effect on the possibilities of protecting privacy interests in courts of law than the details of the technical legal encoding of privacy. Whether changes in these areas are to be coded as of instances 'legal change' or simply as broader social changes that happen to also affect the reality of privacy law ultimately depends on the concept of law that underpins empirical inquiries.²⁰² Furthermore, if it were to be decided that changes in interpretation or enforcement practices are counted as instances of legal change, it is still unclear of how such subtle changes could be pinpointed empirically.

²⁰⁰ Balthasar (n 5) 39.

²⁰¹ Pratt (n 35) 40.

²⁰² For a focus on litigants' behaviour, see George L Priest, 'Measuring Legal Change' (1987) 3 *Journal of Law, Economics & Organization* 193.

This line of argumentation alludes to a further, more fundamental issue: what exactly is this *law* whose change this research project explores? In asking this, I do not mean to imply that an exploration of legal change – or indeed a study of any other socio-legal phenomenon – can only ever proceed after conclusively answering the question ‘*what is law?*’. However, given the variety of understandings of law that are current in academic scholarship, it is advisable to map out the consequences for empirical inquiry that different concepts of law – and correspondingly different concepts of legal change – entail.

The nature of law continues to elude and divide legal theorists and law and society scholars. While General Jurisprudence is committed to articulating a concept of law that roughly confines itself to that which is necessary and sufficient,²⁰³ socio-legal scholars are often less concerned with disentangling law from the social fabric in which it is embedded²⁰⁴ and instead aim for a thick, socially immersed understanding of law. To differentiate the socially contextualised understanding of law that many law and society scholars espouse from the more narrow understanding of law espoused in legal practice and theory, it has become common to contrast the terms *black-letter-law / law-in-the-books* and *law-in-action*²⁰⁵. While *law-in-action* allows that a wide variety of institutions, processes and phenomena are studied under the umbrella term ‘law’, *law-in-the-books* instead aims to confine the term ‘law’ to the norms and principles that are legally valid in a particular legal system at a given point of time.

In contrast to most law and society scholarship, this thesis is not focally concerned with the social effects of legal norms. Instead, it explores the other side of the relational circle: the social process of how valid laws are made, shaped and changed. In this sense, the heuristic understanding of law that underpins this project’s interest in legal change is closer to that of ‘in the books’ or ‘black-letter law’;

²⁰³ Dickson, *Evaluation and Legal Theory* (n 107).

²⁰⁴ DJ Galligan, *Law in Modern Society* (Oxford University Press 2007) 70.

²⁰⁵ Jean-Louis Halpérin, ‘Law in Books and Law in Action: The Problem of Legal Change’ (2011) 64 *Maine Law Review* 45.

the norms that uncontroversially qualify as law from the perspective of legal professionals. This focus serves a dual purpose: firstly, it prevents a boundless conception of legal change where changes in law are de facto equated with social change in general. Instead, focussing on changes in so-called ‘black-letter law’ acknowledges that even though legal change is influenced by and depends upon an infinitely broad set of social facts and practices, it nevertheless deserves our attention as a special sociological phenomenon. Secondly, employing a doctrinally conventional conception of law is likely to yield insights into legal change that can be useful for jurisprudential, doctrinal and socio-legal scholarship alike.

Despite this, as illustrated particularly well by the work of legal realists and critical legal studies scholars, the boundaries between law-in-the-books and law-in-action are not always clear-cut. In situations where the enforcement, interpretation or application of the wording in a statute is radically deficient or distorted, we may with reason question whether formal statutory law in these instances is mere farce or fiction.²⁰⁶ When asked ‘what is the law on this issue?’, it is not uncommon even for legal professionals to diverge from legal text and instead refer to enforcement practices. This is particularly observable in relation to criminal law: changes in enforcement rules regarding the persecution of certain behaviours – such as drug possession – are often hailed as legal change,²⁰⁷ despite the fact that the validity of the respective criminal provisions may well remain unaffected. This suggests that in determining which legal norms govern a given situation, it may sometimes be required to look beyond textual formulations.

But can such a viewpoint be said to refer only to *black-letter-law*? The problem is that taking into account rules of enforcement does not quite seem to meet the breadth of a *law-in-action* lens, given that the reality and social significance of enforcement practices may yet be different altogether. Even a description of the

²⁰⁶ Such a view is espoused by legal realists like Alf Ross, ‘Tû-Tû’ (1957) 70 Harvard Law Review 812.

²⁰⁷ Halpérin (n 205) 66.

combination of criminal provisions and rules of enforcement does not necessarily paint the whole picture sought by *law-in-action*. In other words, even black-letter-law may go beyond words on paper to include some socially conditioned features. The same is argued by John Gardner, who points out that it is common amongst legal professionals to confuse legal norms with what he refers to as ‘their formulation’, that is, the written article, paragraph or section of the legislative or judicial text in which law is anchored. Gardner writes,

‘a lawyer may refer to ‘the words of the rule’. This cannot be taken literally. Rules do not have words. What the lawyer really means is the wording of the legislative provision that creates the rule.’²⁰⁸

This raises the question: if black-letter law is not the text itself, what is it and how do we determine its content? Gardner emphasises that it is only through interpreting legislative text that we arrive at the content of a legal norm²⁰⁹. But our interpretative activities are ultimately influenced by *social* facts, such as shared linguistic practices. A similar observation is made by Robert Alexy in relation to the German legal system. He argues that valid law (Recht) does not necessarily coincide with statute (Gesetz).²¹⁰ Black-letter-law, in other words, is never just *the letters*; it necessarily always entails the social and semantic frameworks that ground the letters’ legal meaning.

Thus, even if we confine our investigations into legal change to *black-letter-law*, determining when exactly legal change occurs may not be as straightforward as tracking textual amendments. Subtle socio-linguistic changes of the meaning of terms employed in statutory documents are perhaps below the threshold of being acknowledged as ‘legal change’ by legal officials and other professionals.²¹¹ But they

²⁰⁸ Gardner (n 102) 155.

²⁰⁹ See Dworkin’s legal interpretivism Dworkin, ‘Law’s Empire’ (n 104); Marmor (n 120).

²¹⁰ Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Paulson & Paulson tr, Clarendon Press 2002) 9.

²¹¹ For an analysis of changes in the meaning of the concept of *data* over time, see González Fuster (n 6).

may nevertheless be insidiously transformative regarding the content of the legal norm.²¹²

This subsection has cautioned that official stories of origins of legal norms may diverge from the empirical-sociological reality of legal change. It has also flagged up some of the difficulties we encounter in empirically locating instances of legal change. Before we may proceed to explore empirically why legal change occurs – including specifically why information privacy was legally encoded in its respective forms – it is thus necessary to operationalise it. Before it is possible to collate insights into the reasons for which law is changed, it is thus necessary to devise a concept of legal change that helps to identify moments of legal change empirically. This work is done in the following subsections.

3.3 The FIRST CONCEPT of legal change: acts of recognition

The previous subsection has explained why it is not always advisable for social scientists to trust the ‘official story’ when it comes to identifying moments of legal change. The present subsection builds on this insight, as well as on the existing sociological and jurisprudential understandings of legal change that were discussed in section 2.2. In particular, this subsection offers a concept of legal change that facilitates identifying moments of legal change for empirical inquiry. Having a clear concept of when, and in virtue of what, a change in law occurs is essential for this project’s ambition of contributing towards a more general sociological understanding of legal change.

The previous section has already explained and defended this research project’s narrow focus on changes of ‘black letter law’ or ‘law in the books’. But it has also pointed out that given the nature of legal norms as social artefacts, the demarcation between *legal* norms and other related *social* norms and practices sometimes remains blurry. Section 3 of the previous chapter has established that this

²¹² One example for such a change in legal meaning is that the legal concept of *data* in various statutory instruments has come to include *metadata*: Ganley (n 4) 244.

project employs a social constructivist lens through which legal norms are viewed as the product of social processes, or *acts of lawmaking*. In outlining this project's research ambitions regarding legal change, section 2.2 has proposed understanding legal change as meaningful social – and thus *communicative* – action: a range of structuralist and post-structuralist social theorists have emphasised the central and integral role of language and grammatical structure for social and cultural life²¹³, and some even define the social world *as such* as a system of communication²¹⁴ or a communicative sphere.²¹⁵ This characterisation is particularly apt in light of the fact that modern legal systems typically comprise constitutions, codes, statutes, judgements, legal opinions and commentaries. These are ultimately composed of speech acts, grounded in language.

In the context of modern legal systems, actions that amount to lawmaking are invariably language-based: institutionalised changes of law through legislative amendments or judicial precedent invariably depend on, or entail, amendments of legal text.²¹⁶ Thus, a useful starting point for the identification of law changing actions – and thus moments of legal change – are the communicative acts, or *speech acts*,²¹⁷ that have the effect of altering the legal status quo. Austin's notion of speech act is particularly useful here as it acknowledges the creative and constructivist potential inherent in various forms of legal speech. Similarly, various social theorists have pointed out the highly *performative* and 'quintessentially active'²¹⁸ nature of legal language. Specifically, Austin describes performative speech acts as those that

²¹³ see, for example, Barthes 1970; Lévi-Strauss 1963.

²¹⁴ Niklas Luhmann, *Law as a Social System* (Oxford University Press 2004).

²¹⁵ Jürgen Habermas, *The Theory of Communicative Action Volume One: Reason and the Rationalisation of Society* (Beacon Press 1984).

²¹⁶ Maayan Ravid and Alice Schneider, 'Legal Concepts in Flux: The Social Construction of Legal Meaning' in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge Taylor and Francis Group 2020) 244.

²¹⁷ JL Austin, *How to Do Things with Words: The William James Lectures, Delivered at Harvard University in 1955* (Oxford University Press 1962) 19.

²¹⁸ Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *The Hastings Law Journal* 805, 839.b

simultaneously describe and *produce* a certain reality; for example, declaring ‘I do’ is constitutive for marriage.²¹⁹ Austin himself acknowledges that these performative speech acts are especially commonplace in legal language.²²⁰

Austin’s theory of speech acts resurfaces in the reflections of jurisprudential and sociological theorists alike. As noted by Terdiman in his *Introduction* to Pierre Bourdieu’s *Sociology of the Juridical Field*, Bourdieu explicitly basis his focus on linguistic and symbolic interaction to speech act theory in recognition of the fact that it is a ‘special linguistic capacity (one which is particularly inherent in the law) that [it] makes things true *simply by saying them*.’²²¹ Given that legal concepts are obviously socially constructed – they are undeniably the products of human interactions²²² – it is intuitive that we look towards language in search of their origins. To suggest that legal norms are made and changed through language is not to claim that they are necessarily instable, or that law is changed easily: not every member of a legal community who possesses linguistic competence is automatically able to change the law as she pleases. Instead, as section 2.2 has outlined, the power to engage in law-changing speech acts is usually confined to a small group of professional politicians and jurists who are commonly referred to as ‘legal officials’.

Furthermore, in modern legal systems, even the speech acts of legal officials are only capable of effecting legal change under various institutional conditions; for example, a passage of a high court judgement may change the status quo on the legal protection of privacy, but the speech acts uttered by the high court judge says at his dinner table have no such effect. This insight iterates the suggestion offered in section 2.2 that when it comes to picking out law-changing acts, it is advisable to focus on the speech acts within institutional discourses in which law is made, rather than on the speech of any individual legal professional.

²¹⁹ Austin (n 217) 10.

²²⁰ *ibid* 19.

²²¹ Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’ (n 218).

²²² Jules L Coleman, Kenneth Einar Himma and Scott J Shapiro, ‘Inclusive Legal Positivism’, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2004) 1.

A further question arises that relates to what exactly happens when a lawmaking institution changes law, specifically when they make some concept or norm *into law*. Building on Austin's notion of performative speech acts, I propose here that identifiable moments in the formation of the right to privacy that each constitute a performative speech act²²³ by a legal institution, for example, in a court decision or piece of legislation are conceived of as *acts of legal recognition*.

The concept of recognition is no stranger to political and legal philosophy.²²⁴ Over the past decades, a range of political and social theorists, including Kojève,²²⁵ Habermas,²²⁶ Honneth,²²⁷ Butler²²⁸ and Williams²²⁹ have developed theories of moral or social development with reference to the concept of recognition. This has led to the awareness that the concept of recognition (*Anerkennung*) was already central to the political philosophy of Fichte²³⁰ and especially Hegel, for whom recognition constituted the process or moment through which a non-violent state of intersubjective freedom and social harmony could be achieved.²³¹ In his 1820 *Philosophy of Right*, Hegel stated that it was through the process of recognition, through

²²³ In his original formulation of speech act theory, Austin distinguished between three types of speech acts (*locutionary*, *illocutionary* and *perlocutionary*) based on the intent behind the utterance, see Austin (n 217). For the purpose of this study, a speech act is simply constitutes as a communicative utterance or statement that addresses privacy as a concept of legal concern or relevance.

²²⁴ Charles Taylor, 'The Politics of Recognition' in Amy Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994) 25; Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (Verso 2003) Preface.

²²⁵ Alexandre Kojève, *Outline of a Phenomenology of Right* (Bryan-Paul Frost ed, Rowman & Littlefield Publishers, Inc 2007).

²²⁶ Jürgen Habermas, 'Struggles for Recognition in the Democratic Constitutional State' in Jürgen Habermas (ed), *The Inclusion of the Other. Studies in Political Theory* (The MIT Press 1998).

²²⁷ Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (The MIT Press 1996); Fraser and Honneth (n 224).

²²⁸ Judith Butler, *Subjects of Desire: Hegelian Reflections in Twentieth-Century France* (Colu 1987).

²²⁹ (1997)

²³⁰ Johann Gottlieb Fichte, '[1797] Foundations of Natural Right' in Frederick Neuhouser (ed), *Cambridge Texts in the History of Philosophy* (Cambridge University Press 2000) 31.

²³¹ Williams (n 229) 22; Sybol Cook Anderson, *Hegel's Theory of Recognition: From Oppression to Ethical Liberal Modernity* (Continuum International Publishing Group 2009) 3.

recognising the self in the other,²³² that the shared transcendental spirit (*Weltgeist*) would be able to actualise itself and thus lead to a condition of social freedom that would enable individuals to realise their full capacity.²³³

The increasing currency of the concept of recognition in social and political theory must be attributed to the fact that it provides a neat conceptual route to a human state of being that is inherently inter-subjective and therein presents an answer to the fundamental sociological question of how society and social order is possible. In both Fichte's²³⁴ and Hegel's formulations, recognition constitutes the moment that allowed the transcending of the Hobbesian 'state of nature', it enabled the premise of social co-existence- the essence of what we mean when we talk about 'society'.²³⁵

This research project seeks to adapt some elements of Hegel's theory of recognition to develop an operationalization of the formation of *legal* instead of moral or other social orders. In this sense, it focuses on the ontological and constructivist aspects of recognition theory, particularly the premise that the moment of recognition implies a detecting of *the self in the other*.

Legal recognition is here defined as an affirmative communicative act, usually contained in speech or writing, by an official legal institution that has some command and authority over deciding *what the law is* within a given social context.

²³² In § 268 of his *Elements of the Philosophy of Right*, Hegel proclaims that the moment of intersubjective recognition – in his case between an individual consciousness and the legal order of the state – constitutes a process of overcoming difference. He states that in the realization that my essential subjective interests are contained in the interest and end of an other “this other immediately ceases to be an other for me, and in my consciousness of this, I am free.” Georg Wilhelm Friedrich Hegel, [1820] *Elements of the Philosophy of Right* (Allen W Wood and HB Nisbet eds, Cambridge University Press 1991) 288.

²³³ Williams (n 229) 204.

²³⁴ Fichte (n 230).

²³⁵ Williams (n 229) 32.

In this sense, an act of recognition constitutes a site of establishing or forming the legal status quo: it is in expressing or proclaiming that a concept has a legal quality or relevance for the law. In that way, the court judgement, legislative act or other source of legal command effectively raises and incorporates the concept into the sphere of the law.

This means that what is essentially *recognised* in such an act of legal recognition is not privacy, but *the law itself*: the specifically legal nature or quality of privacy. In this sense, a body or institution that represents 'the law' in its very actions and proclamations assumes a curative function in that it recognises legal quality or relevance- 'the law'- in a concept, social situation or argument previously categorised as outside (or at least not clearly within) of the confines of legal validity: the law recognises *itself in the other* and through this act of recognition establishes a legal construction of privacy.

Acts of recognition as speech acts are *performative* in Austin's sense; they not only describe what the status of legal validity is, but they simultaneously construct it. Even ostentatious acts of legal change through legislation tend to culminate in a declaratory 'recognition' of the post-change status of legal validity, usually contained in a new legislative act or a statutory amendment: it is in the coming-into force (usually by public declaration) of this new piece of legislation that black letter law is effectively and ultimately changed. This demonstrates that acts of legal recognition not only have a performative (and thus transformative) nature and potential, but that they also provide constitutive seals for legislative change, revealing when a legal change has occurred. In this sense, this final 'act' of recognition is the culmination of the 'juridification' (*Verrechtlichung*) of a concept. Speech acts of legal recognition are thus effective sites for empirically detecting and analysing the formation of legal orders and identifying instances of legal change.

One highly applicable insight of the political theorists' perspective about the concept of recognition is the stipulation that acts of recognition are not only transformative for the object of recognition, but also for the recognising subject,

because through each act of recognition, the subject's life-world is extended. With reference to 'the law' or the institutions that act as its agent, this means that recognising the legal nature of privacy not only transforms the concept of privacy, but it: transforms the body of law itself as the newly recognised legal concept of privacy constitutes a legal development, an *extension of* or *addition to* the law, or, put in less evolution-oriented terminology, it *changes* the normative substance and content of law.

Despite this, in terms of describing specifically *legal* systems and processes, the term 'recognition' has primarily been used to refer to the mere act of ascertaining the status quo of legal validity. In this sense, describing a rule or norm as 'legally recognised' or 'recognised by law' is usually a synonym for saying the rule or norm is law. The most prominent example of this usage of the term 'recognition' is H.L.A. Hart's formulation of the *rule of recognition*, which denotes the sum of internally accepted practices and criteria within a legal system through which the validity of a certain law is determined.²³⁶ Hart's tripartite system of 'secondary' meta-rules in fact clearly distinguishes between the *rule of recognition* and the *rules of change* and *adjudication*. While the rule of recognition comprises the set of rules that help legal officials identify already-valid law, the *rule of change* is defined as the set of practices and accepted norms that

'empower an individual or body of persons to introduce new primary rules (...) and to eliminate old rules – in its most evident form, this rule defines the procedure to be followed in legislation.'²³⁷

This characterisation, however, already reveals that the viability of a sharp distinction between Hart's three secondary rules is questionable. In fact, as Scott Shapiro points out, Hart himself described the rules as existing in 'a very close connection', in

²³⁶ Scott J Shapiro, *What Is the Rule of Recognition (And Does It Exist)?* (Second Edi, Clarendon Press 1994) 96.

²³⁷ *ibid.*

'kinship' and in 'resemblances' to one another.²³⁸ In reality, the boundaries between acknowledging the legal nature of a statement or norm (recognising law) and introducing or extending a legal principle or concept (changing law) are likely to be blurred. This is the case because, as argued in the previous subsection, an ostensible *declaration* that a statement or principle *is* law may have the effect of establishing the concept's legal validity in the first place.

The previous subsection has cited the *Leserbrief* case to illustrate this point – and to cast scepticism on 'the official story'. It should be noted that instances where legal change occurs opaquely – under the pretence of merely descriptive statements about the law – are far from exceptional. Indeed, in German law, the grammar of legal argumentation is generally oriented towards an indicative mode rather than an imperative one: legal commentaries, discussions and applications of law tend to ostensibly be concerned with establishing plausible interpretations of what the law *is*, rather than advocating what it *should* be. For example, in Germany, formulations of law in court opinions or judgements are usually presented as mere interpretations of the will of the legislator (*Gesetzgeber*, literally 'law-giver'), rather than recommendations of what the law should be, let alone active legal change.²³⁹ Even the German terms for legal interpretation, *Auslegung*, which translates to 'laying out', and judicial decision-making, *Rechtsfindung* ('finding of the law') seem to suggest that the 'correct' legal interpretation is an empirically existent fact that has to be discovered using some objective method or procedure.²⁴⁰

The focus on acts of legal recognition that I have outlined in this subsection as the FIRST CONCEPT OF LEGAL CHANGE neatly solves this problem: instead of focussing on official, or doctrinal, narratives about when law was changed, the concept of legal change as acts of legal recognition instead focuses on law-changing

²³⁸ *ibid* 96, 97.

²³⁹ The requirement that legal judgements are bound by law and justice (*Bindung an Recht und Gesetz*) is expressly codified in Article 20 (3) of the German Constitution.

²⁴⁰ This form of judicial decision-making is particularly resonant of Max Weber's description of the judge as a rational automat ('Paragraphenautomat') in the modern bureaucratic state Weber, [1921] *Wirtschaft Und Gesellschaft: 5. Auflage* (n 160) 826..

speech acts, whether they change law covertly or not. Through its focus on speech acts in legal discourse, this FIRST CONCEPT OF LEGAL CHANGE also helpfully accommodates the insights that while legislation is one way of changing law, judicial decision-making and even administrative procedures and academic scholarship sometimes effect legal change or work as sources of law.²⁴¹

On the other hand, it may be argued that not every act of legal recognition necessarily changes law, or at least not to the same degree. As the previous subsection has noted, decisions in ‘landmark cases’ may be mistaken as instances of legal change – even though the norm or concept they refer to was already legally valid before the judgment occurred. More generally, expressing that a certain concept or norm is legally valid sometimes really does merely confirm the legal status quo. It seems that especially longstanding and well-entrenched legal concepts and norms – such as that of Parliamentary Sovereignty in the UK – are not affected by any further citation of it in subsequent court cases or pieces of legislation; presumably, a norm cannot become *more* than already-valid law.

So, although the FIRST CONCEPT OF LEGAL CHANGE as acts of legal recognition is helpful in capturing the more covert instances of legal change that the “official story” may neglect, attributing a transformative potential to every institutional mention of legal concepts and norms arguably leads to too many false positives. This concern is remedied by the SECOND CONCEPT OF LEGAL CHANGE, which is proposed in the following subsection.

²⁴¹ The term ‘sources of law’ is ambiguous is sometimes used to refer to the different manifestations of law like acts, statutes, codes and judgements. However, it may also be used to distinguish law from its social influences. For example, Vogenauer argues that ‘in a given legal system, the law does not simply consist of the raw legal sources. The law in force is the product of their refinement by the competent authorities applying and interpreting them.’ Stefan Vogenauer, ‘Sources of Law and Legal Method in Comparative Law’ in Reinhard Zimmermann and Mathias Reimann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 870. Furthermore, Watson emphasises that that there is no clearly established hierarchy or order to the authority of potential ‘sources of law’ Watson (n 162) 1148.

3.4 The SECOND CONCEPT of legal change: is legal validity binary?

As cautioned at the end of the previous subsection, there is a need for clarifying how acts of legal recognition distinguish mentions of legal concepts that have a *transformative*, law-making effect from those that innocuously reference existing law. One straightforward and simple solution would be to introduce an added requirement. This leads to a slightly amended, *SECOND CONCEPT OF LEGAL CHANGE*:

Under this added requirement, to count as law-changing or *transformative*, acts of legal recognition must also settle the status of a concept whose legal validity was previously either not established, or at least indeterminate.

Practically, this means that in situations where a FIRST CONCEPT-order act of legal recognition occurred only because legal officials could not fail to regard a concept or norm as already-valid law, we would not identify an actual change in the legal status quo. A similar way of thinking about it is to ask whether the legal state of affairs would be the same even in the absence of the specific act of legal recognition in question: in that case, such recognising speech acts may be said to have a cognitive rather than transformative nature.

This more constrained reformulation of acts of legal recognition may be conceptually straightforward. But it introduces the additional methodological difficulty of ascertaining the legal status of norms and concepts before they were recognised. Where do we draw the line between a somewhat contested or indeterminate status and legal validity? When are acts of recognition merely cognitive, and when do they have a transformative or law-changing effect? Answering these questions may well turn out to be tricky matter for some (albeit not most) acts of legal recognition. But although caveats regarding methodological usefulness must be considered in theory building, they do not necessarily pose a red

flag: after all, some difficulty of applying conceptual frameworks to the messy reality of social life is to be expected.

Arguably, a more debatable feature of this reformulated SECOND CONCEPT OF LEGAL CHANGE is that it presupposes that the quality of legal validity is a *binary matter*; norms and concepts are either legally valid in a given legal system, or they are not. The advantage is that this perspective on legal validity is generally shared in jurisprudential and doctrinal scholarship. For example, in *The Authority of Law*, Raz explicitly equates the legal validity of a norm with its existence-as-law. He writes: ‘a valid law is a law, an invalid law is not.’²⁴² The implicit understanding is that even though it may at times be epistemically difficult to ascertain whether a given norm is a valid law of a legal system, this question has a determinate answer. The presumption that legal validity is binary does not leave room for the argument that some laws are more valid than others. If a norm is already legally valid, then any further reference to it as ‘valid law’ does not affect its status.

As intuitive as this view seems to doctrinal and jurisprudential scholars, it should give pause to those approaching law through a social-scientific lens. After all, laws are social facts whose existence and social salience depends on dynamic processes.²⁴³ Are there really no norms and concepts that occupy a liminal space between being fully recognised and existing on the periphery of the awareness of legal systems? And amongst those norms and concepts that even doctrinal scholars would view as clear instances of valid law, do some not enjoy a higher degree of authority and acceptance than others? From a socio-legal perspective, it may be objected that every authoritative mention of a legal norm – every act of recognition – has at least a minimally transformative effect because it contributes to the norm’s

²⁴² Raz, *The Authority of Law: Essays on Law and Morality* (n 101) 146.

²⁴³ Christina Bicchieri, *The Grammar of Society: The Nature and Dynamics of Social Norms* (Cambridge University Press 2006) 8.

salience and thereby cements its standing, possibly raising confidence in future claimants.

This unorthodox but sociologically intuitive perspective allows that the existence of legal concepts in a given society is a cumulative matter. Even those considering the existence of law from an analytic tradition agree that it depends, at least in part,²⁴⁴ on the extent to which the members of a legal or recognitional community *accept* the norm or concept as part of their legal framework.²⁴⁵ *Acceptance*, of course, is a tricky concept: social philosophers differ somewhat in how they cash out the psychological components of relevant internal (mental) states of acceptance. Terms commonly invoked include ‘attitudes’, ‘beliefs’, ‘preferences’, ‘desires’ and ‘expectations’.²⁴⁶ Whether such states of acceptance are held by the members of a given community is an empirical sociological question; the answer is clearly a matter of degree.

Indeed, the fact that empirically, acceptance is bound to be gradual presents some problems for social ontologists and legal scholars who consider the existence of social (and legal) norms a binary matter. For example, what about a minority – say a small group of judges or legal scholars – that fails to accept that a certain norm or concept is valid law?²⁴⁷ In larger, complex societies like those that have developed modern legal systems, it is practically inevitable that some minority will always resist the acceptance of social norms. In the analytic literature, it is thus suggested that for us to find that a norm or concept ‘exists’ in a given society, we ought to view it

²⁴⁴ Adam Perry, ‘The Internal Aspect of Social Rules’ (2011) 50 *133*, 13. The issue of whether social norms include a practice element – whether a social norm must be successful at motivating conforming behaviour – is a more controversial point in social ontology literature.

²⁴⁵ For example, HLA Hart argues that a rule of recognition exists in virtue of legal officials accepting it; Hart For the role of acceptance for social norms more generally, see Geoffrey Brennan and others, *Explaining Norms* (Oxford University Press 2013); Bicchieri (n 243).

²⁴⁶ Brennan and others (n 245); Bicchieri (n 243).

²⁴⁷ The issue of dissenting minorities is notably discussed by Philippa Foot, ‘Morality as a System of Hypothetical Imperatives’ (1972) 81 *The Philosophical Review* 305, 308, 309.

sufficient that *a significant portion* of society members accepts the validity of the norm or concept.²⁴⁸ But when exactly is the ‘significant portion’ threshold met?

The orthodox understanding of legal validity requires some quantification of acceptance. This is problematic for a number of ways. For example, when it comes to law in particular, does the validity of a legal norm require that most of those whose behaviour the norm purports to govern have to *accept* it? Certainly *some* jurisprudential accounts – notably HLA Hart’s Concept of Law – required for the existence of a legal system that primary rules be ‘generally obeyed’²⁴⁹. In current scholarship, however, it is widely recognised that this is not a credible empirical claim. Socio-legal scholars have pointed out that especially in the context of modern legal systems, most people lack detailed knowledge of most laws that pertain to them.²⁵⁰ This renders questionable the assumption that all law has to be accepted by a significant portion of members; as noted by Leslie Green, ‘nobody can obey a law of which he is unaware’.²⁵¹ Empirically, a lack of general acceptance regarding law is likely neither rare nor confined to laws that are socially unpopular or unjust. Rather, in light of the fact that new laws often count as legally valid the logical second after they are posited²⁵² and thus typically before they are widely known, it seems like a prevalent phenomenon that concerns much newly made law.

A further issue that arises in relation to the binary lens – the view that norms and concepts are either accepted as law, or they are not – is that as in any complex social system, different legal agents likely hold different amounts of social capital.²⁵³ This means that from a sociological perspective, the legal validity of norms and

²⁴⁸ Brennan and others (n 245) 30.

²⁴⁹ Hart (n 97) 116.

²⁵⁰ This phenomenon is sometimes referred to as ‘The Gap’ in Law and Society Scholarship, see Susan S Silbey, ‘After Legal Consciousness’ (2005) 1 Annual Review of Law and Social Science 323, 324.

²⁵¹ Green (n 132) 170.

²⁵² Modern legal systems typically require the promulgation of legal changes in legal gazettes or other media. These outlets, however, are usually not followed by a large number of members of the relevant populations.

²⁵³ Bourdieu defines social capital as a form of *influence* or *prestige* and as *recognition*, see Pierre Bourdieu, *The Field of Cultural Production* (Polity Press 1993) 30.

concepts is to be determined with view to *who* accepts them, rather than *how many individuals* accept them. Given that law is a highly professionalised social system in modern societies, the acceptance of professional insiders is likely more weighty. This view seems to be shared by some scholars of jurisprudence who take it to be particularly crucial for the existence of legal systems that legal officials accept the content of their laws.²⁵⁴ This indicates that some voices in jurisprudential scholarship show some awareness that the acceptance-as-law (or recognition) of certain agents matters more to the existence of law.

However, social capital or authority in the legal field is also bound to be a matter of degrees. Again, a binary lens clashes with a continuous and messy social reality. Furthermore, even the more narrow focus on legal officials notoriously fails to address situations where there is significant disagreement even amongst legal professionals on whether a given norm is valid law.²⁵⁵ If law exists in virtue of being accepted, and acceptance is – as I have argued here – a matter of degree, then the conclusion that legal validity is itself a matter of degrees is inviting.

At the very least, the notion that legal validity is cumulative in this way is sociologically intuitive. When it comes to other kinds of human artefacts, for example, works of art, sociologists agree that those ‘exist’, that is, they have their (symbolic) status of ‘artwork’ through being ‘recognised and socially instituted’.²⁵⁶ In his discussion of the field of cultural production, Pierre Bourdieu proposes that an object acquires the status of a work of art in virtue of being recognised-as-art by powerful agents in the artistic field, like museums or prominent gallery owners. They construct the status and value of a work *qua believing in it*.²⁵⁷ Crucially, for Bourdieu, counting-as-art is a matter of degree, subject to variation. Being the product of power-struggles of participating agents in the field who themselves veer for

²⁵⁴ Brennan and others (n 245) 48, 49; Hart (n 97) 116.

²⁵⁵ Kenneth M Ehrenberg, ‘The Anarchist Official: A Problem for Legal Positivism’ (2011) 36 *Australian Journal of Legal Philosophy* 89.

²⁵⁶ Bourdieu, *The Field of Cultural Production* (n 253) 37.

²⁵⁷ *ibid* 35, 36.

recognition or ‘capital’, artistic value is constantly ‘re-produced’ and renegotiated by the meaning-making dynamics within the field.²⁵⁸

Undoubtedly, amongst the set of norms and concepts that make up modern legal systems, some are more salient and authoritative and others are more contested. It seems intuitively true that over time or with prominent use (for example, through litigation), legal concepts solidify. So perhaps, it is apt to view that even a seemingly innocuous *declarative* mention of a legal norm in an act of recognition might have some substantively transformative effect because it contributes to the norm’s salience. Perhaps it enhances the de-facto awareness other legal agents have of it and thereby solidifies its standing, possibly raising confidence in future claimants and thus giving rise to new court actions – at least to some degree.

From that vantage point, processes of maintenance and change are closely intertwined and both acts of recognition that have merely ‘maintained’ and those that ‘changed’ the legal status quo must be viewed as having ultimately contributed to constituting the legal situation (*Rechtsslage*) of privacy. For the purpose of understanding the development of privacy as a legal concept, both the work of maintaining and the work of extending and developing legal validity of privacy are necessarily of interest.

In assembling the landmark court judgements, legislative acts, legal commentaries and opinions that are regarded as ‘authoritative’ or constitutive for the recognition of privacy, legal professionals themselves do not strictly distinguish between acts of recognition that have been ‘transformative’ or ‘maintaining’, as long as they have served to establish, substantiate or solidify a certain legal situation. This consideration casts doubt on the concern that the FIRST CONCEPT OF LEGAL CHANGE invokes too many “false positives”. Rather, it may be premature to overlook the subtle solidifying effects of such mentions of existing law – even if they do not register as changes on a doctrinal radar. In this way, the supposed flaws of the

²⁵⁸ *ibid* 37.

FIRST CONCEPT OF LEGAL CHANGE may not be a conceptual disadvantage at all. By contrast, the SECOND CONCEPT OF LEGAL CHANGE does not leave room for the argument that some laws are more valid than others. This implicitly denies that any act of recognising a given law by a legal institution at least minimally changes the law by solidifying its validity.

This leaves us with a choice between two different concepts of legal change. The FIRST CONCEPT OF LEGAL CHANGE allows that all acts of recognition – even if they concern law that is unambiguously valid – are viewed as having a cumulative effect that further enhances the legal validity of a norm or concept. The previous paragraphs have argued that this perspective is sociologically intuitive and explained that it manages to take into account the fluid social reality of the existence, or salience, of legal norms.

But the proposition that some laws are more valid than others may still read as irritating to many doctrinal and jurisprudential scholars. The choice, it seems, is between the orthodox way of viewing legal validity as binary, or considering it as a feature of norms and concepts that can be acquired gradually and cumulatively. As the present and previous subsections have revealed, there are benefits and detriments associated with both views. A methodologically useful compromise is presented and discussed in the conclusion to this chapter, and is presented in the next chapter.

3.5 Conclusion: operationalising legal change

Through combining conjectures in relation to legal change in jurisprudential scholarship with insights from social and political theory, this chapter has developed two concepts of legal change.

The FIRST CONCEPT OF LEGAL CHANGE proposes a conceptualisation of moments of change as acts of legal recognition. Legal recognition is here defined as an affirmative communicative act, usually contained in speech or writing, by an official legal institution that has some command and authority over deciding *what the law is* within a given social context. The notion of recognition proposed here builds on a social constructivist understanding of recognition – the fact that

recognition takes a role in constructing the social (and legal) world – that is so central to the thought of legal theorists like HLA Hart, as well as the social theory of the likes of Hegel and others. Relying on Austin’s theory of speech acts, the notion of acts of recognition acknowledges the highly *performative* nature of legal language.

The SECOND CONCEPT OF LEGAL CHANGE retains many of the useful features of the FIRST CONCEPT’s strategy in picking out moments of legal change. In particular, it builds on the notion that law changes in virtue of acts of recognition by official legal institutions. However, the SECOND CONCEPT OF LEGAL CHANGE furthermore requires that to count as law-changing or *transformative*, acts of legal recognition must also establish the legal status of a concept whose legal validity was previously either not settled.

This added requirement is devised to address the concern that, presumably, not every mention or citation of a given law by an official legal institution is transformative. Particularly in cases where the legal status of the concept or norm is long established, a norm or concept that is *already legally valid* simply retains its status-as-law in these situations. The added requirement of the SECOND CONCEPT OF LEGAL CHANGE helps filtering out those acts of legal recognition that lack a discernible effect on the legal status quo. Subsection 4 of this chapter furthermore explains how this amended, SECOND CONCEPT OF LEGAL CHANGE conforms to a perspective that considers the legal validity of any given norm or concept to be a binary matter: either norms and concepts *are valid law* in the respective legal system, or they are *not*. This is the orthodox perspective on the validity of legal norms, shared widely in jurisprudential scholarship on the validity (or existence) of laws.

However, rather than accepting this as satisfying and endorsing the SECOND CONCEPT OF LEGAL CHANGE as the theoretical framework for the explorations of legal change conducted within this research project, subsection 4 inquires more deeply into the view that the validity of law is a binary matter. A central matter of discussion is the fact that jurisprudential and other analytical philosophical accounts generally view the existence of laws as contingent on the *acceptance* of the members

of the societies of which they are laws. And while the presumably binary nature of validity is not questioned by these disciplinary approaches, the notion of social acceptance of norms or concepts is undeniably a matter of degree. This presents a variety of conceptual difficulties for the orthodox, jurisprudential perspective on legal validity.

The ensuing critical discussion of sociological versus jurisprudential perspectives on the existence of laws reveals it resonates with sociological approaches to view legal validity as a feature of norms or concepts that can be cumulative or liminal. Other social facts or cultural artefacts are typically described in this way; for example, Bourdieu's characterisation of the art world similarly proposes that whether or an object is – or counts as – an artwork is dependent upon it being recognised as such by influential agents in the field of cultural production. According to Bourdieu, this recognition is a matter of degree and subject to constant renegotiation. Under this view, the fact that the FIRST CONCEPT OF LEGAL CHANGE indiscriminately views all acts of recognition as moments of legal change does not necessarily read as a disadvantage. Rather, such a perspective reflects the sociologically intuitive presumption that even those acts of legal recognition that do not meet the requirement of the SECOND CONCEPT and that ostensibly only affirm already-valid law may be said to have contributed to the perpetuation and solidification of the law in question.

What exactly do we mean when we say that a certain law 'exists' or 'is valid' in a given society? The answer to this question depends on whom we ask. A legal theorist may wish to distinguish legal validity from the social relevance and salience of legal norms and concepts. Socio-legal scholars may find such a distinction artificial, particularly in light of the fact that in their view, both validity and social salience of law depend on the same cumulative processes of recognition, afforded by members of the legal community. From a sociologically oriented perspective, legal validity and social salience or relevance-as-law may well be interchangeable; at the

very least, they exist on a continuum: legal norms exist in virtue of being continuously affirmed and perpetuated through recognition by legal agents.

It is not clear that either of these viewpoints on legal validity – and the resulting concept of legal change – is to be preferred over the other. As this chapter has illustrated, both concepts of legal change capture important facets of lawmaking as a social, communicative process. For this reason, this chapter has presented each concept as a plausible way of pinpointing moments of legal change. Disentangling that jurisprudential and socio-legal approaches may require slightly different conceptualisations of legal change is itself a theoretical contribution of this chapter.

In light of this project's socio-legal orientation, one might think it more apt to employ the more expansive *FRST CONCEPT OF LEGAL CHANGE*. Practically, however, its broad scope runs the risk of making the case study selection of acts of recognition potentially boundless. A pragmatic solution is thus to employ the added requirement of the *SECOND CONCEPT OF LEGAL CHANGE* – not as an exclusionary criterion, but rather as a way of identifying those moments of change that were particularly transformative for the legal recognition of privacy. This allows me to focus qualitative empirical inquiries selectively on the acts of recognition that are most transformative. Given this project's research ambition of contributing towards a more general understanding of legal change, these significantly transformative instances of change are of particular interest.

At the same time, *not* limiting empirical explorations to those acts of legal recognition within the narrower set of the *SECOND CONCEPT OF LEGAL RECOGNITION* allows for the flexibility of accounting for influential speech acts, even if they may only bolster the legal recognition of privacy incrementally. Employing both here-developed concepts of legal change to help identify acts of privacy recognition for qualitative analysis makes the case selection more manageable. The following chapter, which presents and discusses the research project's methodology and analytical strategy, explains in more detail how the theoretical contributions of this chapter aid data collection and analysis.

4. Exploring Acts of Privacy Recognition: Methodology and Analytical Strategy

This chapter describes this study's comparative research design. It explains how the operationalisation of legal change as acts of legal recognition has driven data collection and analysis. This chapter furthermore describes the strategies employed in qualitative data analysis ("coding for reasons"). To elucidate the dataset, this chapter also contains a historical overview over acts of privacy recognition in German and UK law. The chapter furthermore outlines how the inductive comparison facilitates insights into lawmakers' reasons for privacy recognition.

4.1. Introduction: acts of recognition guide data collection and analysis

The empirical component of this research project was designed to respond to the research ambitions outlined in chapter 1, section 2. These were, firstly, to achieve empirically informed insights into the reasons for which privacy was afforded legal recognition, and secondly, to develop an understanding of the socio-legal phenomenon of legal change in modern societies.

The methodology and analytical strategy of this study correspond to this particular study's empirical and theoretical ambitions. These are, as already indicated by subsection 2.3 of chapter 2, best characterised as belonging within the category of 'middle range theory'. In the words of Robert K. Merton, middle-range theories are 'empirically grounded'²⁵⁹ and 'cut across the distinction between micro-sociological problems, as evidenced in small group research, and macro-sociological problems'.²⁶⁰ The research design, particularly the comparative angle that considers both UK and German legal developments,²⁶¹ corresponds to the aim of finding a middle ground between developing an in-depth understanding of the making of privacy laws on the

²⁵⁹ Robert K. Merton (n 183) 62.

²⁶⁰ *ibid* 38.

²⁶¹ The comparative outlook of this study is discussed in more depth in section 4.4.

one hand, and contributing towards a broader understanding of legal change in modern societies on the other. This demands a research design that accommodates the level of granularity required to understand individual acts of privacy recognition. But it must also consider a sufficient range of instances of legal change that allows the detection of general trends and themes.

The operationalisation of legal change as *acts of recognition* developed by chapter 3 of this thesis provides the theoretical framework for this research design. It has three main implications for empirical inquiries into the development of information privacy laws. Firstly, the notion of acts of recognition allows me to identify moments of legal change. This provides a strategy for the gathering of qualitative data. Secondly, conceiving of legal change as acts of recognition entails a focus on speech acts and thus guides empirical investigations towards the professionalised legal discourses (*lawmaking discourses*) in which legal recognition occurs. Section 4.2 describes the process of data collection and explains in detail how I compiled the lawmaking discourses.

Section 4.3 elucidates the context of my dataset by providing a historical overview over acts of privacy recognition in Germany and the UK. As the recognition of privacy was simultaneously afforded by different legal instruments and in different areas of law, I describe various ‘streams’ of recognition that comprise most of the acts of recognition in my dataset.

Focussing my research on acts of legal recognition furthermore situates this research within a social constructivist paradigm. This chimes with the stipulation in section 2.2 that legal change is usefully viewed as a type of meaningful social action that can be analysed qualitatively and theorised sociologically.

Of course, the interpretive lens is merely one way in which legal change can be explored. Other potential approaches to qualitatively studying legal change might range from focussing on lobbying dynamics²⁶² and individual actions²⁶³ to broad

²⁶² For example, see Heike Klüver, *Lobbying in the European Union: Interest Groups, Lobbying Coalitions, and Policy Change* (Oxford University Press 2013).

socio-economic shifts associated with late modernity.²⁶⁴ These different approaches to studying legal change each come with their own benefits and limitations: as pointed out by Guiney, different levels of explanation are bound to each illuminate certain dimensions of the phenomenon they seek to explain and obscure others.²⁶⁵ I am not advocating that the here-adopted research design is the necessary choice of any researcher approaching the study of how laws are changed.

Rather, the empirical methods described below were specifically adopted for the purpose of wanting to make sense of the meanings entailed in acts of legal change: in drawing on Weber's interpretive approach, subsection 2.2.3 has proposed that an act of changing law is a type of social action that is meaningful in virtue of the significance that those who engage in it – *lawmaking agents* – attribute to it. Within the interpretive paradigm, meaningful social action ought to be explained in terms of the acting agents' understandings, purposes, aims, motives and intentions. These manifestations of agency are subsumed here under the more general term *reasons*.²⁶⁶ Thus, in order to offer an interpretive understanding of why legal change occurs, it is crucial to consider the *reasons* that lawmakers attribute to their law-changing acts.

This means that while acts of recognition help identify moments of change in information privacy laws, this study's empirical explorations ultimately aim to uncover the reasons for which lawmakers afforded legal recognition. Thus, when I say that this study *explores acts of privacy recognition*, I am really saying that this study *analyses the reasons* lawmakers cite when they engage in acts of privacy recognition. The process through which lawmaking reasons were coded and analysed

²⁶³ Michael Mintrom and Phillipa Norman, 'Policy Entrepreneurship and Policy Change' (2009) 37 *Policy Studies Journal* 649.

²⁶⁴ Such approaches are especially common in explaining legal change in criminal law, see Thomas Guiney, *Getting Out: Early Release in England and Wales, 1960-1995* (Oxford University Press 2018) 30.

²⁶⁵ *ibid* 29.

²⁶⁶ For a discussion on why the term *reason* is here deemed preferable to similar terms like intention or motive, see subsection 2.2.3.

is described in section 4.4. Specifically, categories of reasons were derived inductively from the data.

Section 4.5 explains how the comparative design with a focus on German and UK lawmaking aided this inductive outlook and enabled a broader perspective on the phenomenon of legal change in modern legal systems.

Since modern lawmaking is a communicative process involving explicit negotiations, a useful place to explore lawmakers' reasons are the discursive environments of acts of privacy recognition. Section 4.2 explains how documents were used to compile the lawmaking discourses that were then surveyed for reasons.

It should be clarified again at this stage that the lawmaking reasons explored in this study do not correspond to the mental states of human individuals. Rather, as subsection 2.2.3 has explained, 'lawmakers' or 'lawmaking agents' can comprise groups of people, like a court of law: when law is changed, the agent who is 'acting' is thus the respective parliament, court, or committee, rather than the sum of human persona(s) involved. In this sense, the *reasons* explored here are not the subjective ones of human individuals, but they are of an embedded, institutional nature. They concern the question of what a court, a government commission – or even the legal community in general – aims to achieve.

Subsection 2.3 of chapter 2 has already discussed some of the advantages of building an understanding of legal change on the basis of institutional lawmaking reasons, rather than on the level of subjective beliefs of individuals. In particular, this focus is able to shed light on the discursive norms in modern legal systems: it illuminates which kinds of considerations are viewed as legally relevant and which arguments and rhetorical strategies are considered persuasive. In this way, focussing on the institutional discursive context in which lawmaking reasons appear acts as a filter; it works to exclude those personal, party-political and other ulterior motives and emphasises the official legal perspective on that which is significant.

Some might object that the image we gather from considering official institutional reasons is too sanitised; after all, personal, and other ulterior motives

might still exert influence on lawmaking processes and warrant the researcher's attention. However, in light of the fact that little research has so far attempted to systematically make sense of legal change even at this institutional level, it seems that presenting official institutional reasons for legal change counts as a valuable contribution. This is the case even if this study's findings cannot claim to tell the 'full story'; after all, social phenomena emerge from messy social realities that lend themselves to many levels of explanation.

At the same time, the objection that the official outputs of legal institutions are 'too sanitised' flags up an important caveat: in many instances, the linguistic formulations that present reasons for recognising privacy will have been worded and edited carefully – and they will have been informed by the unique aims and concerns of the respective legal agent. Considerations like these are discussed subsection 4.5, which concludes this chapter and offers some critical reflections on this study's research design.

4.2 Data collection: compiling lawmaking discourses

A central step in the collection of data is to map the discourses that contain the (speech) acts of recognition. As iterated in the introduction to this chapter, acts of privacy recognition are analysed qualitatively by focussing on the reasons legal agents have for affording legal recognition. In order to pinpoint acts of privacy recognition – as well as to identify the reasons for which lawmakers enacted them – it is essential to compile a data corpus that collates the textual universes and discourses in which acts of privacy recognition are located.²⁶⁷

²⁶⁷ The concept of a textual universe is based on Kristeva's concept of intertextuality and Bakhtin's dialogism. Their theories that emphasise the notion that any semantic expression or next is necessarily part of a wider conceptual framework or dialogue that determines the text's meaning and constitutes the referential framework in which a text was written. Julia Kristeva, *Desire in Language: A Semiotic Approach to Literature and Art* (Leon S Roudiez ed, Columbia University Press 1980) 36; Mikhail Bakhtin, 'Problems of Dostoevsky's Poetics' in Caryl Emerson (ed), *Theory and History of Literature, Volume 8* (University of Minnesota Press 1984).

This focus on discourse is typical for studying legal phenomena and ‘has been shared by scholars coming from backgrounds in political science, sociology, and law.’²⁶⁸ That I have collected documents with the purpose of compiling lawmaking discourses on information privacy may create the impression that the analytical strategy adopted in this study is a form of discourse analysis. In fact, the way data were analysed in this study is better described as qualitative content analysis.²⁶⁹ This is so because the lawmaking discourses compiled here were not themselves the *object* of analysis but rather provided the broader *data corpus* from which lawmaking reasons were identified.²⁷⁰ It is those *reasons*, rather than discursive dynamics or power relations in discourse,²⁷¹ which are the focus of this study.

At the same time, the here employed methodology for data collection and analysis does share some of the features that are typical for discourse analysis. In particular, defining moments of legal change as speech acts entails the epistemological conviction that language is a constitutive representation of social reality. This outlook is central to discourse analysis (though it is also compatible with various forms of content analysis).²⁷² Furthermore, in analysing the reasons lawmakers refer to in the context of privacy recognition, I explore how these reasons are described and normatively negotiated. As pointed out by Potter, looking into how ‘descriptions are organised to make some version more credible and objective’²⁷³ is a typical feature of discourse analysis and it also forms part of the analytical focus on

²⁶⁸ Simon Halliday and Patrick Schmidt, ‘John Conley and William O’Barr and Rules versus Relationships’, *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge University Press 2009) 117.

²⁶⁹ Some prefer the term “thematic analysis”, see Virginia Braun and Victoria Clarke, ‘Using Thematic Analysis in Psychology’ (2006) 3 *Qualitative Research in Psychology* 77, 80.

²⁷⁰ Braun and Clarke propose to distinguish between *data corpus*, which ‘refers to all data collected for a particular research project’, and *data set*, which is ‘those data from the corpus being employed for a particular analysis’. See *ibid* 79.

²⁷¹ The exploration of power relations marks typical object of exploration in discourse analysis as opposed to content analysis, see Yoshiko M Herrera and Bear F Braumoeller, ‘Symposium: Discourse and Content Analysis’ (2004) 2 *Qualitative Methods* 15, 16.

²⁷² *ibid*.

²⁷³ Jonathan Potter, *Representing Reality: Discourse, Rhetoric and Social Construction* (Sage Publications 1996) 9.

reasons in this study. Given that both discourse analysis and the qualitative analysis of lawmakers' reasons conducted here rely on similar epistemological convictions and that both entail textual analysis, these similarities are predictable. To that extent, employing the label of 'qualitative content analysis' for this study's methodology may seem like a matter of nomenclature. For the purposes of this study, this label has the function of emphasising the more narrow, qualitative focus on *lawmakers' reasons* for recognising privacy.

As noted in section 2.2, lawmaking is a communicative and professionalised bureaucratic activity that – especially in the context of modern legal systems – relies heavily on written documents. The centrality of written documents to legal processes has not escaped scholars; for example, in his ethnography of the French Conseil d'Etat, Bruno Latour remarks, 'now, there exists something that traces and organises all activity of the Council. It forms the object of all types of care, of all conversations [...]: it is the *file*.'²⁷⁴ It is true that in modern legislative processes, most steps require the submission of written documents. Even oral debates typically track the creation of written legislative proposals or drafts. Things are similar in judicial and other professional legal contexts: institutionalised oral interactions usually concern, or are themselves recorded in the form of, written texts.

These texts are both representative and constitutive of lawmaking realities. As discussed in the previous chapter, in modern legal systems, the texts that have the most obviously *performative* effect in modern lawmaking (and are thus likely to *contain* transformative acts of privacy recognition) are pieces of legislation and court cases. The first step of collating lawmaking discourses on privacy was thus to identify and collect the documents involved in these processes. Identifying and collecting these lawmaking texts formed the starting point of this analysis. However, single documents are rarely sufficient: particularly pieces of legislation present only a summary of a much longer deliberative lawmaking process. This study's analytical

²⁷⁴ Latour (n 49) 70.

focus on lawmakers' reasons clearly demanded a more expansive account of the discourses leading up to moments of legal recognition.

For this reason, the primary official legislative and judicial documents that contained acts of recognition merely formed the starting point of the document collection process. Potential moments of legal change were first listed on the basis of accounts in academic literature.²⁷⁵ Given my scepticism towards the official story of the development of privacy laws, the concepts of legal change developed in the previous chapter were used to curate this selection by filtering out instances where the legal recognition of privacy was misattributed anachronistically, and by incorporating additional moments where official mentions of privacy contributed to its legal significance.

Additional documents that were included were those that featured in the production of the primary lawmaking documents, such as legislative proposals, transcripts of parliamentary debates or lower-court decisions in the relevant cases. I furthermore paid attention to intertextual references – those 'elements of other texts within a text'²⁷⁶ – that surfaced throughout these documents. Oftentimes, these references related to previous official legal documents like previous cases or legislative proposals. Other texts that were referenced in lawmaking documents included passages from academic legal literature, news articles, as well as foreign legal materials – many of these references are discussed in chapter 7 of this thesis. Intertextual references in lawmaking discourses illuminate how law draws upon those texts external to it²⁷⁷ and thereby shed light on how broader social and cultural considerations are incorporated into the legal sphere. One important finding presented in chapter 6 of this thesis is that references to passages of dystopian fiction

²⁷⁵ Of particular help were Bennett (n 12); Spiros Simitis, *Bundesdatenschutzgesetz Kommentar* (Spiros Simitis ed, Eighth Edi, Nomos 2014); Balthasar (n 5); Pratt (n 35).

²⁷⁶ Norman Fairclough, *Analyzing Discourse: Textual Analysis for Social Research* (Routledge Taylor and Francis Group 2003) 39.

²⁷⁷ *ibid* 17.

were particularly common. All these documents or ‘texts’ were compiled and collated into the lawmaking discourses from which lawmaking reasons were sourced.

Focussing investigations on official, institutionally expressed reasons has methodological benefits. Firstly, this focus chimes with the constructivist outlook emphasised earlier: in exploring lawmakers’ reasons, I am concerned with language itself, rather than with underlying mental states. In other words, this study’s spotlight is trained on the official lawmaking speech acts, rather than on the subjective human thought processes and motives that underpin their production.

A second methodological upshot is that the official documents collected for this research that are ‘natural’²⁷⁸ in the sense that they were constructed without the researcher’s intervention.²⁷⁹ (By contrast, qualitative interviews would have been more apt for a research focus on subjective mental states.) Thirdly, the relevant documents were readily available. In modern legal systems, official documents have the benefit of accessibility and provide broad coverage of modern legal phenomena.²⁸⁰ Relying on documents was also useful in the context of acts of privacy recognition that occurred decades ago: it is likely that historical documents from these points in time convey a more trustworthy account of the considerations that played a role in these moments of legal change than the retrospective accounts of expert interviewees might give. Thus, official documents are undoubtedly an extremely useful resource for exploring past legal events in modern legal systems.

At the same time, it must be kept in mind that most of the documents in my data corpuses are the products of highly professionalised processes. Especially in the case of court opinions, they have been edited carefully and are presumably shaped by various organisational interests. The fact that official documents were produced with those purposes, as well as with a corresponding target audience, warrants special

²⁷⁸ Bettina Lange, *Implementing EU Pollution Control: Law and Integration* (Cambridge University Press) 300.

²⁷⁹ Glenn A Bowen, ‘Document Analysis as a Qualitative Research Method’ (2009) 9 *Qualitative Research Journal* 27, 27.

²⁸⁰ *ibid* 31.

attention and analytical scrutiny.²⁸¹ The discussions of my research findings in the following three chapters demonstrate that I have taken this into account when I have interpreted my findings. In particular, I often approach lawmakers' accounts of their own reasons with scepticism and consider a variety of alternative readings in my discussion.

Furthermore, it must be acknowledged that even though the documents I have collected were not produced in the context of this research project, I have invariably made choices about which documents to include in the 'lawmaking discourses' and which ones to exclude. As pointed out by Herrera et al., '[t]hese choices matter in terms of extracting meaning from text.'²⁸² In particular, given the sheer amount of accumulated data, it was essential to develop strategies to narrow down the discourses for the purpose of qualitative analysis. Here, the SECOND CONCEPT OF LEGAL CHANGE from the previous chapter was particularly useful: the notion of *transformative* acts of privacy recognition helped to prioritise some discourses for investigation over others. A particular analytical emphasis was placed on those discursive interactions *leading up to* acts of legal recognition; this was done to ensure that the lawmaking reasons identified in these passages bore a close relation to moments of legal change.²⁸³

Section 2.2 emphasised my ambition to study the phenomenon of modern legal change across different institutional fora. Thus, one additional consideration in curating the lawmaking discourses was to maintain some balance regarding acts of legal recognition across judicial and legislative contexts, as well as across the two legal systems surveyed here: Germany and the UK. So, while the selection of documents relied on the researcher's choices, these choices were informed by the specific aims of this research project. In compiling and curating the documentary resources of lawmaking discourses in this way, I kept in mind Bowen's suggestion that 'the concern should not be about 'how many'; rather, it should be about the quality of the

²⁸¹ *ibid* 33.

²⁸² Herrera and Braumoeller (n 271) 18.

²⁸³ This qualitative study does not claim that the lawmakers' reasons for recognising information privacy were causal to the legal recognition of privacy. Rather, the constructivist outlook of this study views these reasons as featuring in the social construction of law; they are part of lawmaking as a social process. So, proximity to acts of legal recognition was viewed as an indicator of the relevance of reasons in these processes.

documents and the evidence they contain, given the purpose and design of the study.²⁸⁴

The collation of lawmaking discourses through collecting and narrowing down documentary resources was a multi-stage process. Given the relatively narrow focus on the legal area of information privacy, I did not need to impose a strict historical limit on in the first cycles of document collection. Some acts of recognition that I analyse are thus contained in very early legal efforts to protect the secrecy of letters, diaries and other confidential documents in the 18th and 19th century. But the vast majority of acts of privacy recognition occurred in the context of the data protection legislation efforts throughout the latter half of the 20th century. Thus, in virtue of the phenomenon analysed here, this time period (roughly 1950- 1990) is represented with particular salience in research findings. Information privacy remains a currently active area of lawmaking. Due to the temporal constraints of this doctoral project, no acts of privacy recognition after the calendar year 2016 were considered in the context of this study.

A rough total of 2180 documents were collected (approximately 980 documents containing and preceding UK acts of privacy recognition and approximately 1200 documents containing and preceding German acts of privacy recognition). The length of these documents varied considerably and depended strongly on their nature. The documents collected for the purpose of compiling lawmaking discourses include German and UK acts of parliament (federal and state), legislative proposals ('bills'), committee proposals, committee reports, transcripts of oral debates (including those related to the first and second reading), proposals for legislative amendments, court judgments and opinions (foreign and domestic), legal commentaries, legal academic scholarship (passages from papers and monographs), news media items, as well as passages from literary works of fiction and non-fiction.

²⁸⁴ Bowen (n 279) 33.

A large number of official documents could be obtained online, usually from government website archives and legal research databases. The following websites proved particularly helpful:

<https://hansard.parliament.uk/> (most UK legislative documents could be obtained from Hansard)

<https://www.supremecourt.uk/decided-cases/index.html> (for UK Supreme Court decisions since 2009)

<https://archives.parliament.uk/> (for House of Lords decisions)

<https://www.lexisnexis.com/uk/legal/> (this database was used for lower court decisions)

<https://www.bundestag.de/dokumente> (online archive of the German parliament)

<https://www.bundesrat.de/DE/service/archiv/archiv-node.html>
(the online archive of the Bundesrat only stores documents online from the year 2006 onwards.)

https://www.bundesverfassungsgericht.de/SiteGlobals/Forms/Suche/Entscheidungen_suche_Formular.html?language_=de (online archive of the German Federal Constitutional Court)

<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/list.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288>
(online archive of the German Federal Supreme Court; holds decisions from 2000 onwards)

<https://beck-online.beck.de/Home> (this legal database was used to obtain German court opinions as well as commentaries and passages from legal scholarship).

Some documents had to be obtained in hard copy format. For these purposes, I relied on libraries and archives in Oxford, Berlin and Düsseldorf. The documentary resources from libraries and archives in Berlin were collected during two 2-month periods in the summers of 2015 and 2016, as well as during two 1-month periods in September 2016 and in January 2017. Documents from the Landesbibliothek in Düsseldorf were obtained during a two-week period in December 2017.

1. Bodleian Law Library
Saint Cross Building

Manor Road
Oxford OX1 3UR

2. Parlamentsarchiv des Deutschen Bundestages
Deutscher Bundestag
Parlamentsarchiv
Platz der Republik 1
11011 Berlin

3. Archiv des Deutschen Bundesrates
Bundesrat
Leipziger Straße 3-4
10117 Berlin

4. Humboldt Universitätsbibliothek
Jacob-und-Wilhelm-Grimm-Zentrum
Geschwister-Scholl-Straße 1-3
10117 Berlin

5. Zweigbibliothek Rechtswissenschaften
Humboldt Universität zu Berlin
Bebelplatz 1
10179 Berlin

6. Universitäts- und Landesbibliothek Düsseldorf
Heinrich Heine Universität Düsseldorf
40225 Düsseldorf

4.3 Acts of privacy recognition in Germany and the UK: a historical overview

This section provides a summary of the historical development of privacy law in Germany and the UK. This summary does not purport to be exhaustive. Rather, the purpose of the following two subsections is to provide context for the empirical analyses conducted for this research project. Subsections 4.3.1 and 4.3.2 summarise important moments of privacy development that feature as acts of recognition in my dataset. (Full tables of acts of recognition are provided in the appendix to this thesis).

The history of the legal recognition of information privacy simultaneously spans across various areas of law and includes a variety of legal instruments. So, rather than describing the legal recognition of privacy chronologically, I identify and discuss various phases or ‘streams’ of information privacy recognition in German and UK law. The streams I identify below track the legal recognition of privacy across

different areas of law. The significant areas of law that feature acts of information privacy recognition are constitutional and fundamental rights rights/public law, private law (torts) and data protection legislation (which concerns both public and private actors). These streams temporally overlap, and sometimes even intersect.

My dataset is built around acts of privacy recognition, so I should clarify that the 'streams' I describe below did not play a role in terms of data gathering. Instead, the 'streams' merely provide organisational categories for presenting the historical development of the legal recognition of privacy across different areas of law.

In the case of German law, the streams I discuss below are: (a) the development of data protection legislation, (b) the judicial construction of a constitutional right to privacy based on Articles 2 (1) and 1 of the Basic Law, and (c) the origins and constitutional recognition of the confidentiality of communication in Article 10 of the Basic Law. In the case of UK law, the streams of privacy recognition that contain important UK acts of recognition are (a) the development of data protection legislation, (b) the common law protection of confidence before the introduction of the 1998 Human Rights Act and (c) the legal recognition of privacy in the context of, and after, the UK Human Rights Act. These subsections aim to convey to the reader a sense of the different paths of information privacy recognition in German and UK law.

4.3.1 Streams of German acts of privacy recognition

(a) German data protection legislation

The most significant period in which the legal protection of information privacy was developed and expanded is the context of data protection legislation in the latter half of the twentieth century that began with the 1970 passage of the first data protection act worldwide in the state of Hesse and culminated in the 1977 Federal Data Protection Act and its significant revisions in 1990, 2001, 2003, 2009 and 2015. The majority of the material on the lawmaking discourses in my dataset stem from this phase; especially from parliamentary debates preceding legislative amendments.

It is also during this period that information privacy was increasingly recognised by international legal institutions. To clarify: international laws, including legal instruments of the Council of Europe and the European Union, are neither German nor UK moments of privacy recognition and therefore do not directly

feature as acts of legal recognition in my empirical investigations. However, in various instances, these initiatives did play a significant role in prompting and shaping national legal developments, so they do surface in the lawmaking discourses preceding domestic acts of privacy recognition and thus form part of my dataset. In this way, their impact on German and UK privacy recognition is part of my empirical findings. International law instruments whose impact is considered in detail in this thesis include the Council of Europe's European Convention on Human Rights – particularly Article 8, which protects the right to private life –, as well as the Council's data protection initiatives, like the Privacy and Databank Resolutions of 1973 (22) and 1974 (29)²⁸⁵ and the Convention for the Protection of individuals with regard to automatic processing of personal data²⁸⁶ (hereafter: Convention 108), which was opened for signature in 1981.

As a data protection pioneer, Germany had passed significant data protection legislation before these data protection initiatives. But the impact of these initiatives, particularly of Convention 108, on UK legal developments was significant (see subsection 4.3.2). My findings on how the Council of Europe's initiatives shaped the legal recognition of privacy in Germany and the UK are presented in sections 3 and 4 of chapter 7.

One international law instrument of importance for the development of data protection in German law was the European Union's 1995 Data Protection Directive. After a persistent failure to transpose the directive, the European Commission began infringement proceedings that increased the pressure for a reform of the German Federal Data Protection Act in 2001. This marked the first revision of the Federal Data Protection Act after over a decade. Section 7.4.3 of this thesis discusses the extent to which the 1995 Directive prompted the legal recognition of privacy in data protection legislation.

²⁸⁵ Resolutions of the Committee of Ministers of the Council of Europe No. (73) 22 (adopted 26.9.1973) and No. (74) 29 (adopted 20.9.1974) on the protection of the privacy of individuals vis-a-vis electronic data banks in the private sector, respectively the public sector.

²⁸⁶ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 28.1.1981, European Treaty Series No. 108.

(b) The judicial construction of a constitutional right to privacy based on Articles 2 (1) of the Basic Law

The period of the rise of data protection legislation in the latter half of the twentieth century also coincides with another phase of the legal recognition of information privacy in German law: the expansion of the recognition of a constitutional right to privacy as part of the right to personality. As mentioned in section 3.2 of this thesis, the German constitution contains no explicit mention of privacy. Instead, the protection was inferred from a combined reading of Articles 2 and 1 of the German constitution in the famous *Leserbrief* case in 1954. In this case, the Federal Supreme Court deduced a general right to personality (*Allgemeines Persönlichkeitsrecht*) – and a constitutional right to privacy as a dimension of this general right to personality – from combination of Article 2 (1)²⁸⁷ and Article 1 (1)²⁸⁸ of the Basic Law. This judgment marks an important act of privacy recognition for two reasons: firstly, it established the civil law protection of privacy. § 823 (1) of the German Civil Code sets out the general conditions under which a person owes compensation for damages to another. It states:

*A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.*²⁸⁹

After the *Leserbrief* judgment, there was no doubt left that privacy qualified as “another right” within the meaning of § 823 (1). In this way, the judgment settled any indeterminacy regarding the question of whether an invasion of privacy could entitle the victim to damages.²⁹⁰ At the same time, this judicial innovation of the Federal Supreme Court marked such a departure from previous law that it invited the charge of judicial activism.²⁹¹ This controversy surrounding the scope of judicial lawmaking was finally settled in a 1973 Federal Constitutional Court judgment in the case

²⁸⁷ ‘Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.’ Article 2 (1) Grundgesetz.

²⁸⁸ ‘Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.’ Article 1 (1) Grundgesetz.

²⁸⁹ § 823 (1) Bürgerliches Gesetzbuch (BGB).

²⁹⁰ Balthasar (n 5) 108.

²⁹¹ *ibid* 109.

Soraya. There, the federal Constitutional Court confirmed the Federal Supreme Court's view that a right to privacy could be derived from Articles 2 and 1 of the Basic Law, thereby establishing irrevocably that information privacy enjoyed both constitutional recognition and civil law protection via § 823 (1) of the Civil Code.

Secondly, the 1954 *Leserbrief* judgment contains an important moment of privacy recognition, because it prompted a series of judicial acts of constitutional privacy recognition by the Federal Constitutional Court. The 1973 *Soraya* judgment may be viewed as the first act of recognition falling into that stream. A discussion of each Constitutional Court case within this stream would exceed the scope of this summary. But two judgments where the Federal Constitutional Court has expanded the legal recognition of privacy are worth mentioning: the 1983 judgment concerning a population census (*Volkszählung*,) and the 2008 judgment concerning online searches for crime prevention (*Online-Durchsuchung*).

In the *Volkszählungs*-judgment, the Federal Constitutional Court was asked to review a federal law that prescribed a detailed mandatory population census, planned for 1983. The constitutional complaint was successful and the court held that the law was unconstitutional, thus declaring it void. The reasoning of the judgment posited that the privacy protection of Articles 2 (1) and 1 of the Basic Law encompassed the principle that people should decide for themselves which information were to be collected about them. The Constitutional Court called this principle a 'right to informational autonomy' (*Recht auf informationelle Selbstbestimmung*). The Court justified the recognition of such a broad right by arguing that in the context of modern data gathering technologies, there was "no such thing as neutral information".²⁹²

Similarly, in the 2008 judgment concerning online searches,²⁹³ the Court reviewed the constitutionality of an act of the state of North Rhine-Westphalia that granted extensive authorisation to state secret services to secretly monitor and intercept online activities.²⁹⁴ Finding that the act violated constitutionally protected

²⁹² *Volkszählung*, Urteil vom 15.12.1983, BVerfGE 64, 67, at 45.

²⁹³ *Online-Durchsuchung*, Urteil vom 27.2.2008, BVerfGE 1 BvR 370/07.

²⁹⁴ Gesetz zur Änderung des Gesetzes über den Verfassungsschutz in Nordrhein-Westfalen (Verfassungsschutzgesetz Nordrhein-Westfalen - VSG NRW), 20.12.2006.

rights, including the right to privacy, the Court proceeded to articulate *a right to the confidentiality and integrity of information technology systems (Recht auf die Gewährleistung der Vertraulichkeit und Integrität Informationstechnischer Systeme)*. Again, this judge-made right was presented as already entailed in the general right to personality in Articles 2(1) and 1 of the Basic Law.

The judicial creation of a constitutional right to privacy is discussed in more depth in section 5.2 of this thesis. It is important to emphasise that the stream of judicial acts of recognition by the Federal Constitutional Court intersects with other streams of privacy recognition that I have identified above. For example, the 1983 constitutional court judgment regarding the population census (*Volkszählungsurteil*) is often credited with prompting the reform of the Federal Data Protection Act in 1990.²⁹⁵

(c) The constitutional recognition of the confidentiality of communication in Article 10 of the Basic Law

A third stream of privacy recognition in German law consists of the constitutional recognition of the confidentiality of communication that culminated in Article 10 of the Basic Law. Today, Article 10 (1) states: *The secrecy of letters, post and telecommunications shall be inviolable.*²⁹⁶

Though the protected forms of communication also include post and telecommunications, the concept of the privacy of correspondence has its origins in the legal doctrine of the Briefgeheimnis (secrecy of letters). As a constitutional right, Article 10 of the Basic Law primarily concerns the relation between citizens and the state. But early legal recognition of the Briefgeheimnis in German law mostly concerns the relations between private citizens, or between postal services and their customers. This can be traced back to § 4 Chapter VIII of the *Preussische Postordnung* (enacted on 10.8.1712) and § 3 Chapter V of the *Preussische Allgemeine*

²⁹⁵ Simitis (n 275) 91.

²⁹⁶ Art 10(1) Grundgesetz. *Geheimnis* literally translates to secret (i.e. *secrecy of letters*) but is sometimes replaced by ‘confidentiality’ or ‘privacy’ (i.e. *privacy of letters*). See, for example: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html

Postordnung (enacted on 26.11.1782).²⁹⁷ These postal regulations were ostensibly designed to protect letters from interference only by postal officers. The 1794 *Allgemeine Landesrecht für die Preussischen Staaten (ALPS)* also contained regulations on the confidentiality of letters and specified that postmen would have to remain silent about who their clients were and whom they were corresponding with.²⁹⁸ This protection of the privacy of correspondence in private law was evidently a source for the constitutional recognition of the secrecy of letters: the early judicial decision-making on Article 10 GG even explicitly referred to the 1794 ALPS.²⁹⁹

The Briefgeheimnis was first constitutionally recognised in the *Verfassung des Kurfürstentums Hessen* (5. January 1831), which stated that its violation by postal services would warrant punishment. Alongside these early acts of recognition, the subsequent constitutional recognition of the Briefgeheimnis in German law was directly influenced by Article 22 (1) of the *Belgain Constitution* (7.10.1831), which declared, “the secrecy of letters was inviolable.”³⁰⁰ It is commonly agreed that Article 22 of the Belgian constitution was a direct response to the Belgian state’s monopoly on postal services and its practices of postal censorship and surveillance, and was thus directed against the Belgian state as such.³⁰¹ In the academic literature, it is suggested that the Belgian constitutional developments directly inspired the constitutional recognition of the Briefgeheimnis in § 142 of the charter of human rights of the 1849 Frankfurt Constitution (*Paulskirchenverfassung*), which not only explicitly “guaranteed the secrecy of letters,”³⁰² but furthermore specified the

²⁹⁷ Klaus Marxen, *Das Grundrecht Des Brief-, Post- Und Fernmeldegeheimnisses (Art.10 GG) Unter Besonderer Berücksichtigung Der Gesetzlich Zugelassenen Ausnahmen* (Dissertation 1958) 2.

²⁹⁸ Part II, Title 15, § 204 of the Allgemeine Landrecht für die Preußischen Staaten (ALPS), as referenced by Wolfgang Durner, ‘Artikel 10 GG’ in Theodor Maunz and Günther Dürig (eds), *Grundgesetz Kommentar* (CH Beck 2014) Rn. 9.

²⁹⁹ Bundesverwaltungsgericht (BVerwGE) Urteil 6, 299, 27.3.1958, as cited by ibid 12.

³⁰⁰ *Le secret des lettres est inviolable*. La Constitution du 7 Février 1831, Belgium. https://www.senate.be/doc/const_fr.html

³⁰¹ Peter Badura, ‘Artikel 10 GG’ in Wolfgang Kahl, Christian Waldhoff and Christian Walter (eds), *Bonner Kommentar zum Grundgesetz* (CF Müller Verlag 2008) Rn. 3; Durner (n 298) Rn. 11.

³⁰² *Das Briefgeheimnis ist gewährleistet*, § 142 (1), Verfassung des Deutschen Reichs von 28.3.1849, Ernst Rudolf Huber, *Dokumente Zur Deutschen Verfassungsgeschichte, Band 1: Deutsche Verfassungsdokumente 1803-1850* (Kohlhammer Verlag 1978) 375.

obligation of public bodies to ensure the inviolability of the secrecy of letters against third parties.³⁰³ Despite the fact that the Paulskirchenverfassung was never enacted, this formulation was transferred into the *Verfassungsurkunde für den Preussischen Staat* (31.1.1850).

Following the reappearance of the secrecy of letters in various German states' postal codes, state laws and constitutions,³⁰⁴ federal constitutional protection of the privacy of correspondence was ultimately granted in Article 117 (1) of the 1919 *Weimarer Reichsverfassung*. Article 117 (1) declared the Briefgeheimnis, the Postgeheimnis, the Telegraphengeheimnis and the Fernsprechgeheimnis as 'inviolable'. It thus extended the previously recognised legal protection of the confidentiality of letters to encompass newly emerging forms of individual communication; an ambition that directly determined the formulation of Article 10 GG. Furthermore, Article 117 (2) of the *Weimarer Reichsverfassung* specified that any exception to this provision would have to be granted on the basis of a federal legislative act (Reichsgesetz). Thus, the legal protection of Art 117 (1) extended beyond postal services to encompass any intrusion of public bodies.

Of course, the constitutional rights of Art 117 were suspended following the rise of National Socialism in 1933. Specifically, §1 of the 1933 *Verordnung des Reichspräsidenten zum Schutz von Volk und Staat* determined that Article 117 was, amongst others, "ruled inoperative and that intrusions into the secrecy/confidentiality of letters, post, telegraphs and telecommunications was authorised even beyond the statutorily recognised exceptions."³⁰⁵ Systematic and extensive surveillance practices soon ensued, and extensive surveillance and censorship of individual communications was conducted by the Gestapo and the

³⁰³ Badura (n 301) Rn 8.

³⁰⁴ For example, *Gesetz über das Postwesen des Deutschen Reichs* vom 28.10.1871, Deutsches Reichsgesetzblatt Band 1871, Nr. 42, 347 – 358.; The 1851 Prussian Criminal Code also incriminated the opening of letters and parcels by postal clerks and carriers: *Strafbare Brief- und Paketöffnung durch Postbeamte*, see *Strafgesetzbuch für die Preußischen Staaten* vom 14.4.1851.

³⁰⁵ *Die Artikel (...) 117 (...) der Verfassung des deutschen Reiches werden bis auf weiteres außer Kraft gesetzt. Es sind daher (...) Eingriffe in das Brief- Post-, Telegraphen-, und Fernsprechgeheimnis (...) auch außerhalb der sonst hierfür bestimmten gesetzlichen Regelungen zulässig.*, *Verordnung des Reichspräsidenten zum Schutz von Volk und Staat*, 28.2.1933, Reichsgesetzblatt I, 83.

Berlin police headquarters.³⁰⁶ As suggested by Durner, the German experience of this total loss of privacy of communications significantly shaped the constitutional recognition of the secrecy of letters in Article 10 GG.³⁰⁷

The constitutional protection of the secrecy of letters in Article 10 of the Basic Law is an important act of recognition. In order to map the legal discourses preceding it, my data collection includes the minutes from parliamentary debates and other documents of the Constitutional Convention at Herrenchiemsee in August 1948 and the proceedings of the Parliamentary Council in Bonn between September 1948 and May 1949 (the Basic Law was passed on the 8th of May 1949). Mirroring the wording of Article 117 (1) of the Weimaraer Reichsverfassung, Article 11 of the 1948 *Herrenchiemsee Draft* of the German constitution declared the secrecy of letters, of the post, of telegraphs and telecommunications as ‘inviolable’.

In Articles 1-19 of the Basic Law, it is typical that the first section of each article sets out the protected scope while the second section delineates the conditions under which intrusions into these rights can be justified. Thus, section 2 of Article 11 of the Herrenchiemsee draft limited the legality of intrusions to certain cases defined “on the basis of statutory law”.³⁰⁸ The parliamentary debates preceding the passage of the Basic Law saw some debate over the possibilities of restricting the secrecy of letters; proposals included that intrusions “may occur for political purposes only in cases of endangerment of the constitutional order.”³⁰⁹ This reflects the tension between the fear of politically motivated surveillance and censorship on the one hand, and national security concerns on the other.³¹⁰ Finally in January 1949, a specialised committee proposed – now within Article 10 – a drastically simplified formulation: it synthesised the cases of *Telegraphengeheimnis* and *Fernsprechgeheimnis* into ‘*Fernmeldegeheimnis*’ and merely required that intrusions were based on parliamentary legislation.³¹¹

³⁰⁶ Durner (n 298) Rn. 18.

³⁰⁷ *ibid.*

³⁰⁸ *Ausnahmen sollen nur in einem Gerichtsverfahren in den vom Gesetz vorgeschriebenen Fällen zulässig sein.* Michael Hollmann (ed), *Der Parlamentarische Rat 1948-1949: Akten Und Protokolle* (Band 7, Harald Blodt Verlag 1995) 578.

³⁰⁹ [Z]u politischen Zwecken nur im Falle der Gefährdung der verfassungsmäßigen Ordnung, Artikel 11 Grundgesetz, Fassung vom 13.12.1948 in *ibid.*

³¹⁰ Durner (n 298) Rn. 19.

³¹¹ Hollmann (n 308) 297.

Section 2 of Article 10 was amended again on 24.6.1968 the context of the highly contested German Emergency Acts (Notstandsverfassung). The current version states:

Restrictions may be ordered only pursuant to a law.

If the restriction serves to protect the free democratic basic order or the existence or security of the Federation or of a Land, the law may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.

The degree to which the addition of the second sentence is a direct manifestation of the Emergency Acts is debated within academic literature: for example, Düring and Stein suggest that the reason for the addition of Sentence 2 was the aim of revoking the legal privileging of Allied Powers in deciding and executing surveillance. One might argue that the stream of the constitutional recognition of the confidentiality of communications culminates in the Federal Constitutional Court's judgment (*Abhörurteil*) on 15th December 1970.³¹² In this judgment the German Constitutional Court reviewed the amendment to Article 10 of the Basic Law. Though it deemed the amendment generally compatible with constitutional principles, the Court introduced a series of limitations to surreptitious surveillance practices; for example, it demanded that those whose communications were subject of surveillance are retrospectively notified as soon as they no longer pose a threat to the democratic order.³¹³

The 1970 *Abhörurteil* powerfully iterates the civic importance of privacy protections and thus constitutes another important act of recognition in my dataset. It also forms part of the stream of broadening the constitutional protection of privacy in Articles 2 (2) and 1 of the Basic Law, so it is another example for how acts of recognition from the streams I have identified overlap and intersect.

The acts of recognition featured in the streams I have discussed above form part of my dataset; they have guided the composition of my dataset on lawmaking discourses. Beyond these major streams of the legal recognition of privacy, there are various additional instances where information privacy – or a dimension thereof – was afforded legal recognition. The documents that contain these instances of

³¹² *Abhörurteil* – Urteil vom 15.12.1970, BVerfGE 30, 1.

³¹³ *ibid*, at 79.

privacy recognition are listed in a Table of Acts of Recognition (Appendix). One example for an act of privacy recognition is chapter 15 of the German Criminal Code (sections 201- 206), which criminalises violations of the personal and private sphere (*Verletzungen des persönlichen Lebens- und Geheimbereichs*). Like the secrecy of letters, some of its antecedents can be traced back to the 1794 Allgemeine Landesrecht für die Preussischen Staaten, which already criminalised the unauthorised opening of letters in Part II, § 1370. In its consolidated form, chapter 15 of the German Criminal Code was created by the 1974 Einführungsgesetz zum Strafgesetzbuch (EGStGB), which concluded an extensive reform of the German criminal code (Große Strafrechtsreform) that had began in 1953.³¹⁴ The fact that privacy protections were afforded their own chapter in the criminal code is partially due to the influence of the progressive constitutional recognition of a right to privacy in articles 2 (1) and 1 of the Basic Law,³¹⁵ thus providing yet another example for how acts of privacy recognition of different streams have impacted each other. The creation of chapter 15 StGB and its amendments³¹⁶ are examples for important acts of privacy recognition that feature in my dataset, but that do not quite amount to their own stream of recognition.

4.3.2 Streams of UK acts of privacy recognition

(a) The development of data protection legislation

As in relation to the German legal recognition of privacy, one major stream of information privacy recognition in UK law culminates in the passage of the 1984 Data Protection Act³¹⁷ and its major revision in 1998.³¹⁸ In contrast to the first German Federal Data Protection Act in 1977, which was primarily influenced by

³¹⁴ Einführungsgesetz zum Strafgesetzbuch (EGStGB), 2.3.1974, Bundesgesetzblatt I, 469.

³¹⁵ Reinhart Maurach, Friedrich-Christian Schroeder and Manfred Maiwald, *Strafrecht Besonderer Teil 1: Straftaten Gegen Persönlichkeits- Und Vermögensdelikte* (10. Auflage, CF Müller Verlag 2009) 317.

³¹⁶ Additional important acts of recognition in German criminal law include the addition of §201a Strafgesetzbuch (StGB) in 2004 and of §§202a-c StGB in 2007. §201a concerns the violation of the intimate sphere by taking photographs or other images, while § 202a-c StGB protect against data espionage (§ 202a), phishing (202b) and against acts preparatory to data espionage and phishing (202c).

³¹⁷ Data Protection Act 1984. The act received Royal assent on 12.7.1984.

³¹⁸ Data Protection Act 1998. The act received Royal assent on 16.7.1998.

earlier data protection developments in the German Länder,³¹⁹ the first UK Data Protection Act in 1984 was directly prompted by the Council of Europe's data protection initiatives, particularly Convention 108.³²⁰ In light of these international law influences, it is perhaps no accident that data protection has developed into its own area of law – and one of particular relevance for the legal recognition of information privacy in both Germany and the UK. As pointed out by Hondius, the explanatory report to the Council of Europe's Resolution (73) 22 stated that “it was left to each country to decide under what head of law it wished to give effect to data protection principles,”³²¹ but that rather than inserting data protection law into civil or criminal codes, “all European countries have done so by enacting a separate data protection law.”³²²

European data protection instruments have undoubtedly played a visible role in prompting legislative developments on data protection in the UK: the first major revision of the UK Data Protection Act in 1998 is a direct response to Directive 95/46/EC of the European Parliament³²³, and the second major revision of the UK Data Protection Act in 2018 implements the European Union's 2016 General Data Protection Regulation.³²⁴ The GDPR and 2018 UK Data Protection Act fall outside of the period this research project examines. But the effect of the data protection instruments of the Council of Europe and the European Union on UK data protection legislation is discussed at more length in section 4 of chapter 7 of this thesis. That section investigates the role international data protection instruments have played in prompting the domestic legal recognition of information privacy, particularly how concerns with facilitating trans-border data flows and trade have

³¹⁹ Simitis (n 275) 97.

³²⁰ *ibid* 123; Bennett (n 12) 91.

³²¹ Explanatory Report to Resolution (73) 22, para. 11, as cited by Frits W Hondius, ‘A Decade of International Data Protection’ (1983) 30 *Netherlands International Law Review* 103, 108.

³²² *ibid*.

³²³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. *Official Journal L* 281, 23.11. 1995, 31-50.

³²⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). *Official Journal L* 119, 4.5.2016, 1–88.

played a motivating role in the lawmaking discourses preceding the passages of the 1984 UK Data Protection Act and the 1998 Data Protection Act.

Alongside these international law influences, domestic initiatives to protect information privacy in the UK are already evident in the 1960s with the introduction of Alex Lyon's "Right to Privacy" Bill in the House of Commons on the 8th of February 1967. This bill marked the first of a long series of failed attempts to produce legislation to protect privacy. These attempts have been chronicled and discussed elsewhere,³²⁵ so this subsection only provides a brief summary of the main initiatives. In addition to Lyon's 1967 bill, attempts at legislation include Kenneth Baker's "Data Surveillance Bill" in 1969 and Brian Walden's 1969 "Right of Privacy Bill". Walden's bill, which was based on the 1970 Justice report "Privacy and the Law", sought to create a statutory tort of "infringement of privacy".³²⁶ Though these legislative attempts did not come to fruition, they arguably acted as "a catalyst"³²⁷ for the next phase of attempting legislation following the creation of a specialist committee led by Sir Kenneth Younger in 1970. The Younger Committee report was submitted in 1972 and was rather modest in its recommendations, as it did not recommend the recognition of a general right to privacy by statute.³²⁸ Although the recommendations were the topic of extended parliamentary debates, they were not fully translated into legislation.³²⁹

The issue of insufficient privacy protection continued to occupy lawmakers and in 1975, the UK government published two further White Papers, one entitled "Computers and Privacy"³³⁰ and a supplement entitled "Computers: Safeguards for Privacy".³³¹ In the following year (1976), the government commissioned a

³²⁵ See, for example, Bennett (n 12). Adam Warren and James Dearnley, 'Data Protection Legislation in the United Kingdom: From Development to Statute 1969-84' (2005) 8 *Information Communication and Society* 238.

³²⁶ Bennett (n 12) 84.

³²⁷ Gerald Dworkin, 'The Younger Committee Report on Privacy' (1973) 36 *Modern Law Review* 399, 399.

³²⁸ Younger report, *Report of the Committee on Privacy* (Chairman the Rt. Hon. Kenneth Younger), London 1972, Cmnd 5012. 10.

³²⁹ Although some of the Younger Committee recommendations were adopted in the Consumer Credit Act 1974 c39, see Bennett (n 12) 87.

³³⁰ Home Office, *Computers and Privacy*, 1975, (White Paper, i.e., a statement of Government Policy) Cmnd. 6353. (MHSO, London, 1975)

³³¹ Home Office, *Computers: Safeguards for Privacy* (White Paper), Cmnd. 6354. (HMSO, London, 1975)

“Committee on Data Protection” that was headed by Sir Norman Lindop. This committee, which produced its report in 1978,³³² addressed computer use in the public and private sectors and focussed on the “European concept of ‘data protection’.”³³³ Again, however, the report failed, as González-Fuster phrases it, “to generate any concrete response.”³³⁴ Similarly, Warren and Dearnley describe the period after the publication of the Lindop Committee Report as one of “entropy”.³³⁵

In the academic literature, it is agreed that it was the pressures of the Council of Europe’s Convention 108, combined with the fear of missing out on trade due to a lack of data protection legislation, that provided the critical impetus to prompt the UK to pass the Data Protection Act in 1984.³³⁶ Indeed, the many years of parliamentary deliberation that preceded the passage of the UK Data Protection Act have been described as “sterile”³³⁷ because they generally failed to produce concrete legislation to protect privacy.

However, these attempts at legislation nonetheless provided the discursive background for the legislative recognition of privacy in 1984. Clearly, commercial considerations associated with the Council of Europe’s Convention 108 had, as Warren and Dearnley put it, “hastened the need for legislation”,³³⁸ but prior domestic initiatives were still referred to frequently in the parliamentary debates of the 1984 act, so it is clear that they provided an important reference point for legislative developments.³³⁹ For this reason, the transcripts of these debates as well as the reports and supplementary documents feature in my dataset: they do not constitute acts of privacy recognition in themselves, but they form part of the lawmaking discourses preceding the 1984 Data Protection Act.

³³² Lindop Report, *Report of the Committee on Data Protection* (Chairman Sir Norman Lindop), London 1978, Cmnd. 7341.

³³³ Bennett (n 12) 88.

³³⁴ González Fuster (n 6) 44.

³³⁵ Warren and Dearnley (n 325) 247.

³³⁶ González Fuster (n 6) 44. Warren and Dearnley (n 325) 252. The UK government was faced with the prospect that foreign data protection authorities would refuse data flows to the UK unless it had adequate data protection legislation, thereby posing a threat to the computer industry, see Bennett (n 12) 91.

³³⁷ González Fuster (n 6) 104.

³³⁸ Warren and Dearnley (n 325) 252.

³³⁹ *ibid* 257.

(b) the common law protection of confidence before the introduction of the 1998

Human Rights Act

A second stream of UK acts of privacy recognition concerns the common law protection of confidential information before the introduction of the 1998 Human Rights Act. Though UK courts had a hard time acknowledging rights to privacy (in at least two famous cases, *Kaye v. Robertson* in 1991³⁴⁰ and in *Wainwright v. Home Office* in 2003³⁴¹, judges explicitly rejected that a right to privacy was recognised under English law), UK judges had developed legal instruments for the protection of confidential information under the auspices of the action for *breach of confidence*. The case that is typically credited with establishing this tort is the 1849 case *Albert v. Strange*.³⁴² In this case, the High Court of Chancery granted an injunction to Prince Albert, allowing him to prevent the publication of a gallery catalogue featured etchings of the children of Prince Albert and Queen Elizabeth that they had created for private purposes. Much of the Court's argumentation in favour of granting the injunction heavily relied on the fact that the etchings were Prince Albert's private property,³⁴³ but when the injunction was upheld on appeal, Lord Cottenham LC remarked,

*"this case by no means depends solely upon the question of property, for a breach of trust, confidence, or contract, would of itself entitle the plaintiff to an injunction."*³⁴⁴

It is clear that this judgment, though it did not mention privacy itself, developed the means to legally protect what was essentially an interest to keep aspect of one's life hidden, using the concept of "confidence". Over the years, case law fleshed out the tort of breach of confidence, establishing the need that in order to receive legal protection, the information in question must have been of a confident nature, it must have been imparted in the context of a confidential relationship, and the use or publication of the confidential information must have caused a detriment to the

³⁴⁰ *Kaye v Robertson & Sport Newspapers Ltd* [1991] FSR 62; The Times 21 March 1990.

³⁴¹ [2003] UKHL 53; [2004] 2 AC 406; [2003] 3 WLR 1137; [2003] 3 All ER 943.

³⁴² *Prince Albert v Strange* [1849] EWHC Ch J20. The case is even mentioned in the seminal 1890 article *The Right to Privacy* by Warren and Brandeis, see Warren and Brandeis (n 91) 199.

³⁴³ *Prince Albert v Strange* [1849] EWHC Ch J20 at 695.

³⁴⁴ *Prince Albert v. Strange* [1849] I H & TW 1 at 24.

plaintiff.³⁴⁵ However, one of the persistent limitations of the breach of confidence tort was that it required a certain kind of confidential relationship, so the tort hinged on “something over and above the quality of the information itself in order to impose the obligation of confidentiality.”³⁴⁶ This meant that a large amount of media reporting on the basis of information or photographs that were not obtained in private settings did not fall within the remit of this tort. (This, as argued by Phillipson, changed under the influence of the Human Rights Act.³⁴⁷) In this sense, the action for breach of confidence was focussed on protecting confidential relationships; it was, in the words of Richards and Solove, about protection “against betrayal by confidants rather than embarrassment by strangers.”³⁴⁸

Despite these limitations, the action for breach of confidence was undoubtedly instrumental in protecting privacy interests: additional cases that have cemented the use of the breach of confidence tort to protect information privacy include, for example, the 1913 case *Ashburton v. Pape*,³⁴⁹ which protected confidential letters, and the 1967 case *Argyll v. Argyll*,³⁵⁰ in which the court allowed the former wife of the Duke of Argyll to prevent the disclosure of her diary to the press. Considered from this perspective, the cases that have established and broadened the breach of confidence tort contain acts of privacy recognition and thus form part of my dataset.

It is worth mentioning that especially some of the earlier judgments on the action for breach of confidence are comparatively brief. In terms of mapping the discourses preceding acts of recognition, these judgements do not generate the same number of pages as, say, the parliamentary deliberations that precede acts of

³⁴⁵ These requirements of the action for breach of confidence were summarised in the 1969 case of *Coco v A.N. Clark Engineers Ltd.*, [1969] R.P.C. 41. The facts of the case concerned commercial information on the construction of a moped engine, so it was not concerned with privacy concerns as such. However, the criteria it set out applied to personal as well as commercial types of confidential information. Though “detrimental use” is one of the *Coco* requirements, courts have subsequently been reluctant to require proof of damages beyond the violation of confidence. Neil M Richards and Daniel J Solove, ‘Privacy’s Other Path: Recovering the Law of Confidentiality’ 96 *The Georgetown Law Journal* 123, 161.

³⁴⁶ Gavin Phillipson, ‘Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act’ (2003) 66 *Modern Law Review* 726, 743.

³⁴⁷ *ibid* 744.

³⁴⁸ Richards and Solove (n 345) 166.

³⁴⁹ *Ashburton v Pape* [1913] CA 2 Ch 469.

³⁵⁰ *Duchess of Argyll v Duke of Argyll* [1967] Ch. 302 (1964).

recognition in legislation. Still, they often contain rich and insightful content that illuminates the conditions under which a court considered a privacy interest worthy of legal recognition – and worthy of legal protection. This finding is discussed in subsection 5.2 of chapter 5.

(c) The legal recognition of privacy as part of the Human Rights Act and the judicial privacy recognition after the Human Right Act

Any account that discusses the development of privacy laws in the UK describes the 1998 UK Human Rights Act as a watershed moment.³⁵¹ The Human Rights Act, which came into effect in 2000 incorporated most of the provisions of the European Convention of Human Rights, including Article 8, which provides the “right to respect for private and family life”³⁵², into English law. As pointed out by David Erdos, the Human Rights Act “at a formal level, only gave a domestic legal status to rights which were already binding on the United Kingdom transnationally through the European Convention on Human Rights (ECHR)”.³⁵³ This is not to say that the Human Rights Act itself is of no significance: the contrary is the case. It constitutes an act of recognition in my dataset and in the lawmaking discourses preceding its passage in 1998, the recognition it would afford to privacy was a repeated topic of discussion, as subsection 5.2. of chapter 5 demonstrates.

But the HRA’s effect on the recognition of privacy in English law is primarily considered to be so significant because it provided an impetus to the British judiciary to significantly broaden the action for breach of confidence that I have mentioned above. In particular, the courts were empowered in their progressive expansion of the breach of confidence tort because section 6 of the HRA requires public authorities, including the judiciary, to act in a way that is compatible with convention rights. This horizontal effect meant that Article 8 of the Convention became an “inspiration”, as Phillipson puts it,³⁵⁴ for affording a remedy against the unauthorized publication of private information by private persons and bodies like newspapers.

³⁵¹ See, for example, Richards and Solove (n 345) 166; Phillipson (n 346) 726.

³⁵² Human Rights Act 1998, c42 (received Royal assent on 9.11.1998).

³⁵³ David Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (Oxford University Press 2010) 106.

³⁵⁴ Phillipson (n 346) 726.

One of the main ways in which the breach of confidence tort was stretched is by increasingly omitting the *Coco* requirement of a confidential relationship. As argued by Phillipson, once an obligations to keep information confidential arises purely on the basis of the nature of the information itself, “then it could fairly be said that at the conceptual level, breach of confidence would be substantially transformed into a privacy tort.”³⁵⁵ The requirements of the breach of confidence- tort were increasingly based on Article 8 of the European Convention and concerned the question of whether the plaintiff had a reasonable expectation of privacy that was to be balanced with the freedom of the press granted by Article 10 of the European Convention, taking into account the public interest.³⁵⁶ In subsection 7.3.3 of this thesis, I address the shift from confidence towards the legal recognition of privacy under the influence of the European Convention of Human Rights.

This development in the common law has been detailed elsewhere,³⁵⁷ but one case that warrants some discussion is the 2004 ruling of the House of Lords in the case of *Campbell v. Mirror Group Newspapers Ltd*. In this case, the House of Lords awarded damages to the British model Naomi Campbell after photographs that depicted her leaving a rehabilitation clinic were published by The Mirror. By no longer requiring a confidential relationship, the ruling in this case solidified the expansion of the tort of breach of confidence into a de-facto privacy tort. In fact, Lord Nicholls even stated that “[t]he essence of the tort is better encapsulated now as misuse of private information.”³⁵⁸ The tort of misuse of private information, first recognised in *Campbell*, is now an established part of UK privacy law. Together with the Human Rights Act itself, this body of case law that led to the creation of the misuse of private information tort constitutes the third major ‘stream’ that has supplied acts of recognition in my dataset.

³⁵⁵ *ibid* 744.

³⁵⁶ This test was set out by Baroness Hale, see *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Baroness Hale at 495.

³⁵⁷ See, for example, Phillipson (n 346); NA Moreham, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 *Law Quarterly Review* 628; Tanya Aplin, ‘The Development of the Action for Breach of Confidence in a Post-HRA Era’ (2007) 1 *Intellectual Property Quarterly* 19.

³⁵⁸ See *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Nicholls at 12.

As mentioned above, my dataset also includes various acts of privacy recognition that lie outside of these streams. One example drawn from criminal law is the 2000 Regulation of Investigatory Powers Act (RIPA): despite the extensive and controversial surveillance powers it grants to public bodies,³⁵⁹ RIPA's section 1(1) makes it a criminal offence to intercept, without lawful authority, any communication via post or telephone.³⁶⁰ The different streams I have outlined above only carve up the bulk of acts of recognition that have guided the composition of my dataset; they help elucidate the historical development of privacy recognition, and they provide some insight into the kinds of legal developments that are the object of my analyses.

4.4. Analytical strategy: identifying lawmakers' reasons

As explained in the previous subsection, after compiling lawmaking discourses from the selected documents, I assessed the material to identify the most relevant themes, as they emerged in lawmakers' debates and judgments. Based on these themes, I developed codes as a helpful means of organising the material.

I relied on the data analysis and storage software NVivo (version 11.0.0), as well as on manual coding techniques, to classify, organise and interpret the data. The aim of this analytical process was to identify and interpret the reasons lawmakers purported to have for affording legal recognition to information privacy. NVivo was a particularly helpful tool for storing and coding large amounts of unstructured data, such as Hansard documents on UK legislative developments. A significant amount of data on German legislative processes was stored and coded manually as many these documents had to be obtained as hard copies and could not be incorporated easily into the NVivo software.

As stated above, the objects of empirical analyses were *the reasons lawmakers have for affording legal recognition to information privacy*. (*claim to have) As outlined above, the 'lawmakers' I am concerned with here are institutional agents that have legal authority, rather than human individuals. Correspondingly, this

³⁵⁹ Ian Brown, 'Government Access to Private-Sector Data in the United Kingdom' (2012) 2 International Data Privacy Law 230, 237.

³⁶⁰ Regulation of Investigatory Powers Act 2000 ("RIPA"), c.23. The act received Royal assent on 28.7.2000.

qualitative exploration of lawmakers' reasons is not concerned with the psychological content of individual human minds, but rather seeks to investigate assumptions, ideologies³⁶¹ and normative reasoning at the institutional level.

Examples for reoccurring codes include *dangerous computers* and *other legal systems have superior privacy laws*. The process of developing codes occurred in multiple rounds, some of which prompted further cycles of data collection and analysis, making the research process reflexive rather than linear.³⁶² To account for emerging themes and to appropriately reflect patterns within the data,³⁶³ In vivo coding became an increasingly salient tactic. One of the benefits of employing In vivo coding alongside preconceived categories of reasons was that it encouraged critical reflections on the existing literature on privacy development.

Echoing an apparently common research experience,³⁶⁴ it turned out that some of the passages identified in this process were so poignant that they became part of the organisational framework in which themes were presented. For example, reference to dystopian visions emerged as particularly salient. The categorisation of data into reasons provided the framework for the following three chapters. These are organised around the following three most central and overarching themes: the pre-determinate features of legal systems (*legal antecedents*), the fear of dystopia (*dystopian visions*) and the pressures of foreign and international law (*global pressures*).

4.5 Inductive comparison: UK and German law

The legal systems surveyed for acts of privacy recognition include Germany and the UK. The decision to focus on German and UK law was also based on the researcher's knowledge of law and legal processes in both systems, as well as linguistic

³⁶¹ I use the term in a descriptive sense that refers to lawmakers' shared dispositions, concepts and beliefs, see Scott J Shapiro, *Legality* (The Belknap Press of Harvard University Press 2011).

³⁶² Jennifer Fereday and Eimear Muir-Cochrane, 'Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development' (2006) 5 *International Journal of Qualitative Methods* 80, 82.

³⁶³ *ibid.*

³⁶⁴ Johnny Saldana, *The Coding Manual for Qualitative Researchers* (Sage Publications 2009) 16.

competence. These qualities were deemed beneficial to carrying out qualitative socio-legal research. This selection was reflected at various stages of the research design and process.

In light of the study's concern with developing an interpretive understanding of the legal recognition of privacy, it was evaluated whether an exclusive focus on either the UK or German context may prove more conducive. It was concluded that an exclusive focus on one legal system would have likely yielded a richer qualitative exposition of the reasons for which lawmaking agents engaged in the activities that contributed to the legal recognition of privacy.

However, the relative benefit of dedicating more resources to one system seemed marginal in relation to the interpretative advantages that a comparative edge enables. In particular, it became clear at an early stage of empirical research that in considering the more specific empirical research question of the reasons for which privacy was afforded legal recognition, a comparative framework was particularly conducive for encouraging critical reflections of findings. Variances across legal systems helped to raise seemingly mundane issues, such as pertaining to the understanding of law and technology that might otherwise have escaped the researcher's attention more easily. These benefits were already evident at the stage of reviewing the academic literature on the development of privacy laws. Section 2.1 has repeatedly commented on the usefulness of the comparative lens when it comes to critically challenging the narratives that have been proposed to explain the development of information privacy laws.

Furthermore, regarding the ambition of contributing towards a more general understanding of legal change in late modern societies, the comparative advantage of considering two legal systems was deemed indispensable. This is certainly the case with regard to sociological theories about reasons for legal change: in fact, it would undoubtedly have been beneficial to consider law-changing actions across various additional legal systems. At the same time, it is already the case that because of the stark differences in structural and institutional design that the German and UK legal

systems entail, including one or two additional modern legal systems would have compromised in-depth qualitative explorations within the time and resource constraints of a doctoral project. Furthermore, given that a noteworthy amount of scholarship on the development of information privacy already exists for the US context, it was decided that such scholarship could be drawn on in discussing possibilities for generalising insights.

The precise role of empirical facts in relation to legal theory is methodologically contested.³⁶⁵ However, it is widely acknowledged that knowledge about things is indispensable for building refined hypotheses; even in the case of conceptual analysis.³⁶⁶ The present research project employs qualitative empirical insights as a basis for developing theories about legal change in general. I rely on the variability and idiosyncrasy of my findings to flag up the caveats and limitations for generalising inductively. A comparative design of two legal systems thus likely provides some useful indications of what is *contingently* and what is *generally* true of legal change. Furthermore, General Jurisprudence is centrally concerned with modern municipal legal systems, and German and UK law have traditionally provided the core knowledge background for most jurisprudential scholarship.

An additional factor that makes the comparison between German and UK Law particularly interesting is the widely shared view – salient in legal literature on the topic – that the concept of privacy has a fundamentally different significance in German and UK law.³⁶⁷ In terms of the legal architecture of privacy, differences

³⁶⁵ As emphasised by jurisprudential and socio-legal scholars alike, methodology in jurisprudence is contested; see Denis J Galligan, 'Legal Theory and Empirical Research', *The Oxford Handbook of Empirical Legal Research* (2010). Particularly its relationship to empirical research is far from clear: Dickson, *Evaluation and Legal Theory* (n 107); Plunkett and Shapiro (n 197); Richard Nobles and David Schiff, *A Sociology of Jurisprudence* (Hart Publishing 2006).

³⁶⁶ Examples for scholars who make this claim include Kenneth Einar Himma, 'Conceptual Jurisprudence - An Introduction to Conceptual Analysis and Methodology in Legal Theory' (2015) 26 *Revus* 65, 72.

³⁶⁷ The legal design of information privacy in Germany is complex. The most comprehensive overview is provided by Balthasar (n 5); Andrew Kenyon and Megan Richardson, *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press 2006); Cremer (n 9).

include formal legal design and instruments, enforcement³⁶⁸ and substantive scope of legal protection. The scope of difference exacerbated by the fact that legal terminology used to describe privacy issues is not unified. On the one hand, this is a consequence of fundamental problems of translation across languages that also manifest in legal terminology (who is to say whether the German term 'Privatsphäre' and the English 'privacy' are truly equivalent in meaning?³⁶⁹).

On the other hand, the difference in signification also entails that within legal orders, a variety of terms and concepts are employed to characterise the normative tension and value. For example, English legal discourse uses terms such as 'confidentiality', 'confidence', 'privilege' or 'secrecy' to describe the legal prerequisites for non-disclosure that were legally recognised in certain types of relationships like those between lawyers and clients or in religious confession,³⁷⁰ long before English law recognised anything approximating a general right to privacy. Indeed, there is widespread agreement amongst legal professionals across jurisdictions that privacy is notoriously elusive and difficult to define.³⁷¹ Perhaps as a consequence of this, German legal discourse has treated issues pertaining to informational control with varied terminology, employing – in addition to 'Privatsphäre' – terms such as *Persönlichkeitsrecht* (right to personality), *Würde* (dignity), *Ehre* (honour), *Geheimnis/ Geheimhaltung* (secret/secrecy), and, more recently, *Informationelle Selbstbestimmung* (informational autonomy).

Of course, this combination of terminological and substantive variance complicates matters for comparativists: if different jurisdictions employ different terms for different legal instruments with different social consequences and

³⁶⁸ For a critical overview of enforcement practices, see Simitis (n 275). Dariusz Kloza and A Mościbroda, 'Making the Case for Enhanced Enforcement Cooperation between Data Protection Authorities: Insights from Competition Law' (2014) 4 *International Data Privacy Law* 120; David Erdos, 'European Data Protection Regulation and Online New Media: Mind the Enforcement Gap' (2016) 43 *Journal of Law and Society* 534.

³⁶⁹ The indeterminacy of translation is famously explained through the example of 'gavagai': Willard Van Orman Quine, *Word and Object* (MIT Press 1960) 32.

³⁷⁰ For a summary, see Richards and Solove (n 345).

³⁷¹

objectives, what then amounts to the presumption of similarity that justifies comparison? It prompts the question of whether, amongst all these differences, there remain any commonalities; anything essential to what we may describe as ‘information privacy law’?

This problem is not confined to the topic of information privacy, but informs comparative approaches to law more generally: the idiosyncratic nature of legal systems has always presented a problem to legal theorists and socio-legal scholars who aimed to develop more general theories and characterisations of the nature or function of the law in modern society.

The assumption that there are some transcending or shared aspects to the concept or essence of the law has constituted both the premise and guiding research objective of academic fields like comparative law, socio-legal studies, law and society, and even the jurisprudential tradition of legal positivism as advanced by Bentham, Kelsen, Hart and Dworkin.³⁷² It is with reference to this academic endeavour that Siems suggests social-scientific approaches to law always ‘implicitly’ deal with topics of comparative law.³⁷³ As outlined above, this research project is concerned with understanding how the legal recognition of privacy developed. Thus, in order to enable insights into the shaping force of the specific idiosyncratic structures of national legal systems – such as whether they emphasise codification, recognise *stare decisis* as a source of law, and have a systematic hierarchy of legal norms – a more explicit comparative angle that aims to investigate the formation of privacy regulation in the context of both the UK and Germany is employed here.

As pointed out by Siems, comparative law has developed a range of concepts designed to emphasise both similarity across legal systems and the embeddedness of law in social practices and life, like the notions of ‘legal culture’³⁷⁴, ‘legal family’ or

³⁷² Habermas points out that some traditions in legal philosophy and sociology of law share the epistemological premise that law is a social construct: Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (n 128) 42 ff.

³⁷³ As used by Mathias Siems, *Comparative Law* (Cambridge University Press 2014) 287.

³⁷⁴ David Nelken, ‘Using The Concept of Legal Culture’ (2004) 29 *Australian Journal of Legal Philosophy* 1; Whitman (n 2).

'legal tradition'³⁷⁵ – and legal 'system' itself.³⁷⁶ Particularly, the 'differentiation of legal families has a long tradition in comparative law, even though legal scholars continue to debate the criteria that distinguish them.'³⁷⁷ The notion of legal cultures is also used widely in the comparative study of law, legal systems and legal practices and it is conceptually useful in the sense that it provides a vehicle through which history and language can be linked to contemporary laws and legal practices.³⁷⁸ The most common differentiation or categorisation for which these concepts have been employed is the distinction between common and civil law systems.³⁷⁹ In spite of the German and the UK legal system's own respective historical, cultural, linguistic and doctrinal particularities, they are commonly viewed as the two national legal orders that most clearly approximate the 'ideal types'³⁸⁰ of civil versus common law families or traditions.

At the same time, the extent to which concepts such as family, culture or tradition are used to emphasise legal 'universalities' versus 'singularities'³⁸¹ varies according to the purpose and orientation with which they are applied; they are used in an immense multitude of contexts and ways. In particular, the orthodox distinction between common and civil law jurisdictions or systems has been subjected to questioning. For example, it has been remarked frequently that 'common law countries have witnessed an increasing number of statutory

³⁷⁵ Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, Third Edit, Clarendon Press 1998); Katharina Pistor and others, 'The Evolution of Corporate Law: A Cross-Country Comparison' (2002) 23 *The University of Pennsylvania Journal of International Economic Law* 791.

³⁷⁶ The identification of a (continuing) legal system poses problems in transitional cases, see Roger Cotterrell, 'Comparatists and Sociology' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003) 77.

³⁷⁷ Pistor and others (n 281) 8.

³⁷⁸ See, for example, Miriam Aziz, *The Impact of European Rights on National Legal Cultures* (Hart Publishing 2004) 6.

³⁷⁹ Zweigert and Kötz (n 377); Roger Cotterrell, 'Comparative Sociology of Law' in David S Clark (ed), *Comparative Law and Society* (Edward Elgar 2012); Nelken (n 376).

³⁸⁰ Max Weber, who coined the concept of ideal types (*Idealtypen*), uses it as a heuristic tool for comparative sociological purposes. Weber, *Economy and Society: An Outline of Interpretive Sociology* (n 25) Chapter 1, Page 9.

³⁸¹ Siems (n 375) 305.

enactments over the past two hundred years [and in] civil law countries, courts have at times played a much more proactive role in shaping the contents of legal rules than the general principle that ‘judges interpret, but do not make the law’ may suggest’.³⁸² This example illustrates how vulnerable broad presumptions of similarity and difference are to specific cases. The very premise that comparative legal scholars and social scientists should strive to develop universal principles and aim for reduction is itself contested.³⁸³

In a similar vein, Cotterrell proposes that comparative socio-legal scholarship entails a careful navigation between similarity and variance, and can challenge ‘the sense of naturalness and inevitability of [...] particular legal arrangements.’³⁸⁴ The upshot seems to be that uninterrogated assumptions of similarity and difference are fragile in light of closer scrutiny. However, as emphasised by Creutzfeld et al, such presumptions – even if ultimately refuted or amended – may still provide useful to research ambitions: particularly in the rich context of qualitative research, they reveal deeper analysis, reveal complexity and allow researchers to assess assumptions of sameness.³⁸⁵

It is in this way that the present project relies on comparative opportunities. I have conducted data collection and analysis with tentative presumptions of similarity as well as difference, and have allowed for these presumptions to be problematised in my findings. Asking, ‘*Is this reason for recognising privacy equally present in German/UK lawmaking discourses?*’ allowed me to identify similarity, difference as well as to pick up general patterns in the data.³⁸⁶ The notions of similarity and difference are thus employed inductively rather than deductively; as an interpretive tool that helps to navigate, rather than restrict, particular and general insights into the making or information privacy law – and into legal change more generally.

³⁸² Pistor and others (n 377) 799

³⁸³ Siems specifically refers to Bruno Latour, who argues that descriptions of social practices and facts cannot be “too particular, too idiosyncratic, too localized” (Latour, 2005: 137, quoted by Siems (n 375) 307; Zweigert and Kötz (n 377) 63.

³⁸⁴ Cotterrell (n 378) 135.

³⁸⁵ Creutzfeldt, Kubal and Pirie (n 373) 386.

³⁸⁶ Bowen (n 279) 37.

4.6 Conclusion: a critical appraisal of research methods

This chapter has explained how data was collected and analysed. It has provided a historical overview over the major streams of privacy recognition in German and UK law that have supplied the majority of acts of recognition in my dataset.

The design of the study was determined by two central tenets that were developed in the previous chapters. These were, firstly, an interpretive approach to social action that entailed a focus on lawmakers' reasons for recognising privacy, and secondly, constructivist epistemological underpinnings that viewed lawmaking as consisting in communicative interactions in the legal field. Thus, when it came to identifying and analysing the reasons for legal change, official documents were collected to map lawmaking discourses. This project's ambition of contributing to a more general understanding of legal change in modern societies (see subsection 2.2.3 of this thesis) guided the comparative focus on UK and German acts of privacy recognition.

This study's research focus is on the official institutional reasons that lawmakers cite in favour of privacy recognition. As mentioned in the introduction to this chapter, the epistemological and methodological choices described above have advantages as well as caveats, which I will discuss here.

First and foremost, the *reasons* this research project explores are not to be taken as direct *causes* of the legal recognition of privacy. This is not to say that many of the reasons I have identified did not play a causal role in shaping privacy laws: after all, they represent considerations that were central to the way lawmakers conceived of regulatory issues surrounding information privacy. Presumably, the way we conceive of a problem influences the solutions we develop. So lawmakers' reasons are undoubtedly *relevant* to law-changing acts. And yet, the connection between actions and between the considerations that inform them is not straightforward in the sense of 'mechanical causality'.³⁸⁷ Within an interpretive paradigm, the reason an

³⁸⁷ Fairclough (n 276) 8.

agent has for engaging in an action does not necessarily (and certainly not exclusively) *cause* said action.

This also means that this study's findings do not lend themselves to predictive analyses concerning privacy laws. In other words, it is entirely conceivable that lawmaking discourses in a different legal system feature similar sets of reasons but ultimately fail to result in the same legal recognition of privacy. The focus of this study was to qualitatively explain lawmaking acts when they occurred, rather than to identify causes of legal change, or causes of privacy recognition, for future policy analyses.

My focus on official, institutional reasons entails a focus on how state actors, including legislators and judges, have understood and shaped information privacy and on the narratives they construct to explain, or justify, its legal recognition. In that way, it resembles the orientation of Johnstone's study on human trafficking.³⁸⁸ In contrast to Johnstone, however, I do not focus on the entire discursive construction of the concept of privacy, but on moments of legal change and how these are motivated by reasons. That means that my study ranges more widely across time, but it is focussed on productive lawmaking discourses (by which I mean the discourses that result in legal acts of privacy recognition). This also means my dataset does not include a large amount of discourse on privacy that state actors have participated in, but that has not directly resulted in the legal recognition of privacy.

The findings of this study are presented and discussed in the following three chapters. However, given the large amount of data I collected on lawmakers' reasons, the data presented here are bound to be selective. In this way, they present my own interpretation of research findings and depend on my subjective preconceptions about what counts as a valuable insight into legal change. To this extent, the story told in the following chapters is subjective; it presents one possible version amongst many. It is widely acknowledged that qualitative research findings depend on the

³⁸⁸ Owain Johnstone, 'The Role of the State in the Construction of "Human Trafficking" in the UK, Thesis Submitted for the Degree of Doctor of Philosophy' (Oxford University 2017).

researcher who draws out meaning from the data and makes it explicit.³⁸⁹ Indeed, many emphasise that the researcher's own cognitive lens and capacity for interpretation are an important asset in qualitative studies; for example, Merriam describes researchers as the 'first instrument for data collection and analysis.'³⁹⁰ In order to ensure qualitative trustworthiness of my findings, I have used this chapter to provide detailed explanations of the data collection and analysis processes, as well as to introduce the reader to the main instances of recognition that are the object of my analyses. Furthermore, when it came to interpreting and presenting my research findings, I have taken care to remain reflexive and to critically consider competing interpretations at every stage.

³⁸⁹ Jane Ritchie and Jane Lewis, *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage Publications 2003) 57.

³⁹⁰ Merriam (n 111) 211.

5. Legal Antecedents and Law's Claims

The fifth chapter focuses on the shaping force of the existing normative and institutional structures of legal systems. In particular, I discuss of how institutional designs of legal systems, as well as intrinsic fundamental features of law that are described as 'law's claims' – particularly laws claims to authority, and to be just – constitute lawmakers' reasons for recognising information privacy.

5.1 Introduction

The conceptualisation of legal change as acts of recognition picks out moments of legal change across different institutions in the German and UK legal system. The following three chapters present and discuss the findings following qualitative analyses of the discourses preceding these acts of recognition. Inquiries probe into the reasons for which lawmakers afforded legal recognition to information privacy and the chapters are organised to represent to the different themes to which lawmakers' reasons belonged. These are (1) antecedent features of the respective legal systems, (2) dystopian visions, and (3) global pressures and national legal identities.

The present chapter addresses how existing, or *antecedent*, features of the respective legal systems feature as reasons for lawmakers to engage in legal change. These antecedent legal features include existing institutional arrangements between legislative and judicial institutions, as well as conventionally accepted aspects of the nature and purpose of law. In this way, this chapter reflects on the broader insight that lawmakers' understandings of their own institutional roles, as well as expectations of the kind of thing that law *is* (or that which law *claims to be*) affect their engagement in the legal recognition of privacy.

The notion that existing law determines and constrains what can be made into law is controversial; particularly when it comes to legislative institutions that are viewed as 'sovereign' and thus as more autonomous from existing law than, for example, judicial institutions. The issue of institutional discretion is addressed in the

subsection following this introduction. Section 2.1 critically revisits the presumption that legislative agents enjoy full lawmaking discretion. The following subsections present the finding that in UK acts of privacy recognition, lawmakers attribute significance to the institutional forum where legal recognition is afforded. In particular, there is concern over allowing judicial agents to advance privacy recognition ‘through the back door’. Conversely, analyses of intra-institutional interactions in German acts of recognition reveal that the proactive judicial development of privacy rights by the German Federal Constitutional Court is viewed far less controversially than judicial privacy recognition in UK contexts.

Empirical inquiries into the respective influence of the antecedent normative and institutional structures of legal systems across both judiciary and legislative contexts enable a more systematic understanding of the reasons for which lawmakers engage in legal change. In particular, this chapter inquires into the formative influence of existing legal structures on legal change across different institutions and legal systems. This is designed to enable a more systematic understanding of the phenomenon of legal change. Construing generalised understandings and concepts is essential to theory building and, as elaborated in the previous chapter, it allows us to map out and make sense of social realities. Developing a more general understanding of what is at stake in acts of recognition may allow for a theoretical framework that helps to pick out more systematic features of legal change as a social process.

Despite the fact that the phenomenon of legal change is rarely studied with view to such generalisations, scholarship in legal theory has proposed some concepts that encourage understanding legal change in a more systematic way: *across* institutional contexts and legal systems. Indeed, the qualitative analyses conducted within this research project suggest that there are some legal antecedents that feature in lawmakers’ reasons for legal recognition across institutions, and even across legal systems. These include shared fundamental presumptions of what law ought to *do* and *be like*. The academic literature has used the term ‘claims’ to refer to these

considerations.³⁹¹ Subsections 3-5 of this chapter addresses law's claims and inquire into the role they play in legal agents' reasons for privacy recognition.

I suggest that the view that law necessarily *claims* authority³⁹² or practical correctness³⁹³ may be central to a general understanding of legal change. Law's claims are employed here as categories for normative expectations regarding law's nature that lead lawmakers to afford legal recognition to privacy. In particular, subsections 5.4 and 5.5 investigate the expectations that law claims to be *authoritative* and that law claims to be *just*. The notion that law necessarily 'claims' certain qualities has been developed in paralleled versions in both socio-legal theory and General Jurisprudence. Socio-legal theory has developed a conception of law's claims as the pragmatically implied validity claims operative in legal discourse. The notion stems from Habermas' concept of communicative rationality³⁹⁴ and was further developed in Robert Alexy's *Theory of Legal Argumentation*. Habermas and Alexy argue that speech acts in legal discourse necessarily entail claims to practical correctness; these are analogous to the validity claims that are operative in other types of practical discourse.³⁹⁵

General Jurisprudence, on the other hand, deliberates over whether the notion that 'law claims something' entails the view that law or legal institutions have (concerted) agency³⁹⁶ and can be conceived as acting with intention or for reasons,³⁹⁷ or whether the expression that 'law claims' is merely an elliptical reference to claims that individual legal officials make on behalf of law.³⁹⁸ A central concern is that

³⁹¹ Gardner (n 102) 125.

³⁹² Raz, *The Authority of Law: Essays on Law and Morality* (n 101) 34.

³⁹³ Alexy, *Theorie Der Juristischen Argumentation* (n 121) 264.

³⁹⁴ Habermas, *The Theory of Communicative Action Volume One: Reason and the Rationalisation of Society* (n 215) 23; Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (n 128) 13.

³⁹⁵ Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (n 128); Alexy, *Theorie Der Juristischen Argumentation* (n 121).

³⁹⁶ John Gardner, 'How Law Claims, What Law Claims' (2008) 44 *Oxford Legal Studies Research Paper* 1, 6.

³⁹⁷ Ekins (n 155) 88; J Raz, 'Reasons for Action, Decisions and Norms' (1975) 84 *Mind* 481.

³⁹⁸ Luís Duarte D'Almeida and James Edwards, 'Some Claims about Law's Claims' (2014) 33 *Law and Philosophy* 725, 726.

thinking of law as a type of thing that itself possesses agency may be a distorting personification. Theoretical disagreement ensues over whether and in virtue of what such personifications are defensible. In contrast to this concern, section 5.3 presents the empirical finding that lawmakers commonly talk of law and legal concepts as possessing intrinsic agency. In this way, lawmakers also imply that their control of legal content is limited.

The point of this chapter is not to solve the conceptual puzzles inherent in the notion of 'law's claims', but rather to illuminate their empirical existence and significance: even if we deny that law is the kind of thing that can make claims, the *presumption* that it does may well constrain law-making actions by featuring as a reason for which agents engage in legal change. One view that helpfully refines the notion that law 'claims' things suggests that they refer to the claims that legal agents commonly make on law's behalf.³⁹⁹ As stated above, sections 5.4 and 5.5 rely on the notion of law's claims to categorise lawmakers' normative expectations of law, and how these affect their engagement in legal change.

Although jurisprudence does not explicitly conceive of law as a type of discourse or communicative system, it is clear that the understandings of law's 'claims' held by both jurisprudence and socio-legal theory scholars are similar in significant ways. Both understand 'law's claims' as a robust and central feature of legal systems. Law's claims, in other words, let us in on something fundamental and systematic about the purposes, understandings and normative expectations that inform lawmaking processes. For example, the notion that law claims to be just means that even though law is fallible and may in fact fail to meet standards of justice, considerations of what is just are presumably amongst the reasons that bear on law-making actions.

While an exploration of law's claims cannot tell us much about the content of any given law (which may well fail to meet any one of law's claims), it reveals the

³⁹⁹ Luís Duarte D'Almeida and James Edwards, 'Some Claims about Law's Claims' (2014) 33 *Law and Philosophy* 725, 726.

normative ideals and how they operate in law-making discourse. In this sense, law's *claims* are considerations for which lawmakers amend the legal status quo; they are reasons for legal change.

5.2 Institutional antecedents: rules of legal change for legislature and judiciary

5.2.1 Unconstrained legislatures?

Subsection 2.2.2 of this thesis has reviewed the distinction drawn between legislative and judicial lawmaking. Particularly the latter kind is portrayed as more strongly constrained, whereas the former is doctrinally portrayed as supreme, supported by the legal principle of parliamentary sovereignty.⁴⁰⁰ However, a presumption of different rules, or degrees of constraints, between legislative and other types of lawmaking obscures continuities and commonalities of lawmaking processes across institutions and legal systems. Do law-changing acts have something in common? Are different lawmaking actors and institutions engaged in some common project? The previous chapter has proposed that the notion of 'legal system' entails the presumption that different legal institutions within one system share a conception of the type of thing – *law* – on their worktables. This prompts the view that there are some transcendental elements to law's nature and purpose that are central to legal change in all contexts within and possibly even across legal systems. Even if the relevant institutional designs that shape lawmaking vary across institutional contexts and legal systems, there may be some essential or typical reasons entailed in law-changing acts. Eliciting lawmakers' shared reasons for engaging in legal change is central to a more systematic understanding of legal change as a social process, and it is one of the objectives of this research project.

Nevertheless, the respective forum and institutional rules matter for any type of social action. We cannot deny that Gardner's observation that 'the judge's powers

⁴⁰⁰ AV Dicey, *An Introduction to the Study of the Law of the Constitution* ([1885], Macmillan Press LTD 1979). More recent appraisals continue to emphasise legislative supremacy, see Alison L Young, *Parliamentary Sovereignty and the Human Rights Act*, vol 68 (Hart Publishing 2009) 32.

[are] subject to many constraints narrowing his choice from which a legislature may be quite free'⁴⁰¹ captures something important about institutional differences: after all, even courts that enjoy a high degree of institutional independence and extensive competences of judicial review – such as the German Federal Constitutional Court – only engage in legal change under the formal and substantive conditions that prompt their institutional engagement in the first place. These include, amongst other requirements, that a constitutional complaint or inquiry is brought to their consideration, which typically hinges on the availability of a presumptive constitutional basis or right for the claim to begin with. In this sense, it seems evident that legislatures and judiciaries develop law under different institutional constraints.

At the same time, the UK conception of unconstrained legislative power is exceptional and deviates from constitutional arrangements in most other legal systems. For example, the principle of the primacy of statutory law (*Vorrang des Gesetzes*) in Article 20 (3) of the German Constitution specifies: not only are executive and judiciary activities constrained by law, but that the legislature is equally bound by the constitutional order.⁴⁰² According to German legal doctrine, a legislative action that is incompatible with constitutional principles counts – subject to further specification by the Constitutional Court – as *ex nunc* invalid.⁴⁰³ 'Ex nunc' entails the legal fiction that the legislative act in question never counted as legally valid in the first place. In this sense, the substantive considerations enshrined in the Constitution operate as limiting criteria of legal validity. Through constitutional provisions, legal antecedents determine whether or not a given legislative act is 'in accordance with the constitution' and thus legally valid.⁴⁰⁴

⁴⁰¹ HLA Hart, *The Concept of Law* (2nd Editio, Clarendon Press 1994) Postscript: 273.

⁴⁰² Article 20 (3) of the German Basic Law

⁴⁰³ § 95 (3) 1 Bundesverfassungsgerichtsgesetz – Act of the Federal Constitutional Court.

⁴⁰⁴ In the German context, unconstitutional legislation is typically considered *ex ante* invalid. This principle, of course, is a legal fiction that results in the anachronistic projection that the law in question never validly existed in the first place, see Jörn Ipsen, *Rechtsfolgen Der Verfassungswidrigkeit von Norm Und Einzelakt* (Nomos 1980).

This points towards limitations of the applicability of the constrained-versus-unconstrained binary image of judicial and legislative lawmaking in the UK context. Even though UK legal discourse hardly enumerates explicit legal constraints on Parliamentary Sovereignty, it is widely acknowledged that legislative autonomy exists in effective tension with other constitutional principles such as the Rule of Law, human rights, supranational institutions, or voter accountability.⁴⁰⁵ These constraints are often described as the UK's 'political' constitution and map out the practical normative constraints under which legislative institutions operate when they make law.⁴⁰⁶

The doctrinal bifurcation between unconstrained legislatures on the one hand and constrained judiciaries on the other thus hardly takes account of the sociological reality of legal change. Therefore, the following subsection looks beyond doctrinal narratives and focuses on lawmakers' own conceptions of how their institutional context and role encourages or restrains their decisions to afford legal recognition to information privacy.

5.2.2 'Through the back door': inter-institutional interactions in UK lawmaking

This subsection presents and discusses findings on lawmakers' own awareness of how their institutional setting encourages or deters legal change. The present part of this section (5.2.2) focuses on perceptions of legislative versus judicial lawmaking in UK acts of recognition. Subsection 5.2.3 takes a closer look at the inter-institutional dynamic in German acts of recognition. In-depth qualitative explorations of lawmaking discourses preceding acts of privacy recognition revealed that lawmakers' institutional setting – specifically whether they formed part of the legislative or the judiciary – often featured in deliberations on whether and how to afford legal recognition to privacy. Even though legal agents across institutions conceive of

⁴⁰⁵ Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015) 112, 113.

⁴⁰⁶ NW Barber, 'Laws and Constitutional Conventions' (2009) 125 *Law Quarterly Review* 294; JAG Griffith, 'The Political Constitution' (1979) 42 *The Modern Law Review* 1.

themselves as engaged in a common project (i.e. making law, or more specifically, ‘protecting privacy’), they attribute significance to the institutional forum where legal recognition is afforded. In various instances, this consideration emerges as a reason for and sometimes against affording legal recognition to privacy.

Findings revealed that in UK acts of recognition, lawmakers’ reflections on institutional context often concerned the introduction of a general right to privacy through Article 8 of the 1998 Human Rights Act. A central concern for legislative agents was the prospect that by requiring public bodies – including courts of law – to respect a general right to privacy, Article 8 of the HRA might prompt British courts to expand civil law remedies available for privacy invasions. A catchphrase that exemplified this concern is that of the courts ‘developing privacy through the back door’, such as illustrated by the below extract:

*The Bill, as the noble and learned Lord's letter to me confirms, takes the matter out of the hands of Parliament and in doing so introduces a back-door privacy law.*⁴⁰⁷

Even though the Human Rights Act introduced and solidified a whole range of rights and civil liberties, the catchphrase ‘through the back door’ almost exclusively surfaced in relation to privacy. This reveals that legislative lawmakers thought privacy to be at particular risk of judicial activism, such as illustrated in the following passage:

*The [Human Rights] Bill represents the most obvious example yet of the contempt in which the Government hold Parliament and – even worse – the sovereignty of Parliament. [...] Unelected judges will be enabled to override elected Members of Parliament [...] Let us look at a specific example. Parliament has always resisted the introduction of privacy legislation.*⁴⁰⁸

⁴⁰⁷ *Human Rights Bill*, House of Lords, Hansard Volume 583, 24.11.1997, Lord Wakeham. A note on empirical data presentation and translation: all passages from my data are presented in italics. Underlining is sometimes used for emphasis.

All translations from German into English are mine, unless otherwise indicated. I have aimed to convey literal meaning, whenever possible.

⁴⁰⁸ *Human Rights Bill*, House of Commons, Hansard Volume 306, 16.2.1998, Sir Brian Mawhinney.

The above passage flags up some of the key components of common critiques of judge-made law in the UK. These include the mention that judges are *unelected* and that Parliament is (or ought to be) *sovereign*. The above passage furthermore accuses the privacy recognition of the Human Rights Act as betraying *contempt for Parliament*, thus fuelling the charge of inter-institutional competition and judicial activism. The specific concern that judges interfere with politics also surfaces frequently in these discourse passages and is illustrated by the extract below:

*The effect [of privacy legislation] will be to bring our judiciary into the arena of political controversy. It is a traditional wisdom of our system that judges are better kept out of political decision-making.*⁴⁰⁹

Although these passages seem to suggest that institutional context can count as a reason against the legal recognition of privacy, a more sceptical interpretation might caution that legislative agents might reject a legal protection of privacy altogether – not merely its *judicial* creation. However, qualitative coding of the reasons that lawmakers cite *in favour* of affording legal recognition to privacy suggests a different reading: legislative agents state the need for legal privacy protections with enthusiasm; they merely insist that *they* (that is, *Parliament*) ought to be entrusted with this task:

*It was a fear that the Government were seeking to introduce a privacy law through the back door by means of the Bill. [...]. But if there were to be a privacy law, my noble friend was quite right to make it clear that it is something Parliament itself should hammer out and should go through in considerable detail by means of legislation rather than leaving it to the courts to develop as they wish.*⁴¹⁰

Similarly, consider the extract from a more recent parliamentary debate:

⁴⁰⁹ *Bill of Rights Debate*, House of Lords, Hansard Volume 895, 15.7.1975, Lord Lloyd.

⁴¹⁰ *Human Rights Bill*, House of Lords, Hansard Volume 583, 24.11.1997, Lord Henley.

*My Lords, is not the implication of that Answer that we are to have a privacy law in a back door, ad hoc way, which will do great damage and cause great confusion [...]? Would it not be far better to have a privacy law which could be scrutinised – there could be pre-legislative scrutiny by Parliament and full public debate [...]?*⁴¹¹

Both of the above passages demonstrate that legislative lawmakers recognise a need to legally protect privacy and view themselves as appropriate agents. The passages furthermore insinuate that the capacity for in-depth scrutiny and detailed design are supposedly exclusive features of the legislative forum that give it an advantage in legal change.

The above-mentioned catchphrase of recognising privacy ‘through the back door’ is also apparent in both passages. The expression ‘through the back door’ denotes an activity that is unorthodox at best and possibly carries the implication that the behaviour is clandestine and forbidden.

For a common-law system, the suggestion that judge-made law is an unorthodox way of effecting legal change reads as surprising. Indeed, my analysis of lawmaking discourses show that the phrase ‘through the back door’ tends to be met with some resistance. Here, lawmakers tend to stress that common law developments are a traditional form of lawmaking in the UK, such as prominently pointed out by the privacy advocate Alexander Lyon in the passage below:

*As a concept in law, the right of privacy goes back to the English common law. [...] I remind the House, to stifle the criticism of those who say that the Bill puts too much power in the hands of the judges, that most of our basic freedoms under the law have been protected by the judges, by judge-made law over the centuries.*⁴¹²

The same opposition to the ‘back door’ accusation can be observed throughout judicial discourse contributions:

⁴¹¹ *Privacy Law*, House of Lords, Hansard Volume 661, 12.5.2004, Lord McNally.

⁴¹² *Right of Privacy Bill (Order for Second Reading)*, House of Commons, Hansard Volume 794, 23.1.1970, Mr. Lyon.

*Despite this long history, it has for several years been repeated [...] that courts are “introducing a law of privacy by the back door”. Yet the principles have long been open to scrutiny. They are readily apparent from the terms of the Human Rights Act, and indeed from the content of the European Convention itself.*⁴¹³

The above passage from the judgment in *CTB v News Group Newspapers* reveals, first and foremost, that judges reject that their recognition of privacy lacks opportunity for scrutiny. Furthermore, judicial agents tend to reject that their acts of legal recognition are activist. They instead refer to legislative and other legal instruments that supposedly anchor their actions, such as in the passage above. Findings also reveal that sometimes, judges explicitly hold themselves out to be legally obligated to extend privacy rights and thereby downplay their own discretion, a theme that is explored in more depth in subsection 7.3.2 of this thesis.

This exploration of the development of privacy laws thus uncovers active discussion amongst lawmakers on what some might take to be constitutive and fundamental rules of legal systems,⁴¹⁴ such as the conditions under which the judiciary ought to engage in legal change. The fact that lawmaking discourses contain discussions regarding the role of different institutional forums for legal change is significant in two ways: firstly, references to ‘back-door lawmaking demonstrate that lawmakers are not only concerned with instrumental purposes of privacy protection, but they actively consider institutional antecedents such as the respective legal systems’ rules for legal change. Secondly, the fact that the ‘back-door’ accusation is a subject of discussion shows that late modern lawmaking is a reflexive and deliberative activity: lawmakers do not shy away from negotiating their respective legal systems’ rules of legal change.

⁴¹³ *CTB v News Group Newspapers Ltd (No 2)* [2011] EWHC 1326 (QB), Lord Eady at 20, 21.

⁴¹⁴ Brian Leiter, ‘Explaining Theoretical Disagreement’ (2009) 76 *University of Chicago Law Review* 1215.

However, perhaps most importantly, the findings of this study shed light on inter-institutional discourse. Judges' discourse contributions indicate that they are aware of legislators' critique of their engagement in privacy recognition. Judgments often contain passages that explicitly address these concerns, such as the one featured above. Legislative agents take detailed note of judicial developments, often uttering statements like *I would expect the Law Lords to create a tort of privacy in just such a case.*⁴¹⁵ This shows that agents of both institutions conceive of themselves as involved in a common project when they change the law. Some of these inter-institutional discursive interactions seem more antagonistic. Others, such as the statement featured in this paragraph, are of a more collaborative nature and suggest constructive division of labour. These institutional interactions may be read as tentative evidence for a theory of a constitutional dialogue model of rights protection,⁴¹⁶ though the analysis required for such a conclusion surpasses the scope of this subsection.

5.2.3 Institutional antecedents in German acts of recognition

When it comes to lawmaking discourses on privacy, we can observe some collaborative inter-institutional interactions between the UK courts and Parliament. This collaborative dimension is even more obvious in the German context: the qualitative analyses of German lawmaking discourses conducted within this research project reveal that lawmakers in legislative and judiciary conceive of themselves as working towards the shared aim of creating privacy protections.

An important institutional difference between the modern German and UK legal systems is that the German Federal Constitutional Court has extensive powers of judicial review that include invalidating laws that it finds to be in violation of constitutional rights and principles. As a consequence, the Court is often

⁴¹⁵ *Criminal Justice And Public Order Bill*, House of Lords, Hansard Volume 555, 24.5.1994, Lord Lester.

⁴¹⁶ Alison Young, *Democratic Dialogue and the Constitution* (Oxford University Press 2017) 117.

characterised as harbouring an active role in the political process and emerging as somewhat of a ‘veto-player’ when it comes to legal change.⁴¹⁷ Christine Landfried has argued that the Court’s general willingness to invalidate parliamentary legislation not only affects the outcome of the sum of valid laws, but the awareness of prospective judicial review already leads legislative agents to ‘adjust their bills to former decisions of the Court’.⁴¹⁸ The image conveyed by critics of judicial activism is one of the Court looming large; imposing policies on democratically elected legislative bodies.

However, the findings of this research project do not support the view that lawmakers in legislative institutions conceive of themselves as *constrained* by the German Constitutional Court. Though Constitutional Court judgments are sometimes mentioned in legislative contexts, they are usually cited in support of a legal agent’s argument, rather than as an obstacle or constraint to legislative legal change. A similar picture emerges on the side of the judiciary: a closer analysis of the Court’s discursive contributions to acts of privacy recognition indicate cautious restraint and acceptance of parliamentary discretion when it comes to judicial review. This is evident in the following passage:

*The population census act of 1983 complies with the principle of proportionality. Concerning the assessment of complex matters, the legislator has discretion to evaluate and to assess – he thereby has a decisional prerogative. The danger of prompting a political quarrel on the sense or nonsense of a law can only be mitigated by judicial restraint.*⁴¹⁹

⁴¹⁷ Sascha Kneip, ‘Gegenspieler, Vetospieler Oder Was? Demokratiefunktionales Agieren Des Bundesverfassungsgerichts 1951-2005’ (2011) 52 Politische Vierteljahresschrift 220

⁴¹⁸ Christine Landfried, ‘The Judicialization of Politics in Germany’ (1994) 15 International Political Science Review 113, 117.

⁴¹⁹ *Volkszählung*, Urteil vom 15.12.1983, BVerfGE 64, 67:

Das Volkszählungsgesetz 1983 entspreche auch dem Grundsatz der Verhältnismäßigkeit. Dem Gesetzgeber komme bei der Beurteilung komplexer Sachverhalte ein Beurteilungs- und Einschätzungsspielraum und damit eine Entscheidungsprärogative zu. [...]. Nur durch richterliche Zurückhaltung könne der Gefahr begegnet werden, jeden letztlich politischen Streit über Sinn oder Unsinn eines Gesetzes verfassungsgerichtlich zu führen.

The concepts *Beurteilungsspielraum*, *Entscheidungsspielraum* and especially *Entscheidungsprärogative* each denote dimensions of legislative discretion. Listing these is a rhetorical tool by which the judicial agent demonstrates its self-proclaimed subordination to parliamentary decision-making. Furthermore, the second sentence of the passage reveals that judicial agents are often acutely aware that they are exercising judicial restraint (*richterliche Zurückhaltung*) and even include a justification (in this case, it is avoiding a *political* quarrel). This observation, of which the above extract is merely illustrative, chimes with Kneip's finding that despite the German Federal Constitutional Court's extensive and controversial powers of judicial review, the Court commonly exercises judicial restraint and affirms legislative activities far more commonly than it invalidates them.⁴²⁰ Rather than the legislature, it seems to be the judiciary who is constrained by the latent charge of judicial activism.

The Court's apparent caution when it comes to invalidating legislation, however, is only one side of the story: in the German context, the charge of judicial activism usually arises with view to judicial review, but the Court's practice of constitutional construction and its role in the active development of constitutional rights is rarely lamented as controversial.⁴²¹ Nevertheless, this study's empirical analyses find that those are far more common: these judicial innovations are often subtle and framed as directly emanating from the constitution itself (rather than judges' interpretation thereof). Sometimes judges hold themselves out as legally obligated to engage in legal recognition, thus mirroring a trend that high courts in the UK have been criticised of practicing.⁴²²

However, in some rare judicial discourse contributions, judges themselves acknowledge more explicitly that they are affording legal recognition to a hitherto

⁴²⁰ Sascha Kneip, *Verfassungsgerichte Als Demokratische Akteure. Der Beitrag Des Bundesverfassungsgerichtes Zur Qualität Der Bundesdeutschen Demokratie* (Nomos 2011) 78.

⁴²¹ Sascha Kneip, *Verfassungsgerichte Als Demokratische Akteure. Der Beitrag Des Bundesverfassungsgerichtes Zur Qualität Der Bundesdeutschen Demokratie* (Nomos 2011) 78.

⁴²² This accusation is discussed in more depth in subsection 7.3.2 of this thesis.

unrecognised dimension of privacy and that they are thus actively developing the law. One noteworthy case where this is particularly evident is the German Constitutional Court's decision in the case of *Soraya*. The passage featured below justifies the Court's proactive recognition of privacy rights as warranted (*constitutionally required*) in light of what is described as the legislature's failure to offer adequate privacy protections.

*The alternative to await regulation by the legislator can, in light of the circumstances, not be viewed as constitutionally required. The federal government has twice attempted to bring about a legislative solution for the problem of the protection of the personality in civil law. But the legislative proposals of the years 1959 and 1967 failed already in the early stages of the legislative process [...]*⁴²³

Such striking admissions of active constitutional construction contrast starkly with the more cautious tone of UK judicial agents. This illustrates a crucial difference in institutional antecedents between the modern UK and German legal systems: as outlined by Kneip, in the German system of rights protection, there is an expectation that the Federal Constitutional Court (and, to a lesser extent, the German Supreme Court) assume a role as active guardians of the constitution.⁴²⁴ This means that in the German context, judges are institutionally expected to engage in the active development of constitutional rights⁴²⁵ – a fact that renders their engagement in the legal recognition of privacy far less controversial.

⁴²³ *Soraya*, Beschluss vom 14.2.1973, BVerfGE 34, 269:

Die Alternative, eine Regelung durch den Gesetzgeber abzuwarten, kann nach Lage der Dinge nicht als verfassungsrechtlich geboten erachtet werden. Zwar hat die Bundesregierung sich zweimal darum bemüht, das Problem des zivilrechtlichen Persönlichkeitsschutzes einer gesetzgeberischen Lösung zuzuführen. Die in den Jahren 1959 und 1967 ausgearbeiteten Gesetzentwürfe sind jedoch bereits in den Anfängen des Gesetzgebungsverfahrens gescheitert [...]

⁴²⁴ Kneip, 'Gegenspieler, Vetospieler Oder Was? Demokratiefunktionales Agieren Des Bundesverfassungsgerichts 1951-2005' (n 420) 236.

⁴²⁵ For example, Alexy's Theory of Legal Argumentation is based on the recognition that judges sometimes "decide and decree in the manner of legislators" (Engisch, Einführung in das juristische Denken, p. 107, as cited by Sascha Kneip, 'Spiel Über Bande. Intendierter Und Nicht-Intendierter Verfassungswandel Durch Klagen Vor Dem Bundesverfassungsgericht' in

In contrast to UK lawmaking discourses on privacy – particularly those concerning the Human Rights Act – the German Constitutional Court does not conceive of itself as relying on parliament to licence its proactive ‘protection’ of rights. Rather, the ‘protecting rights’ discourse⁴²⁶ that can be traced throughout German acts of recognition across institutions suggests the view that courts and parliament conceive of themselves as working collaboratively, *in tandem*, to achieve privacy protections.

An important finding that foreshadows some of the analyses presented in the next section is that many instances where judicial agents afford legal recognition to privacy rights make explicit references to the German Constitution (*Verfassung, Grundgesetz*) or to constitutional provisions, which are discursively framed as action-guiding and as making active demands upon judges. This tendency can already be observed with view to the passage featured above: the expression *constitutionally required* implies that it is the constitution itself that possesses the agency to require lawmakers to engage in legal change.

5.3 Law personified: from artefact to agent.

Analyses of acts of recognition reveal that lawmakers make explicit and implicit claims about the kind of thing law is. These claims portray law not only as having certain qualities, but also as actively *doing* things: empirically, law is widely represented as having agency. This suggests that the personification implicit in the expression ‘law claims’ is not an aloof meta-theoretical invention: rather, the view that it is indeed law *itself* that ‘claims’, ‘knows’ or ‘wants’ certain things is strongly resonant in law-making contexts. This subsection spends some time exploring the significance of conceiving of law as a personified agent rather than an artefact, and the role this plays in relation to lawmakers’ reasons for affording legal recognition to privacy.

Christoph Hönnige, Sascha Kneip and Astrid Lorenz (eds), *Verfassungswandel im Mehrebenensystem* (VS Verlag für Sozialwissenschaften Springer 2011) 245.)

⁴²⁶ The significance of lawmakers’ claim to act for protective purposes is analysed in more depth in section 5.5, as well as in the next chapter.

By way of example, consider the passage in draft legislation on a UK privacy bill that discusses the influence of technological development:

*[...] Nor does the law control it. [...]. English law did not evolve with a knowledge of devices like these.*⁴²⁷

The term *evolve* alludes to biological processes and thereby suggests that the law (English law, in this case) is a living thing that grows and develops without human interference. This portrayal – though far from untypical – contrasts with the notion that law is a human construct whose development is dependent on intentional action. Furthermore, the suggestion that law can *evolve with knowledge* glosses law as a cognitive agent; a thing that can ‘know’ or ‘fail to know’.

Similarly, consider the following passages from an appendix to a German piece of draft legislation on the criminal protection of personal/private living space:

*The concept has so far been a stranger to criminal law, but approximates the concept of ‘highly personal/private living space’ [...], which criminal law is acquainted with [...]*⁴²⁸

*However, the criminal code has thus far declined to make an offence of the illicit recording of images.*⁴²⁹

It is also noteworthy that law is personified on different scales. Findings reveal that at times, the aspects of law that are ascribed agency range from law *in general* to a specific legal system (i.e. *German law*), a specific area of law (i.e. *criminal law*), and

⁴²⁷ *Right of Privacy Bill*, House of Commons, Hansard Volume 794, 23.1.1970, Mr. Buck.

⁴²⁸ *Entwurf eines Strafänderungsgesetzes: §201a StGB*, Bundestag, 15. Wahlperiode, Bundesdrucksache 15/361, 10.2.2004, 4.

Dieser Begriff ist dem Strafrecht zwar bisher fremd, lehnt sich aber an den dem Strafrecht bereits bekannten Begriff des persönlichen Lebensbereiches an [...]

⁴²⁹ *Entwurf eines Strafänderungsgesetzes: §201a StGB*, Bundestag, 15. Wahlperiode, Bundesdrucksache 15/361, 10.2.2004, 3:

Allerdings hat das Strafgesetzbuch bisher darauf verzichtet, das unbefugte Aufnehmen des Bildes [...]unter Strafe zu stellen.

even to a specific legal concept (i.e. *the personality, privacy*.) Similar claims to agency are also advanced regarding legal institutions (*Parliament, 'the courts'*), or even specific legal documents (*Grundgesetz*). The above passages portray Strafrecht (criminal law) and the Strafgesetzbuch (the criminal code) as subjects that can 'fail to be acquainted with a concept' or 'decline the imposition of a sanction'. Not only are the features attributed to an area of law and legal statute using active verbs, but they are the kinds of verbs that typically characterise human actions. This way of talking about law surfaces throughout empirical findings and will be visible in the presentations of qualitative data in this and the following chapters; the above examples are merely illustrative. The use of active verbs contributes to the portrayal of areas of law, legal institutions and law in general as active agents. This semantic particularity is likely neither particular to information privacy, nor to the discursive surroundings of acts of legal change. Instead, it may well be characteristic of thought and talk about law more generally.

Yet, in the context of legal change, this attribution of agency arguably assumes special significance because it syntactically denies human control over legal meaning and content. In particular, ways of characterising the legal status in ways similar to observing natural phenomena obscure that existing laws is the result of man-made practical choices. This becomes even more salient when such semantic constructs are used to refer to legal concepts in-the-making. Consider the following expression:

*Thus far, the concept of intimate sphere has not surfaced in legislation.*⁴³⁰

To appear/ to surface- is an active verb that affords agency and implies that the existence and appearance of legal norms and concepts (the 'intimate sphere', in the

⁴³⁰ Antrag: *Demokratische und soziale Antworten auf die Herausforderungen der neuen Informationstechnologien*, Bundestag, 13. Wahlperiode, Bundesdrucksache 13/2740, 24.10.1995, 3.

Bisher taucht der Begriff der Intimsphäre in der Gesetzgebung nicht auf

above case) is something to be observed empirically, rather than to be concluded normatively. In this way, an act of recognition can be couched as an innocuous epistemic exercise – a way of pointing out a fact – without raising questions of responsibility and accountability for normative legislative choice.

Furthermore, even by pointing out that a concept has not been afforded explicit legal recognition, semantic choice can do a lot of work towards paving justifications. In the above expression, the term *auftauchen* insinuates that the concept of *intimate sphere* certainly does exist; it has simply been lurking under the surface. Expressing what concepts ‘do’ in relation to law serves to render the subsequent legal recognition of such concepts more palatable.

As an additional example, consider the following phrase in a landmark Constitutional Court judgment on privacy as a dimension of the general right to personality:

*So far, specifications offered in adjudication do not determinately circumscribe the content of the right to personality. It encompasses [...]*⁴³¹

This phrasing might not strike as particularly remarkable. On the face of it, it seems to merely refer to the rather common occurrence that the meaning of a legal concept has not yet been fully determined. However, it must be remembered that *the right to personality* is a judicial invention,⁴³² so any previous judicial ‘clarifications’ of its meaning are really legal innovations. The above passage, however, denies that judicial actions are to be credited with establishing the right to personality and instead presents it as a phenomenon whose existence has merely been ‘discovered’. Contrasting verbs here are *umschreiben* – suggesting that judicial mention of personality rights has merely been descriptive (rather than

⁴³¹ *Volkszählung*, Urteil vom 15.12.1983, BVerfGE 64, 67, at 170:

Die bisherigen Konkretisierungen durch die Rechtsprechung umschreiben den Inhalt des Persönlichkeitsrechts nicht abschließend. Es umfaßt [...]

⁴³² Gerrit Hornung, *Grundrechtsinnovationen* (Mohr Siebeck 2015) 258.

constitutive), and *umfassen* (to entail), which is a feature attributed independently to the legal concept itself. The passage subtly reverses the relationship between law and lawmaker: although the right to personality in fact fully depends for its existence on creative judicial intervention, the above phrase conversely suggests that it is because of the antecedent existence of the right in question that the courts were able to ‘detect’ and describe it. For lawmakers in both judicial and legislative institutions, the benefit of such attributions of agency to law and legal tokens is that the activity of changing law is camouflaged. This avoids accountability to formal authorisation and substantive justification.

On the other hand, semantic attributions of agency might relay something more sincere: perhaps the tendency to describe law by using active verbs is not aimed at obscuring the normative responsibility associated with legal change. Rather, it may be read to reflect an actually existing agency of law, or at least as a genuine institutional way of viewing law and legal tokens as having this kind of agency. If lawmakers truly conceive of law in this way, the extent to which law is amenable to their actions will effectively appear limited to them. On this view, legal creations are understood as potentially acquiring a life of their own beyond the control of their creators. This conception of unruly human artefacts is not uncommon: epitomised by Frankenstein’s monster, the notion that the products of our creation come to dominate us is a salient theme in modern and late modern thought.⁴³³

Framing law and legal concepts as agents imbues them with a certain kind of authority that is encapsulated by aptly named modern legal principles like *Rule of Law* or *Rechtsstaat*. Despite some conceptual and doctrinal differences, both legal principles refer to the idea that political communities are, or ought to be, governed by law itself, rather than by fallible human individuals. What does it mean for law to govern or ‘rule’? Is the governance of laws not ultimately the governance of

⁴³³ See, for example, Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage 1992); or Weber’s writings on bureaucracy; Max Weber, *From Max Weber: Essays in Sociology* (HH Gerth and C Wright Mills eds, Routledge 2009).

lawmakers? Again, the research ambition here is not to solve the tension on the theoretical plane of constituent and constituted power,⁴³⁴ but to investigate the practical significance of law's agency in the context of lawmaking. Legal doctrine conventionally has officials attributing to law not only the ability to make claims and act, but also to constrain or obligate them.

The findings of this study indicate that the view that law's rule practically obligates lawmakers to afford certain instances of privacy recognition is most commonly and explicitly advanced with regard to German constitutional principles. The puzzle that remains to be addressed is whether such semantic attributions of agency sincerely refer to agents' reasons for legal change, or whether they are invoked to conceal law-changing activities. For an exemplary analysis, consider the following extract:

*After the Basic Law eventually acknowledged the human right to dignity as well as the right to the free development of the personality as private rights, to be respected by everyone [...] the general right to personality must be recognised as a constitutionally guaranteed fundamental right.*⁴³⁵

Again, the Basic Law is here characterised as an agent who holds the cognitive power to afford legal recognition (anerkennen) of rights. This is far from uncommon in German legal discourse and points towards the fact that the constitution incontestably has a preeminent legal status in the 'norm hierarchy' of German law.⁴³⁶ Furthermore, the deontic semantic formulation of *must be recognised* reads as normatively obligating lawmakers to afford legal recognition to the touchstone of German legal privacy: the general right to personality.

⁴³⁴ For a detailed analysis, see Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017).

⁴³⁵ *Leserbrief/Veröffentlichung von Briefen*, Urteil vom 25.5.1954, BGHZ 13, 334: *Nachdem nunmehr das Grundgesetz das Recht des Menschen auf Achtung seiner Würde (Art. 1 GrundG) und das Recht auf freie Entfaltung seiner Persönlichkeit auch als privates, von jedermann zu achtendes Recht anerkennt, [...] muß das allgemeine Persönlichkeitsrecht als ein verfassungsmäßig gewährleistetes Grundrecht angesehen werden.*

⁴³⁶ Alexy, *A Theory of Constitutional Rights* (n 196).

Yet, the Federal Constitutional Court's legal recognition of the general right to personality in this particular judgment is widely viewed as one of the most notorious and controversial cases of creative judicial lawmaking.⁴³⁷ It is evident that the legal recognition of such a right is not mandated by the Basic Law itself, which includes no mention of it. This suggests that the allusion to an alleged *obligation* for the court to recognise it may be interpreted as a rhetorical strategy to conceal an exercise of legal discretion.

For a similar analysis, compare the following passage from an equally notorious case in the Constitutional Court's recognition of privacy (here concerning damages):

*Now, after the Basic Law has guaranteed an encompassing protection of the personality and human dignity, and has recognised the right to free development of the personality as a being of foundational value to the legal order – and thereby corrected the assumption of the original legislator that there was no general right to personality warranting protection in civil law – it would be an unbearable disregard for this right if one were to deny compensation for damages to those who were violated in the autonomy over their personal living space.*⁴³⁸

Regarding the question of whether the attribution of agency to law strategically camouflages lawmakers' discretion, various features are noticeable about this passage. In the above extract, an excessively long sentence contains the crux of the decision (that and why compensatory damages are awarded for privacy violations).

⁴³⁷ Theodor Maunz and Günther Dürig, *Grundgesetzkommentar* (72. Auflag, Beck Online 2018) Artikel 2; Stephan Balthasar, *Der Schutz Der Privatsphäre Im Zivilrecht: Eine Historisch-Vergleichende Untersuchung Zum Deutschen, Französisch Und Englischem Recht Vom Uis Commune Bis Heute* (Mohr Siebeck 2006) 105; Hornung (n 42) 266.

⁴³⁸ *Herrenreiter*, Urteil vom 14.2.1958, BGHZ 26, 349:

Nachdem nunmehr das Grundgesetz einen umfassenden Schutz der Persönlichkeit garantiert und die Würde des Menschen sowie das Recht zur freien Entfaltung der Persönlichkeit als einen Grundwert der Rechtsordnung anerkannt und damit die Auffassung des ursprünglichen Gesetzgebers des Bürgerlichen Gesetzbuches, es gäbe kein bürgerlich-rechtlich zu schätzendes allgemeines Persönlichkeitsrecht, berichtigt hat, würde es eine nicht erträgliche Mißachtung dieses Rechts darstellen, wollte man demjenigen, der in der Freiheit der Selbstentschließung über seinen persönlichen Lebensbereich verletzt ist, einen Anspruch auf Ersatz des hierdurch hervorgerufenen immateriellen Schadens versagen

Notably, this central part is buried in the middle of paragraph 19 of the judgment, making it difficult to spot. The content of the passage furthermore suggests that in affording legal (constitutional) recognition to the Allgemeine Persönlichkeitsrecht, the Grundgesetz actively ‘corrected’ the supposedly mistaken views of the original lawmakers, who did not recognise a civil law equivalent to the right. The implication that original lawmakers were ‘mistaken’ is, of course, highly anachronistic since the right in question was only judicially developed long after the Civil Code was passed. The above passage also claims that in light of this (now-corrected) conception of civil law, the Constitutional Court is practically *obligated* to afford damages to the claimant, since the failure to do so would amount to an ‘unbearable disregard’ for the (now properly acknowledged) civil right to the personality.

I have spent some time disentangling this sentence to emphasise that the reasoning that leads the Court to a legal basis for damages is highly obscured. The quick succession of various disputable claims in sub-clauses undoubtedly veils a significant instance of legal recognition. Like in the previous passage, the Court portrays itself as, on a ‘correct’ reading of extant law, having no choice but to recognise [a legal basis to claim damages for privacy violations]. But the implication that existing law left no scope of judicial discretion is entirely unpersuasive.

The above passage is rife with considerations that might count as convincing reasons for why civil-law-privacy (or its header notion- ‘personality’) *should be* given the status of valid law. But instead of merely stating those reasons for recognition, the Court here advanced the claim that a civil-law conception of privacy was practically already entailed in existing law. This is not only far-fetched, but it hides crucial normative discretion in the decision. It also obscures the fact that an instance of legal change occurred. This illustrates that sometimes, references to existing legal material, such as constitutional provisions, are presented as legal antecedents of privacy, but on a more realistic interpretation, they serve to justify, or rather; *circumvent the need to justify* an instance of legal change.

In stressing this interpretation of the significance of personifications of law for legal change, I am not denying that in many cases, genuine understandings of law as having agency do constrain lawmakers in their discretion to enact legal change. That existing law has a certain shape may exclude or favour certain acts of legal recognition. In fact, the following subsections of this chapter explore situations where antecedent features of law – such that law is meant to be just and guide actions – motivate acts of legal privacy recognition. But the qualitative analysis of law and legal tokens as agents offered above urges some caution with view to the presumption that portrayals of legal antecedents and law’s claims are always sincere.

5.4 Regulating effectively: law’s claim to authority

As pointed out above, the view that law purports to regulate human behaviour is a classical iteration of the view that law makes claims.⁴³⁹ One variant of this view is that, even though law sometimes fails to achieve its regulatory ambitions,⁴⁴⁰ its essential purpose is to guide human behaviour. This is sometimes described as a ‘claim to authority’, although the concept of legal ‘authority’ remains somewhat elusive, particularly regarding the normative weight associated with it. Law seems to claim our obedience, but does it claim we ought to obey *all things considered*; that is, even in contexts of moral dilemmas and practical impossibility?⁴⁴¹

These questions are the topics of theoretical debates regarding law’s nature, but they also pertain to sociological explorations of legal change: lawmakers’ views on how law guides human behaviour may direct what kind of content they consider positing as law. How does the conception of law as an authoritative regulatory tool shape how, and what, lawmakers proceed to afford legal recognition to? The present subsection maps out how research findings speak back to these questions,

⁴³⁹ Raz, *The Authority of Law: Essays on Law and Morality* (n 2) 34; Gardner (n 1).

⁴⁴⁰ For a critical discussion of the nature of law’s regulatory ambitions, see Banakar, ‘Law and Regulation in Late Modernity’ (n 48).

⁴⁴¹ Joseph Raz, ‘The Obligation to Obey: Revision and Tradition’ (2014) 1 *Notre Dame Journal of Ethics & Public Policy* 139.

specifically, whether the claim that law authoritatively guides action plays a role in the legal recognition of privacy. A crucial finding in this context is the contrast between regulatory pessimism regarding possibilities for the protection of privacy in UK acts of recognition versus a more optimistic view on legal regulation in the German context.

Across academic disciplines, there is a common view that the meaning of privacy is notoriously elusive.⁴⁴² This study's findings mirror this ambiguity in lawmaking contexts. Importantly, lawmakers take insufficient clarity of the meaning and value of privacy to be an obstacle to encoding privacy as an action-guiding legal norm. This concern is expressed throughout legislative contexts. For example, the report of one first attempt at a comprehensive piece of UK privacy legislation by the Younger Committee in 1973 begins:

*The first difficulty we faced as a committee was in trying to define "privacy", and we decided that it could not satisfactorily be done.*⁴⁴³

The sense that privacy is poorly understood commonly manifests in a sense of regulatory insecurity. This is the case across legislative and judicial acts of recognition in both the German and UK contexts. However, while this seems to frequently ensue in lawmaking apathy in the UK context (for example, the Younger Committee failed to produce a valid piece of privacy legislation), it is approached more proactively in the German context. For example, consider the following extract from drafting material for the 1977 German Federal Data Protection Act:

Drafting preparations proved difficult and lengthy due to the novelty of the subject

⁴⁴² Helen Nissenbaum, *Privacy in Context: Technology, Policy and the Integrity of Social Life* (Stanford University Press 2010); Beate Rössler, *The Value of Privacy* (Polity Press 2005); David J Seipp, 'English Judicial Recognition of a Right to Privacy' (1983) 3 *Oxford Journal of Legal Studies* 325.

⁴⁴³ *Privacy: Younger Committee's Report*, House of Lords, Hansard Volume 343, 6.6.1973, Lord Byers.

*matter and its relevance for a wide scope of legal and life contexts.*⁴⁴⁴

The above passage acknowledges regulatory difficulties associated with the hard-to-predict scope of information privacy. Nevertheless, the draft proceeds to attempt to characterise privacy by contrasting it with the interest to access information. UK legislative contexts feature more pessimistic undertones when it comes to the possibility of grasping privacy in a legal sense and tend to emphasise the perceived impossibility of defining the scope of privacy. For example, consider the following exchange in a parliamentary debate on the scope of Article 8 of the Convention on Human Rights:

The Lord Chancellor: What benefit will the individual citizen derive from saying that he is entitled to respect for his private and family life under the provisions of Article 8 of the Convention, unless he knows whether he is protected against breach of that privacy by the Press—and such breaches of privacy are alleged from time to time to take place—or by private detective agencies as well as by the State?

Lord Davies of Leek:: Or by a double-decker bus company!

The Lord Chancellor: I do not know the relevance of a double-decker bus company, but if my noble friend wishes me to do so I will add that to the category.

Lord Davies of Leek: My Lords, it is not a bit funny. I had that case brought to me. A double-decker bus had a stop stage outside a bedroom window of a cottage. It went on for three years; and it was driving the people in the house crazy.

*The Lord Chancellor: My Lords, I find that a fascinating situation. [...] I submit that it is better, once we have decided how far the individual's privacy needs the protection of the law, to see that our own domestic law deals specifically with that point rather than to adopt the vague and uncertain concept which now exists in the language of the Convention [...]*⁴⁴⁵

The interruption of the parliamentary member Lord Davies of Leek in this case contains a hyperbolic caricature of the wide scope of things that might count as privacy considerations. The point is to humour and ridicule the seriousness of privacy concerns; the disclaimer 'it is not a bit funny' is obviously ironic. The

⁴⁴⁴ *Schutz der Privatsphäre: Große Anfrage der Regierung, Bundestag, 6. Wahlperiode, Drucksache VI/3896 6.12.1972:*

Die Vorbereitungsarbeiten an dem Entwurf erwiesen sich wegen der Neuartigkeit der Materie und ihrer Ausstrahlungen in weite Rechts- und Lebensgebiete als schwierig und langwierig.

⁴⁴⁵ *Bill of Rights Bill, House of Lords, Hansard Volume 379, 3.2.1977.*

suggestion that privacy may be viewed as violated by things as innocuous, pervasive and traditionally British as a double-decker bus is supposed to motivate the assumption that privacy is alien to the British cultural and legal landscape. Though the above mention of a double-decker bus is certainly unique in the lawmaking discourses analysed in this project, analogous caricatures of privacy interests are more common in UK legislative discourse; for example:

*[T]he right hon. and learned Member gave vent to the sentiment that in his constituency the biggest invasion of privacy was regarded as aircraft noise.*⁴⁴⁶

In the German context, it appears that solving *the puzzle of different interests inherent in the data privacy problem*⁴⁴⁷ is more commonly portrayed as an inviting challenge, than as a regulatory impossibility. That privacy is best addressed through legal means is generally presumed in German contexts; it is certainly not called into question with the same frequency. As illustrated in the previous section, particularly German judicial decision-making operates on semantic constructs that portray privacy as a concept that already exists within law and needs only be identified or brought to the surface. Legislative acts of recognition are arguably clearer in that they explicate more sincerely what is and what is not already recognised in law:

*Our legal order knows a multitude of norms [...]. At the same time, a comprehensive regulation of the protection of privacy with view to the dangers of data processing is uncharted territory.*⁴⁴⁸

Though it is explicitly acknowledged that (data) privacy is a novelty, the above

⁴⁴⁶ *Committee on Privacy*, House of Commons, Hansard Volume 801, 14.5.1970, Mr Callaghan.

⁴⁴⁷ *Schutz der Privatsphäre: Kleine Anfrage der Fraktionen SPD, FDP*, Bundestag, 6. Wahlperiode, Drucksache VI/3826 7.7.1972:

Datenschutzproblematik innewohnenden Interessengegensätzen und Sachkonflikten

⁴⁴⁸ *Ibid*:

Unsere Rechtsordnung kennt eine Fülle von Vorschriften [...]. Gleichwohl ist eine umfassende gesetzliche Regelung des Schutzes der Privatsphäre unter dem Gesichtspunkt ihrer Gefährdung durch die Datenverarbeitung Neuland.

passage begins by mapping out a variety of allegedly similar terms like ‘personality’ and ‘secrecy’ that already enjoy legal recognition. The tendency to accommodate legal innovations within an existing structure of legal concepts is notably salient in the German context and likely influenced by the pervasive sense that law is conceived of as a structured order or system.

What is further noteworthy is the usage of the term *unchartered territory* (‘Neuland’). As opposed to terminology that stresses that privacy is unclear and undefined, the term ‘Neuland’ imports a certain regulatory optimism and it insinuates, like the section before has emphasised, that the existence of ‘privacy-as-law’ is akin to a natural kind, something to be explored rather than normatively engineered. The term ‘Neuland’ is also suggestive of the view that law seeks to progressively conquer and encode social life, which is highly reminiscent of Habermas’ famous ‘juridification’ thesis of the legal system’s colonisation of the lifeworld.⁴⁴⁹

In the UK context, the difficulties lawmakers pick out in acts of legal privacy recognition are not confined to the supposed elusiveness of the concept of privacy: rather, a large amount of regulatory pessimism here seems to stem from the view that law itself is often viewed as an unfit instrument. Consider the following comments:

*Society has become so complex and modern inventions so new and unexpected that neither the development of the common law nor the introduction of specific legislation can keep pace with all the new and changing circumstances [...]*⁴⁵⁰

*[My colleague] is liable to find that the law is slow, disagreeable and expensive.*⁴⁵¹

These comments indicate lawmakers are aware of the limitations of legal regulation and display a kind of reflexivity that is often observed in late modern regulatory

⁴⁴⁹ Jürgen Habermas, *The Theory of Communicative Action, Volume Two: Lifeworld and System – A Critique of Functionalist Reason* (Beacon Press 1987) 359.

⁴⁵⁰ *Bill of Rights Debate*, House of Lords, Hansard Volume 379, 3.2.1977, Lord Wade.

⁴⁵¹ *Privacy: Younger Committee’s Report*, House of Lords, Hansard Volume 343, 6.6.1973, Lord Bethell.

institutions.⁴⁵² Law and legal institutions are presented as lagging behind; the spatial terminology that stands out is ‘keeping pace’ and ‘slow’. Rather than implying that regulatory efforts are urgent and that the law ought to ‘catch up’, the tenor of these statements is defeatist and paints a pessimistic conception of legal authority in a complex, late modern world. Throughout legislative and judicial acts of recognition, privacy is contextualised with a view to distinctively late modern features, increased social complexity and socio-technical change. The details of these portrayals are the topic of the next chapter, but what is of interest here is that the same challenges that are viewed as endemic to privacy are also cited as independently affecting regulation. This becomes particularly evident in the following quotation:

*The amount of legislation with which this House deals is getting ever larger. There is less and less time for it to be debated. The scale of bureaucratic interference in the life of the individual is ever greater. The development and use of technology in things such as computers and bugging devices poses ever greater threats to our rights and to our privacy.*⁴⁵³

Here, ‘bureaucratic interference’ is seen as posing a threat to individual’s privacy interests, as well as to possibilities for legal regulation in general. Almost ironically, the perceived danger or regulatory problem that warrants lawmakers’ intervention is portrayed as the very reason that stifles legislative efforts. The obfuscation of regulatory need on the one hand and the limitation of regulation on the other is particularly evident in legislative contexts. That lawmakers were ‘overwhelmed’ by distinctively late modern developments is cited as a common excuse for why the development of privacy legislation has not proceeded more expediently:

However, the major factor then was the overwhelming amount of legislation, which

⁴⁵² For example, it has been noted by Banakar (n 53); Sionaidh Douglas-Scott, *Law after Modernity* (Hart Publishing 2013); Michael Moran, *The British Regulatory State: High Modernism and Hyper-Innovation* (Oxford University Press 2003).

⁴⁵³ *Address in Reply to Her Majesty’s Most Gracious Speech*, House of Lords, Hansard Volume 366, 25.11.1977, Lord Donaldson.

*was before the House last year*⁴⁵⁴

The apologetic tone in these passages betrays layers of self-awareness in law making. Not only are lawmakers acutely aware of the problem for whose solution they consider bringing about legal change, but they are also aware of the limits of their legislative capacities and shortcomings. Findings indicate this in even more express forms: acts of recognition often feature mentions of previously attempted acts of privacy recognition. Consider the following passage:

*Over the past years your Lordships have had many debates in this House on the subject of whether we could introduce some sensible and appropriate legislation to prevent unjustifiable invasions of privacy. [...]. There are intractable problems— how do we do it? [...] Is Parliament to say, "We abrogate; we have been thinking about how to deal with invasions of privacy. We have failed to find any methods. We abandon it all [...]"?*⁴⁵⁵

The above passage points out a need for the legal recognition of privacy and further emphasises that previous efforts have lagged behind, or were unsuccessful. Discourses in most democratic legislative institutions tend to be heavy with references to ‘failed’ bills and acts. These mentions of failed attempts at changing law have normative significance, since they entail value judgments: even the decision *not* to pass legislation (and to thus maintain a given status quo of legal validity) can be as deliberative and considered legislative choice, so describing a bill as ‘failed’ implies that an intention to pass it was left unsatisfied.

In other words, there is no intrinsic reason to conceive of legal changes as necessarily more ‘successful’ than the choice to abstain from legal intervention. Therefore, the notion of a ‘failed bill’ negatively encodes previous omission to effect legal change. The notion of a ‘failed bill’ – however objectionable that bill might have

⁴⁵⁴ *Bill of Rights Debate*, House of Lords, Hansard Volume 379, 3.2.1977, Lord Wade.

⁴⁵⁵ *Bill of Rights: Select Committee Report*, House of Lords, Hansard Volume 396, 29.11.1978, Lord Morris.

been – is a staple in parliamentary discourse.⁴⁵⁶ It undoubtedly contributes to a self-conception of legislative failure and ineffectiveness when it comes to legal change.

How did this construed history of a failure to recognise privacy affect UK acts of recognition? The answer is not readily available; findings point to a certain ambiguity. On the one hand – as evidenced by some of the extracts featured – there is a clear indication of regulatory pessimism that motivates the view that law might be inept at responding to what is seen as the ‘issue’ or ‘problem’ privacy poses. On the other hand, however, the lamentation of failure glosses over the fact that the decision *not* to legislate may have been adequate in its respective instances and is later used to motivate prompt regulatory activity.

The findings presented in this subsection illustrate that lawmakers’ expectations that that law is capable of authoritatively regulating human behavior affect their engagement in legal change. Especially the perceived difficulty to define privacy leads to the skeptical concern that law may not be an appropriate tool to protect it. This, as this subsection has shown, often results in an attitude of regulatory pessimism. In UK acts of privacy recognition, this skepticism towards the efficacy of legal regulations on privacy furthermore stems from a generally pessimistic conception of the power of legal rules in modern society.

5.5 Making good law: law’s claim to be just

5.5.1 Claiming justice

The nature of the relationship between legal norms and ethical considerations of how we ought to behave is the subject of core debates in legal theory. Even amongst legal positivists, there is a lingering intuition that even though examples for unjust law are rife, there must be a link between law and morality or justice. Positivists often cash

⁴⁵⁶ Colin J Bennett, *Regulating Privacy: Data Protection and Public Policy in Europe and the United States* (Cornell University Press 1992).

out this intuition as a kind of ambition or purpose of law: *law aims to be just*,⁴⁵⁷ or *it is law's purpose to facilitate what morality demands*.⁴⁵⁸ As stated in section 5.1, typical renditions of this view employ the terminology of 'claims'. The pervasiveness of the view that 'law claims to be just' in scholarship suggests that lawmakers aim to create law that has certain moral qualities, or at least possesses what Roger Brownsword calls 'regulatory prudence'.⁴⁵⁹ This leads to the hypothesis that the ambition to make law just (or, less demandingly, 'practically correct') assumes central role in the practice of lawmaking – despite the fact that the product of such lawmaking processes might, of course, fall short of said aims or claims.

The present subsection is concerned with exploring empirically whether and how considerations of practical correctness surface as lawmakers' reasons favour of acts of legal information privacy recognition. Predictably, initial rounds of inductive coding revealed that a common category of reasons cited in favour of recognising information privacy was that such legal recognition was the 'good', 'just' and 'morally required' thing to do; thereby implying that lawmakers are guided by considerations of practical correctness.

However, subsequent refinements of coding nodes revealed that in the context of modern and late modern legal systems, the proverbial distance between law and morality means that considerations of practical correctness occupy a somewhat tense place in the context of legal change. On the one hand, law's claim to practical correctness means that a legal state of affairs is considered morally offensive is viewed as warranting legal change. Yet, lawmaking discourses also reveal that lawmakers are committed to the validity of existing law: they consider a law valid even when it falls short of normative expectations.

⁴⁵⁷ R Brownsword, 'The Shaping of Our On-Line Worlds: Getting the Regulatory Environment Right' (2012) 20 *International Journal of Law and Information Technology* 249, 255.

⁴⁵⁸ David Plunkett, 'Legal Positivism and the Moral Aim Thesis' (2013) 33 *Oxford Journal of Legal Studies* 563.

⁴⁵⁹ R Brownsword, 'The Shaping of Our On-Line Worlds: Getting the Regulatory Environment Right' (2012) 20 *International Journal of Law and Information Technology* 249, 255.

In addition to that, the explicit acknowledgement that existing law may itself be unjust is an uncomfortable counterpoint to the official view that law is presumably morally sound and trustworthy. In other words, *unjust law* – when called out – weighs heavy as a contradiction on law’s own self-presentation. Correspondingly, in findings, explicit admissions that existing law was unjust – and therefore requiring change – were in fact very rare. Instead, more veiled rhetorical tropes emerge: invivo coding elicited two salient ways in which considerations of practical correctness feature in discourse surrounding acts of legal recognition. In the first place, moral and ethical concerns are often raised obliquely, through references values and normative ideals that are already entrenched in the legal order. Common examples are constitutional principles and human rights; they are what Banakar terms ‘moral concerns juridified’.⁴⁶⁰

Some of these ‘juridified’ moral values are discussed in more depth in chapter 7 of this thesis. Here, I wish to only briefly note that various explanations are available for this discursive trope: as noted by Banakar, detracting from the fact that lawmakers have considerable discretion in matters of moral decision-making has various advantages. In discussing the significance of employing more indirect legalistic forms, Banakar refers to Smith’s insight that once moral concerns are ‘expressed in terms of legal rules and rights, they cease to require moral justification for their validity or enforcement.’⁴⁶¹ Insofar legal change is framed as necessitated by existing laws and legal concepts, legal officials are less likely to be held accountable for exercising discretion in matters of morality; their acts of recognition seem to be a mere fulfilment of duties.

The focus of this subsection, however, is the second salient way in which considerations of justice feature as reasons for the legal recognition of information

⁴⁶⁰ Banakar, *Normativity in Legal Sociology: Methodological Reflections on Law and Regulation in Late Modernity* (n 198) 11.

⁴⁶¹ *ibid.*

privacy, and likely for legal change more generally:⁴⁶² the discursive trope of *protection*. In summary, law's purpose is presented as protecting from various alleged dangers and risks. A supposed need for protection is discursively framed as automatically establishing a need for legal recognition. Qualitative analyses further indicate that the normative meaning 'regulation' is in fact often conflated with 'protection' – the two verbs are often used interchangeably.

A need for legal change is deduced from alleged hazards that are, as discussed below and in the following chapter, often vague and ill defined. The iterative evocation of the concepts of 'protection' and 'danger' betrays that the normative commitment of lawmakers is better viewed as countering *injustice*, or this risk thereof: the data collected contain a lot more information of what is conceived as dangerous, unjust and undesirable, rather than on what positively counts as just. The normative focus of acts of recognition is thus rarely on law's own moral shortcomings, but instead on the extraneous factors that, the narrative goes, present a certain danger and thereby prompt legal intervention.

Despite the salience of the discursive trope of law-as-protection, *who* exactly requires protection and *what specific dangers* warrant lawmakers' intervention varies significantly across different instances of information privacy recognition. The present section presents and discusses empirical findings on these dimensions of the law-as-protection conception.

5.5.2 Legal change and law's purpose of 'protecting others'

The notion that law aims to provide protection exists in some tension with the above-mentioned expectation that law ought to be just or practically correct. On the one hand, protecting from harm is clearly one dimension of doing good, but it is also much narrower than the aim of furthering justice in general. For example, in the 1849 judgment in *Prince Albert v Strange*, a case widely heralded as having prompted

⁴⁶² The extent to which insights into the case of privacy recognition can be extended to legal change in modern societies more generally is discussed section 8.5 of this thesis.

the UK legal recognition of information privacy through the tort of breach of confidence,⁴⁶³ the High Court of Chancery spent some time disentangling what it was about the unsanctioned publication of etchings that was worthy of legal protection.

The judgment specifies:

*The gratification felt in the possession of [the etchings] may be diminished by such a proceeding. But these are matters which the law does not provide for [...]. The law does not give an action for such things of delight [...].*⁴⁶⁴

The considerations invoked here as weighing on the scale against legal intervention are ‘gratification’ and ‘delight’; they illustrate what legal agents deem as trivial and thus falling short of establishing a need for legal intervention. Here, the implied purpose of law is to merely provide a protection of people’s interests that are serious. In this way, the need for legal protection is semantically contrasted with the luxury and frivolity associated with terms such as ‘delight’. The tradition of denying the legal recognition of privacy in the UK context because it is viewed as indulgent is well documented in judicial contexts.⁴⁶⁵

Of particular interest is the judgment’s subsequent reference to the previous ruling in the *Prince Albert* case, which it describes as

*“founded more on the morality of the question than on the strict legal rights of the parties.”*⁴⁶⁶

This assertion is followed by a reference to Mackeldey’s *Compendium of Modern Civil Law*, a passage of which is quoted in a footnote to the judgment:

The line of demarcation between law and ethics must be strictly observed, and internal

⁴⁶³ Pratt (n 35) 36.

⁴⁶⁴ *Prince Albert v Strange* [1849] EWHC Ch J20.

⁴⁶⁵ David J Seipp, ‘English Judicial Recognition of a Right to Privacy’ (1983) 3 *Oxford Journal of Legal Studies* 325.

⁴⁶⁶ *Prince Albert v Strange* [1849] EWHC Ch J20.

*actions must not be made the object of the law. This doctrine was fully recognised by the Romans: whence the maxim, 'Interna non curat praetor.' When this fundamental distinction is violated, a door is opened at once to the most injurious and arbitrary invasions of the rights of individuals by the ruling power: and in general, wherever the judicial power is allowed to encroach too far on the widely extended domain of moral duties, it is in danger of becoming inconsistent and unjust.*⁴⁶⁷

These passages contain a range of binaries that provide insight into considerations that count as reasons for legal recognition, by emphasizing those that evidently are not good reasons. 'Legal rights' are contrasted with 'morality', 'law' is juxtaposed with 'ethics', 'internal actions' are contrasted with 'the object of law' and 'judicial power' is singled out from 'the widely extended domain of moral duties'. These binaries demonstrate that just because one has a 'moral' or 'ethical' interest in a thing like privacy, it does not automatically warrant *legal* recognition. The passage distinguishes between serious virtues that warrant legal protection and gratuitous delights that exceed that which law-as-protection is concerned with. The view that law's purpose is to protect, in other words, also supplies limits to the regulatory aim of furthering justice.

Coding for lawmakers' reasons revealed that this distinction is particularly salient surrounding UK acts of privacy recognition. Whereas in German acts of privacy recognition, considerations regarding the moral value of privacy are predominantly cited as straightforwardly establishing a need for legal recognition, UK legal discourses tend to emphasise a distinction between the broader normative field of human interaction (in which privacy undeniably features), and the narrower circle of protected considerations that are legally relevant. In this narrow circle, privacy's membership is contested at best and denied at worst. The semantic strategy of acknowledging that privacy is *prima facie* valuable and yet not quite worthy of legal protection is not only evident in this study's findings, but it also chimes with the literature that documents the reluctant judicial⁴⁶⁸ and legislative⁴⁶⁹ tradition of

⁴⁶⁷ Mackeldey, F. *Compendium of Modern Civil Law* Vol. 1, 1845, p. 123, as cited in *Prince Albert v Strange* [1849] EWHC Ch J20.

⁴⁶⁸ Seipp (n 467).

recognizing privacy in the UK. For example, in explaining what hindered the legal recognition of privacy in English law, Beverly-Smith et al. quote the Younger Committee Report's concern that a legal recognition of privacy would constitute an intrusion 'too far into the determination of controversial questions of a social and political character'.⁴⁷⁰

5.5.3 Protecting from what? Dangers as reasons for privacy recognition

Insofar a need for 'protection' is not already entailed in privacy's intrinsic value, what then are the reasons for which privacy is afforded specifically *legal* recognition? As noted above, the discursive trope of law-as-protection shifts the focus of lawmakers' reasons onto the supposed dangers that a legal recognition of privacy is designed to respond to. Across UK and German acts of privacy recognition, semantic characterisations of dangers are varied. Inductive coding has been employed to categorise perceived dangers into focal themes. The two dominant themes that emerged through data analysis are TECHNOLOGY and THE STATE. (Another more minor theme that emerged in this context was CORPORATIONS, but this will only be discussed in subsection 6.2.2.) This finding neatly corresponds to the existing literature on the development of privacy,⁴⁷¹ which discusses innovations in communication and information technologies on the one hand, and expansions of governmental control on the other as the two aspects of late modern social change towards which the legal recognition of privacy responds.⁴⁷²

At the same time, qualitative explorations reveal that both themes contain within themselves a variety of different sub-concepts and characterisations that pick out what exactly is deemed as emanating danger. These, as illustrated below and in the following chapter, can be as concrete as 'computers' and 'the newspapers', or as

⁴⁶⁹ *ibid* 345; Beverly-Smith, Ohly and Lucas-Schloetter (n 8) 77.

⁴⁷⁰ See Younger Committee, Report on Privacy, paras 652–3. Beverly-Smith, Ohly and Lucas-Schloetter (n 82) 77.

⁴⁷¹ See Section 2.1.

⁴⁷² For expositions of both points, see Bennett (n 12); Pratt (n 35); Busch (n 60).

abstract as ‘the future’; they also differ in interesting ways across German and UK acts of privacy recognition.

Furthermore, in a significant number of instances of privacy recognition, the danger categories of TECHNOLOGY and THE STATE are presented as interconnected in various ways, with implications regarding how their ‘dangerousness’ is construed. For example, it is sometimes suggested that it is *because* state governments are technologically equipped that they present a danger; or it is proposed that *because* technology might fall into the wrong hands – such as those of totalitarian governments – that its dangers are exacerbated. This is a finding that is not exactly strange to the literature on the concept of privacy: especially the field of surveillance studies devotes attention to the unique cross-fertilisation between mediated visibility and governmental power.⁴⁷³ However, in the literature on the development of privacy as a legally recognised category, the two themes are largely presented as distinct and little effort has been devoted to draw out their interconnectedness. This gap in the literature is addressed through the analysis of findings in this subsection.

TECHNOLOGY

As mentioned above, the reason-category of TECHNOLOGY as a legally relevant type of danger encompasses a wide range of more specific ‘culprits’. Corresponding to socio-technical change, these tend to vary between acts of recognition across time, starting with letters and newspapers and moving towards photography, the telegram, telecommunications, recording devices, CCTV cameras and the Internet. The point of this section is not to evaluate whether these ‘dangers’ and ‘risks’ were accurately conceived, or whether they are exaggerated and misunderstood, and whether

⁴⁷³ This connection between technology and power is emphasised in surveillance studies. Michel Foucault, *Discipline & Punish: The Birth of the Prison* (Vintage Books 1995) 195; Ian Brown and Douwe Korff, ‘Terrorism and the Proportionality of Internet Surveillance’ (2009) 6 *European Journal of Criminology* 119; Kevin Stenson, ‘Reconstructing the Government of Crime’ in Gary Wickham and George Pavlich (eds), *Rethinking Law, Society and Governance: Foucault’s Bequest* (Hackett Publishing 2001) 102.

lawmakers are, as they are so often accused,⁴⁷⁴ lagging behind in terms of technological literacy. It seems to me that, against the backdrop of the respective socio-historical context of many acts of privacy recognition, some of the ways in which technology is described as ‘dangerous’ seem paranoid, while others seem clairvoyant. This should not concern us here; instead, this subsection explores in the qualitative details of how reasons for legal change are described.

Interestingly – and this may well be attributed to the specific subject matter of privacy – a common rhetorical device in portraying the dangers of technology in the UK context are references to light and darkness. Consider the following examples:

*[...] those who, through accident or tragedy or being in responsible positions, find themselves willy-nilly in the bright searchlight glare of publicity and are subjected to the merciless probing and even sadistic scrutiny of the mass media.*⁴⁷⁵

*But surely we ought to come down heavily also on those who sneak, who spy, who work in darkness for profit—the silent invader of the home.*⁴⁷⁶

These examples were selected from a range of allusions to light and darkness across UK acts of recognition. They feature seemingly contrasting references to import normative valence into media technology: in the former context, it is the *bright searchlight glare of publicity* that presents the danger, whereas the second passage – a reference to surveillance techniques – presents the *spy who works in darkness* as the culprit that law needs to provide protection from. In light of the notorious difficulty of pinpointing the value of privacy, a heavy reliance on allegory is unsurprising. The binary of *light | darkness* is, alongside *visibility | hiddenness* and *transparency | secrecy*, a common metaphors used to characterise privacy. However, the above passages

⁴⁷⁴ Roger Brownsword, WR Cornish and Margaret Llewelyn, ‘Regulation as Facilitation: Negotiating the Genetic Revolution’ in Roger Brownsword, WR Cornish and Margaret Llewelyn (eds), *Human Genetics and the Law: Regulating a Revolution* (Hart Publishing 1998) 265.

⁴⁷⁵ *Privacy: Younger Committee’s Report*, House of Lords, Hansard Volume 343, 6.6.1973, Baroness Emmet of Amberley.

⁴⁷⁶ *Ibid.*

indicate that the use of references to light and darkness does more than simply invoke connotations of good and bad. Both light and darkness are used to draw out the unequal power dynamics entailed in privacy intrusions: those whose privacy is invaded are rendered painstakingly visible (indeed, the usage of *bright glare* suggests that their own vision may be compromised), while the intruder, in both of the above metaphors, remains invisible and thus difficult to navigate.

When it comes to the dangers technological devices supposedly harbor, an additional metaphorical peculiarity to be noted in UK acts of privacy recognition are references to vermin. This, surely, is prompted by the fact that the term ‘bug’ refers to both insects and hidden recording devices. The metaphor is commonly taken further, however, as the following passage illustrates:

*But I think that if anyone is going to be placed at a disadvantage by such records, which can be used in evidence against one [...], a person ought, at any rate, to have the opportunity of knowing what the tapeworms have been storing up against him behind his back.*⁴⁷⁷

References to bugs and tapeworms illustrate the supposed dangers of technology by importing the aversion we tend to feel towards vermin. Furthermore, talking of communication and data collection devices as if they were living things portrays them as having a kind of agency and as presenting a danger in themselves. This linguistic tendency is extremely salient across acts of recognition in both legal systems. Especially computers are vilified as being innately dangerous and as presenting a need for acts of information privacy recognition. In light of more recent technological developments in data storage such as cloud computing⁴⁷⁸ or ‘the

⁴⁷⁷ *Bill of Rights Debate*, House of Lords, Hansard Volume 313, 26.11.1970, the Earl of Cork and Orrery.

⁴⁷⁸ WK Hon, C Millard and I Walden, ‘The Problem of “personal Data” in Cloud Computing: What Information Is Regulated? The Cloud of Unknowing’ (2011) 1 *International Data Privacy Law* 211.

Internet of things',⁴⁷⁹ portraying non-human devices as dangerous agents does not read as far-fetched. But the trope precedes the high degrees of operational autonomy we are used to today. This is illustrated by the following passage from the 1973 Younger Committee's report on privacy:

*The mass media, particularly radio and television, as we well know, have grown enormously in the last 20 years. Television is a most devastating instrument, [...] That trend needs watching.[...]. But where is all this going to end? Science does not stop, and these devices will be improved and new ones will be invented. I believe that some standing committee has to watch what is being used in this direction with electronic devices.*⁴⁸⁰

There are various ways in which the discursive trope of technology-as-danger can be interpreted. On the one hand, the apparent vilification of technologies in legal discourses has not escaped critics, some of which take it to be an indicator of a lack of understanding technology amongst lawmakers.⁴⁸¹ Criticisms particularly extend to the implication, evident in a large amount of legislation, that legal norms pertain to or regulate non-human objects. For example, this is evident in the term 'data protection', rather than human interactions.⁴⁸² It goes without saying that on most conventional views on law and society, nonhuman objects are unable to conform to legal norms; law is only efficacious in relation to human actions.⁴⁸³ One might therefore interpret the linguistic presentation of technology-as-danger as an elliptical reference to the dangerousness of those who use them: the human and institutional agents behind the lens who employ technologies as tools to collect, access and

⁴⁷⁹ This is lamented by Carsten Maple, 'Security and Privacy in the Internet of Things' (2017) 2 *Journal of Cyber Policy* 155.

⁴⁸⁰ *Privacy: Younger Committee's Report*, House of Lords, Hansard Volume 343, 6.6.1973, Lord Harvey of Prestbury.

⁴⁸¹ Brown and Marsden (n 28) 34.

⁴⁸² Scholarship on the normativity and efficacy of law nearly exclusively focuses on human action, see Gloria González Fuster, *DELETE / REPLACE The Emergence of Personal Data Protection as a Fundamental Right of the EU* (Springer 2014).

⁴⁸³ Grant Lamond, 'Coercion and the Nature of Law' (2001) 7 *Legal Theory* 35; Frederick Schauer, *The Force of Law* (Harvard University Press 2014); Joseph Raz, 'Explaining Normativity: On Rationality and the Justification of Reason' (1999) 12 *Ratio* 354.

disseminate information. On this view, stating that technologies are dangerous ultimately counts as a claim about the dangers human beings pose to other, and technologies merely exacerbate, but do not constitute, said dangers.

The difficulty with this interpretation, however, is that it is often left unspecified which individuals, groups or institutions exactly ground the dangers that warrant legal intervention. This, of course is subject to various exceptions: particularly in the discourses preceding UK acts of recognition, news agencies and their employees are often referred to via terms such as *the media*, *the papers/ news / newspapers / tabloids*, and *reporters*. (Qualitative analyses indicate that there is a particular increase in the term *paparazzi* as a category of dangerous actors in UK lawmaking discourses in the late 1990s and early 2000s, which may be prompted by the scandal surrounding the death of Princess Diana in 1997.) News agencies and their uses of technology are viewed as particularly threatening because invading privacy is of obvious commercial benefit to them, and thus highly incentivised. Their deplorability is often insinuated by somewhat highbrowed references to the vices of sensationalism, celebrity and nosiness that accompany their business.

However, as soon as the portrayal of technology as dangerous involves references to news media, an immediate competing consideration is invoked: freedom of expression, which arguably holds a much stronger tradition of legal recognition in English common law.⁴⁸⁴ Interestingly, even though the presentation of technologies as dangerous is equally prevalent throughout German acts of recognition, the link drawn to news media is much weaker. Reasons for this might involve the fact that the continental conception of privacy that underpins German legal recognition is, as famously argued by Whitman, more oriented towards dignity and autonomy, than liberty.⁴⁸⁵

⁴⁸⁴ Alec Samuel, 'The Rights of Privacy and Freedom of Expression: The Drafting Challenge' (1999) 20 Statute Law Review 66; Mark Pawlowski, 'Private Lives: Right to Privacy or Freedom of Expression?' (2002) 8 Trusts & Trustees 22.

⁴⁸⁵ Whitman (n 2).

An alternative explanation that can be deduced from Balthasar's analysis of the history of the protection of privacy in civil law is that German law pre-empted a large part of the heated contestations involving privacy and the press in English law by affording early judicial and legislative recognition to the right to determine the publication of one's own image (*Recht am eigenen Bild*), thereby settling the conflict before the advent of most innovations in information and communication technologies. In 1890, Warren and Brandeis had famously argued in favour of a legal recognition of privacy to counteract the fact that recently emergent technologies, stating that

'instantaneous photographs and news-paper enterprise have invaded sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'⁴⁸⁶

In 1899 – not even a decade later – the descendants of the then recently deceased former chancellor Otto von Bismarck brought an action in front of the German Reichsgericht for an injunction against the publication of a photograph of Bismarck on his deathbed. Although the Reichsgericht rejected the argument that an injunction could be granted on the basis of personality rights of either Bismarck or his descendants, the descendants' action was sustained on the basis that the photograph had been acquired in the context of an unlawful entering of the house. However, while the German laws of trespassing were explicitly directed at protecting one's property from interference of third persons, it is clear that the primary aim of the action had been the publication of the photographs, rather than enforcing property rights to their home.⁴⁸⁷ In fact, the controversy resulting from this case led to the creation of §§22 and 23 *Kunsturhebergesetz* (Law of Artistic Creations) in

⁴⁸⁶ Warren and Brandeis (n 91) 195.

⁴⁸⁷ Balthasar (n 5) 99.

1907, which provided a legal basis for the protection of the ‘right to one’s own image’ in German Law.⁴⁸⁸

This early legal act of recognition – though it did not make great mention of the linguistic concept *Privatsphäre* but instead hinged on its early analogue of *property*⁴⁸⁹ – meant that effectively, friction between privacy and the press was legally confined to special contexts involving *Personen des öffentlichen Lebens* (individuals of public concern or significance), with respect to whom recording and publications were allowed more liberally. Discourses surrounding these acts of recognition, particularly in the various appeals of the case of *Von Hannover v Germany* throughout the 1990s and 2000s in front of German courts, including the German Supreme Court,⁴⁹⁰ the German Constitutional Court,⁴⁹¹ and the European Court of Human Rights,⁴⁹² display conceptions of technologically equipped news media as ‘dangerous’ and thus mirror aforementioned tropes.

Other categories of dangerous types of persons that are singled out less frequently in relation to media technologies are *private agents* and *detectives*, as well as *neighbours*. However, as mentioned above, there exist far more references to dangerous technological devices that leave open the question of who utilises them.

As an alternative to the view that mentions of technologies ultimately refer to the intruders who employ them, an interpretation that might be most intuitive – and certainly the one that fits this study’s empirical data best – is the view that technological devices have a certain semiotic content that really does constitute a certain danger. This is a view that aligns with recent scholarship in social theory, especially actor-network theory (ANT). Suitably, approaches within ANT were developed in science and technology studies and emphasise that humans exist in

⁴⁸⁸ *ibid.*

⁴⁸⁹ See section 2.1.2 of this thesis.

⁴⁹⁰ *Caroline III*, Urteil vom 19.12.1995, NJW 1996, 1128

⁴⁹¹ *Caroline*, Beschluss vom 15.12.1999, BVerfGE 101, 361

⁴⁹² *Von Hannover v Germany* 59320/00 [2004] ECHR 294 and *Von Hannover v Germany II* 40660/08 and 60641/08 [2012] 55 E.H.R.R. 15.

relationships with non-human material entities that convey meaning.⁴⁹³ Rather than a coherent theory, ANT encompasses a range of ontological assumptions that take seriously the materiality of non-human units in the empirical analysis of social kinds.⁴⁹⁴ The here conducted analyses are not methodologically based on ANT approaches, but it seems that the ontologies associated with this branch of thinking about the social and the technical corresponds to lawmakers' conceptions of technology that emerge from this study's findings.

ANT insists that materiality – the presence of physical things in the social spaces we inhabit – literally *matters*. It helps us understand that the mere presence of a camera lens conveys meanings that may manifest as threats and constraints, irrespective of whether recorded content is subsequently monitored or processed by humans. Today, in the age of Internet bots, such views have reached a whole new level of pertinence. But it cannot be denied that even decades ago, such views were apt; in the 1970s, when data protection acts began to be deliberated in both the German and the UK, as well as various other, parliaments, Susan Sontag writes, 'there is an aggression implicit in every use of the camera'.⁴⁹⁵ She proceeds to compare cameras to 'predatory weapons',⁴⁹⁶ a category of nonhuman artifacts – *technologies* – whose innate dangerousness is implied. Though the comparison between weapons and information and communication technologies as dangerous tools may be far-fetched, it draws out that a certain threatening quality can form part of the material semiotics of an object. That nonhuman entities have this significance is the case because of their being encoded with meaning through social processes. These processes of attributing meaning are iterative, so sources of meaning within social dynamics or within the object itself are difficult to disentangle: as John Law puts it, 'we have seen that the social and the technical are embedded in each other.'⁴⁹⁷

⁴⁹³ Latour (n 170).

⁴⁹⁴ Law (n 170) 146.

⁴⁹⁵ Susan Sontag, *On Photography* (Farrar, Straus and Giroux 1973) 4.

⁴⁹⁶ *ibid* 10.

⁴⁹⁷ Law (n 170) 147.

An adequate reading of the technology-related dangers lawmakers pick out as reasons for bolstering the legal recognition of privacy are thus *socio-technical* realities, that is, objects in light of their social significance.

THE STATE

The second broad category of danger that lawmakers invoke as a reason for why they afford legal recognition to information privacy is THE STATE. Discourses pertaining to the state and governmental institutions are plentiful in acts of recognitions. This is not surprising, given that lawmakers and the institutions they inhabit are themselves governmental institutions. The present subsection is focused on how the state is discursively presented as constituting a danger that motivates affording legal recognition to information privacy. What, specifically, constitutes a privacy threat from lawmakers' perspectives? Especially in this category, differences between German and UK acts of privacy recognition are pronounced. German legal discourse displays a more nuanced sensitivity towards the unequal power dynamics that characterise the relationship between citizens and their governments, and laments the rationalization of human lives that accompanies the collection of data for administrative purposes. For example, consider the following passages:

*It contradicts human dignity to make man a mere object of the state. It would be incompatible with dignity if the state forcibly categorised and catalogued people in their full personhood - even in anonymous statistical contexts- and thereby treat man like a thing that is amenable to being recorded.*⁴⁹⁸

⁴⁹⁸ *Mikrozensus*, Beschluss vom 16.7.1969, BVerfGE 27, 1:

Es widerspricht der menschlichen Würde, den Menschen zum bloßen Objekt im Staat zu machen [...] Mit der Menschenwürde wäre es nicht zu vereinbaren, wenn der Staat das Recht für sich in Anspruch nehmen könnte, den Menschen zwangsweise in seiner ganzen Persönlichkeit zu registrieren und zu katalogisieren, sei es auch in der Anonymität einer statistischen Erhebung, und ihn damit wie eine Sache zu behandeln, die einer Bestandsaufnahme in jeder Beziehung zugänglich ist.

*To that extent, even the State of the modern industrial society faces limits to their administrative “de-personification”*⁴⁹⁹

It is particularly noteworthy that the data bear a close resemblance to critical discourses about regulation and modernity. In particular, the concern with registration, categorisation (cataloguing) and ‘depersonalification’ is reminiscent of Max Weber’s famous critique of bureaucracy that states, as early as 1920,

‘the primary source of the superiority of bureaucratic administration lies in the role of technical knowledge which, through the development of modern technology [...] has become completely indispensable’.⁵⁰⁰

A further way in which THE STATE is portrayed as dangerous in both German and UK acts of recognition is through allusions to unjust and dystopian regimes. These are explored at length in chapter 6, which argues that the portrayal of THE STATE as a threat solidifies the conception that it is law’s purpose, or claim, to do good.

5.6 Conclusions on legal antecedents

This study’s focus on lawmakers’ own conception of institutional role and of the kind of product they are working on – *law* – has illuminated various considerations that become salient in the context of legal change. The present chapter has presented and analysed the shaping force of the existing institutional and normative structures of legal systems. The here presented analyses demonstrate whether legal recognition was to take part in a legislative or judicial forum was an important consideration. In UK acts of recognition, particularly those concerning Article 8 of the European Convention, the pervasive catchphrase ‘through the back door’ revealed lawmakers’ view that privacy recognition was at particular risk of judicial activism.

⁴⁹⁹ *ibid*:

Insoweit gibt es auch für den Staat der modernen Industriegesellschaft Sperren vor der verwaltungstechnischen ‚Entpersönlichung‘

⁵⁰⁰ Weber, *Economy and Society: An Outline of Interpretive Sociology* (n 25) 223.

By contrast, the German Constitutional Court's practice of creatively developing constitutional rights in general and privacy in particular did not register as nearly as controversial; qualitative analyses indicate that in the German context, the charge of judicial activism is far more common when it comes to the Court's extensive powers of judicial review. In general, it was clear across German and UK acts of recognition that lawmakers across judicial and legislative institutions conceived of themselves as working on the common project of making law, though some inter-institutional interactions were more harmonious than others.

Sections 5.3 to 5.5 are equally concerned with antecedent aspects of legal systems that shape or constrain legal change. More specifically, they discuss of how expectations of law that are so fundamental to legal systems that they are sometimes described as 'law's claims' feature as reasons for and against recognising privacy.

One important finding is that when legal change is framed as necessitated by existing features of the legal system, legal officials may be less likely to be held accountable for exercising discretion in matters of morality. Their acts of recognition are thereby presented as determined by law, implicitly denying human control over legal meaning and content. This has been emphasised as an important caveat regarding the question of whether law's antecedents, including particularly law's claims to be authoritatively guide behaviour and to be just, really do constrain lawmakers in their acts of legal change.

Against this interpretation, I have argued that the portrayal of law as effectively demanding certain acts of recognition may reflect a sincere conception of law as having this kind of agency. If lawmakers really do conceive of law as having this kind of agency, the extent to which law is amenable to their actions will effectively constrain them in their acts of recognition.

Regarding law's claim to authoritative or 'action-guiding' role, a salient finding is the contrast between regulatory pessimism regarding the protection of privacy in UK acts of recognition versus a more optimistic approach to legal regulation in the German context. With view to law's claim to be just or 'practically

correct', findings have revealed extensive references to of the notions of 'protection' and 'danger'. It has been suggested that law's claim to correctness plays a role in lawmakers' reasons for legal change by prompting them to counter *injustice*.

In particular, the data collected contain a lot more information of what is conceived as dangerous, unjust and undesirable, rather than on what counts as just. Coding has collated the data on legally relevant dangers into the categories of TECHNOLOGY and THE STATE. I have affirmatively tied back the finding that these categories of danger play a role in lawmaker's reasons for acts of privacy recognition to the literature, which cites these considerations as central to the development of privacy laws.

Finally, the discussions in this chapter are attentive to late modern features of legal change. This is designed to flag up the extent to which lawmakers' reasons for which information privacy was afforded legal recognition are historically contingent.

6. Dystopian Visions: Law's Representations of Technology, the State, and Privacy

A central theme that emerged in the context of coding was lawmakers' preoccupation with a dystopian future (*dystopian visions*), and how it might be prevented. The salience of dystopian themes in lawmaking has been detected by a variety of scholars who have made the observation that there is a close kinship between legal texts and utopian/dystopian fiction. This similarity is intuitive because legal institutions are inevitably concerned with working towards social ideals that are developed in reference to existing cultural imaginations.⁵⁰¹ The present chapter argues that in the context of the legal recognition of privacy, characterisations of the socio-technical status quo as 'dangerous' in a dystopian sense have the role of justifying why legal intervention is warranted.

6.1 Introduction: lawmaking and the dystopian genre

In literary criticism, the terms 'utopia' and 'dystopia' are often understood as variations of the same concept; an imagined social space that is normatively distinct from the status quo. In one sense, 'utopia' and 'dystopia' are antonyms. In another sense, their meanings are continuous: though the term 'utopia' evokes paradisiac associations, its literal translation – 'no place' – implies that it is inevitably unrealistic and unachievable. In fact, critics have long agreed that the works that are taken as examples of 'utopian' literature, like Thomas More's 1516 *Utopia* and classical 'dystopias' like Orwell's *Nineteen Eighty-Four* (1949), in fact possess features of both genres.⁵⁰²

⁵⁰¹ Graeme Laurie, Shawn HE Harmon and Fabiana Arzuaga, 'Foresighting Futures: Law, New Technologies, and the Challenges of Regulating for Uncertainty' (2012) 4 Law, Innovation and Technology 1.

⁵⁰² Sarat, Douglas and Merrill Umphrey (n 46) 8. Gordin et al call Dystopia "Utopia's twentieth-century doppelgänger", see Gregory Claeys, 'The Origins of Dystopia: Wells, Huxley and Orwell' in G Claeys (ed), *The Cambridge Companion to Utopian Literature* (Cambridge University Press 2010) 108.

It has furthermore been suggested that utopia and dystopia merely represent different orientations within the same literary genre: while *utopia* was the historically dominant didactic way of imagining society across space and time, *dystopia* – the form that became the more dominant literary form in the mid-twentieth century⁵⁰³ – can be viewed as a disillusioned, late modern version of the same kind of imagination:⁵⁰⁴ as pointed out by Rogan, ‘there does not appear to be a critical consensus regarding the usefulness of making a distinction between critical utopias and dystopias, which share many of the same characteristics’.⁵⁰⁵ In a similar vein, Lyman Tower Sargent states: ‘utopia implies or contains dystopia’.⁵⁰⁶ Thus, although this chapter is entitled ‘Dystopian Visions’, it considers dystopia and utopia as a common trope and explores its role in legal change. The term ‘dystopian’ is thus understood as entailing utopian variations.

Dystopian imagining is defined by creative, emotional speculation and its capacity for critique.⁵⁰⁷ It draws heavily on desire and fear and develops detailed images of good and evil. In applying these lenses to its central subject – social and political life –, dystopian imagining shares core features with social and political thought more generally.⁵⁰⁸ The ideological caveats of dystopian thinking are well acknowledged in the history of political thought.⁵⁰⁹ Less well explored are the similarities between dystopian imagining and other kinds of normative thought, such as normative deliberation in lawmaking.

⁵⁰³ Michael D Gordin, Helen Tilley and Gyan Prakash, ‘Utopia and Dystopia beyond Space and Time’ in Michael D Gordin, Helen Tilley and Gyan Prakash (eds), *Utopia/Dystopia: Conditions of Historical Possibility* (Princeton University Press 2010) 8.

⁵⁰⁴ Alcena Madeline Davis Rogan, ‘Utopian Studies’ in Mark Bould and others (eds), *The Routledge Companion to Science Fiction* (Routledge Taylor and Francis Group 2009) 313.

⁵⁰⁵ *ibid.*

⁵⁰⁶ *ibid.* 312.

⁵⁰⁷ Judith Shklar, ‘The Political Theory of Utopia: From Melancholy to Nostalgia’ (1965) 94 *Daedalus* 367; C Wright Mills, *The Sociological Imagination* (Oxford University Press 1959).

⁵⁰⁸ Judith Shklar, ‘The Political Theory of Utopia: From Melancholy to Nostalgia’ (1965) 94 *Daedalus* 367; C Wright Mills, *The Sociological Imagination* (Oxford University Press 1959).

⁵⁰⁹ Laurence Davis, ‘Isaiah Berlin, William Morris, and the Politics of Utopia’ (2000) 3 *Critical Review of International Social and Political Philosophy* 56.

That law and dystopia share certain affinities has not escaped scholarship. Especially the law and literature movement has noted how saliently laws and legal institutions feature in both utopias and dystopias.⁵¹⁰ However, in their introduction to *Law and the Utopian Imagination*, Sarat et.al. doubt that normative legal discourse habitually contains dystopian elements: ‘who, then, writes seriously on the idea of utopia today? The answer would seem to be: almost no one, least of all scholars of the law.’⁵¹¹ This remark portrays contemporary lawmaking discourse as highly rationalised and disillusioned. Indeed, a common aim of the contributions in *Law and the Utopian Imagination* is to reinvigorate utopianism in legal thinking.⁵¹²

But one may wonder whether this is an accurate portrayal of late modern legal discourse; after all, the making of legal rules as a creative human activity that requires the imagination of a better society as a guiding ideal. For example, the image of society that is implied in constitutional and human rights declarations is necessarily aspirational, if not explicitly utopian.⁵¹³ This observation has not escaped the literature: Almog points out that ‘since compiling systemic sets of norms is at the centre of both the utopian and the legal projects, there is an innate kinship between many legal and utopian expressions.’⁵¹⁴

The previous chapter has considered how legal antecedents – that is, previously existent institutional structures and normative expectations within legal systems – form part of the architecture of legal systems and thus shape the reasons for which law is changed. This chapter zones in on the expectation that law ought to be used for protection and explores the dangers lawmakers refer to as prompting them to afford legal recognition to privacy. Given that discourses on privacy in general often appeal to dystopian metaphors, the appearance of dystopian themes in

⁵¹⁰ Miguel Angel Ramiro Avilés, ‘The Law-Based Utopia’ (2000) 3 Critical Review of International Social and Political Philosophy 225; Sargent (n 509).

⁵¹¹ Sarat, Douglas and Merrill Umphrey (n 46) 1.

⁵¹² See, for example, Moyn (n 79).

⁵¹³ Moyn (n 82).

⁵¹⁴ Shulamit Almog, ‘Dystopian Narratives and Legal Imagination: Tales of Noir Cities and Dark Laws’ in Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey (eds), *Law and the Utopian Imagination* (Stanford University Press 2014) 155.

this study's findings was anticipated. Indeed, inductive coding of my data revealed that dystopian themes, including references to dystopian literature, as well as dystopian characterisations of past, present and future societies, appeared discourses preceding legal change. This prompted a more systematic analysis of the role of dystopian imaginations in acts of privacy recognition.

While there may be conceptual continuities between dystopian/utopian and legal imaginations, such as the fact that both are concerned with counterfactual thinking, this chapter takes a step back from preconceived notions about the relationship between law and dystopia. Instead, it explores the role of dystopian thought in lawmaking on the basis of qualitative empirical sociological insights. This interpretative approach is data-driven; the category of *dystopian visions* corresponds to the theme's salience in my data and the research findings based thereon.

Qualitative investigations of the relationship between dystopia/ utopia and reasons for legal change reveal that dystopia is significant in various and contradictory ways. Approaching dystopian visions as a collation of themes, tropes and imaginative strategies, the present chapter inquires into the relationship between dystopian visions and the normative ideals that guide legal change. The individual subsections correspond to different types of dystopian visions and the role they play with a view to lawmakers' reasons for recognising information privacy.

Section 6.2 begins by offering some general reflections on the salience of dystopian themes in acts of recognition. In particular, subsection 6.2.1 argues that they challenge the presumption that modern lawmaking is an entirely rational, scientific and fact-driven enterprise. Instead, the existence of dystopian imaginations detected by this research project illustrates that legal change is a type of social action that is meaningful beyond its specific purposes. Most obviously, dystopian visions are evoked as reasons that prompt and justify the legal recognition of privacy. Here, legal protections of privacy are framed as necessary to avoid looming dystopian dangers. The way these dangers are characterised is often abstract and elusive, relying heavily on established tropes in dystopian literature. Subsection 6.2.2 presents findings of

dystopian visions within the different categories of danger that the previous chapter already identified. These include TECHNOLOGY, THE STATE, as well as CORPORATIONS.

The third section of this chapter, *Real and fictional utopias*, delves deeper into the danger-category of a technologically empowered totalitarian state. Subsection 6.3.1 discusses the different types of dystopia that are evoked in the context of privacy recognition and how they are conflated to portray dystopian dangers as more realistic. These include both fictional worlds and historical, contemporary and hypothetical examples of unjust regimes. Subsection 6.3.2 considers that literary imaginations of dystopia are often themselves built on historical experience, suggesting that the aptness for social critique is, as literary critics suggest, built into dystopia as a genre.⁵¹⁵ Subsection 6.3.3 considers a specific trope in which the real and the fictional are conflated: as a consequence of the cultural salience of Orwell's *Nineteen Eighty-Four*, lawmakers treat the calendar year 1984 as a temporal milestone of dystopian doom that demands regulatory intervention.

Section 6.4, *Utopian counterpoints*, focuses on two themes in my data that were contrasted with dystopian visions: democracy and privacy. Subsection 6.4.1 explores how democratic themes are employed as a counterpoint to fears of dystopian totalitarianism. Portraying privacy invasions as harmful to democratic ideals discursively amplifies their dangerousness – and thereby works to justify legislative and judicial intervention. Another notion that surfaces alongside dystopian themes in a contrastive way is how lawmakers imagine privacy: findings reveal that throughout acts of recognition, privacy is often characterised topologically as a free, utopian oasis in a hostile world. The utopian (or heterotopian) dimensions of privacy are the topic of subsection 6.4.2.

6.2 Dystopian dangers demand the legal protection of privacy

⁵¹⁵ Keith M Booker, *The Dystopian Impulse in Modern Literature: Fiction as Social Criticism* (Greenwood Press 1994) 82.

6.2.1 Lawmaking between fear and rationality

Analyses of acts of privacy recognition reveal a salience of dystopian themes.⁵¹⁶ As discussed in section 4.3 of this thesis, qualitative coding focussed on the reasons for which lawmakers engaged in acts of legal change; specifically, why they afforded legal recognition to privacy. Dystopian visions surfaced extensively in legislative debates and legal scholarship and also appeared in court judgments throughout both UK and German acts of privacy recognition. This suggests that lawmakers took dystopian themes to be meaningful and institutionally relevant to legal change, treating them as one of the reasons for affording legal recognition to information privacy.

The prominence of explicit and implicit references to works of dystopian literature and the use of dystopian jargon in research findings chimes with writing on the topic of privacy more generally, which commonly features these themes.⁵¹⁷ In privacy discourse, dystopian themes have the primary function of invoking literary imaginations of a negative counterfactual: a world without privacy or privacy rights. In this way, arguments in favour of greater privacy protection employ the popularity of rich literary creations of George Orwell or Aldous Huxley to motivate the claim that that privacy protection for our own society are necessary to counteract a dystopian totalitarian future.

As mentioned in the Introduction (section 1.1), the task of explaining why privacy is valuable has presented notorious difficulties to theorists and legal scholars alike. Here, the visions of ‘Oceania’ in *Nineteen Eighty-Four* and the ‘World State’ in Huxley’s work are useful because they provoke associations of surveillance and totalitarianism that are emotionally compelling. Because works of this genre tend to be widely known, even brief references and allusions in dystopian fiction often

⁵¹⁶ For example, consider the following passage from a UK Court of Appeal judgment: *The objection to the storage is reflected in the appreciative public response to novels such as Aldous Huxley’s ‘Brave New World’ and George Orwell’s ‘1984’ R (on the application of Marper and another) v Chief Constable of South Yorkshire* [2002] EWCA Civ 1275, The Lord Chief Justice at 34.

⁵¹⁷ Keith M Booker, *Dystopian Literature: A Theory and Research Guide* (Greenwood Press 1994) 3.

succeed in importing such normative content. In this way, accounts of dystopia invoke a fear of future danger that – however fictional and implausible they may be – helps to make a persuasive case in favour of protecting privacy. By relying on these dystopian blueprints, privacy advocates are able to circumvent the onus of having to explain why privacy warrants legal recognition. Thus, dystopian visions are a way in which emotion-laden speculation informs legal change.⁵¹⁸

The observation that supposedly rational, fact-based processes like lawmaking are influenced by dystopian visions is not a negative judgment: using dystopian themes to illustrate concerns about surveillance seems like a valid rhetorical strategy in normative negotiation. Nevertheless, the insight that dystopian themes are of significance in lawmaking discourse challenges the presumption that modern lawmaking is a wholly rational, fact-based enterprise. The findings alert us to the fact that normative negotiation entails value-commitments that are not always rationally accountable: some meta-ethicists even propose that normative thinking paradigmatically expresses emotional states rather than actual reasons.⁵¹⁹ So, the fact that reasoning about what law *ought to be like* is evidently responsive to emotions like fear and dread is not objectionable *per se*. Instead, these emotive and culturally laden imaginations shed light on the ways in which legal change is sociologically meaningful beyond being strictly purposive.

The presumption that lawmaking is wholly rational and fact-based, however, continues to underpin much scholarship on privacy regulation, particularly in the political sciences. There, a typical focus of analysis is the effectiveness of policy responses to regulatory challenges. For example, Colin Bennett begins his

⁵¹⁸ The relationship between dystopia and ideology is explored extensively in the field of utopian studies. There, ‘utopia’ is typically taken to advocate enlightenment ideology, see Solove, *The Digital Person: Technology and Privacy in the Information Age* (n 8) 29; Westin (n 17) 70. Meanwhile, ‘dystopia’, or its synonym ‘critical utopia’, advances a kind of counter-ideology that aims to render visible false consciousness in present society, see Isaiah Berlin, ‘The Decline of Utopian Ideals in the West’ in Henry Hardy (ed), *The Crooked Timber of Humanity: Chapters in the History of Ideas* (Princeton University Press 2013).

⁵¹⁹ A prominent account of *moral expressivism* can be found in Allan Gibbard, *Wise Choices, Apt Feelings* (Harvard University Press 1990).

comparative policy analysis of data protection acts by outlining what he takes to be essentially ‘the same policy problem’ across different political systems, one that he views as enabling for ‘a pure test of different policy-making processes’.⁵²⁰ Of course, the socio-legal reality of law-making as a type of social action is bound to be complicated: the comparative policy approach risks overlooking that prior to crafting regulatory *solutions*, legal institutions may vary meaningfully in how they frame a given issue for their purposes.

Lawmakers do not merely *react* to social problems that exist in some detached, objective sense: rather, by selectively attributing legal meaning and significance to certain facts over others, they take an active role in the construction of regulatory challenges. This insight is recognised amongst socio-legal theorists; it is what Habermas explicitly picks out as something on which he agrees with Luhmann’s systems-theoretical account of law.⁵²¹ So, legal agents’ reasons for affording legal recognition to privacy invariably depend on conceptions of the regulatory challenge they take themselves to respond to.

The image lawmakers have of the societies they regulate – and of what counts as a legally relevant danger or problem – is an important object of exploration for an interpretative analysis of legal change. Lawmakers’ constructions of regulatory problems and challenges allow insight into the reasons for which they engaged in acts of legally recognising privacy. Thus, this chapter draws out some of the normative colourings and background assumptions that frame the legal recognition of privacy.

⁵²⁰ Bennett (n 12) 3.

⁵²¹ See, for example, Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (n 128) Introduction, xxii. Habermas writes: ‘inasmuch as the system’s language, or “code and programming”, determine what, and how, external events are observed, a system reproduces not only itself but its environment as well. Conversely, there is no central, overarching perspective on society as a whole [...]. On Luhmann’s systems approach, society is polycentric’

6.2.2 Intersecting categories of dystopian danger

Multiple rounds of qualitative coding revealed that the kinds of dangers that dystopian visions entail broadly fit into the thematic categories of TECHNOLOGY, THE STATE, and, to a lesser extent, CORPORATIONS.

In the lawmaking discourses preceding acts of privacy recognition, these danger categories of are often presented as interconnected in various ways. This has implications for how their ‘dangerousness’ is construed. For example, it is sometimes suggested that it is *because* state governments or companies are technologically equipped that they present a danger; or it is suggested that *because* technology might fall into the wrong hands – such as those of totalitarian governments – that its dangers are exacerbated. Scholarship on the development of privacy often emphasises the dangers entailed in technological change and totalitarianism,⁵²² but it takes little notice of the interconnectedness between these categories of danger. One exception is the field of surveillance studies, which devotes attention to the unique intersection between mediated visibility and governmental power.⁵²³

Dystopian writing has, as a genre, likely done much work towards developing the conceptual links between information and communication technologies and public power, focussing primarily on a technologically empowered authority. As stated by Moylan, ‘[t]echnology and the authoritarian state are the classical pillars of dystopian thought.’⁵²⁴ In this research project’s findings, some references to this literary genre place a more explicit emphasis on THE STATE as cause for dystopian concern,⁵²⁵ while others, such as the following passage from a parliamentary discussion on the codification of privacy in a bill of rights, seem more evidently concerned with TECHNOLOGY:

⁵²² See, for example, Bennett (n 12) 3.

⁵²³ This connection between technology and power is emphasised in surveillance studies. Foucault (n 475) 195; Brown and Korff (n 475); Stenson (n 475) 102.

⁵²⁴ Tom Moylan, *Scraps of the Untainted Sky: Science Fiction, Utopia, Dystopia* (Westview Press 2000) xii.

⁵²⁵ I discuss the dystopian portrayal of governmental power and authority in more detail in the next subsection.

This indeed is "Big Brother" coming to life in a nightmare way, and 14 years before 1984. I do not know whether it is possible to legislate against information going into such computers [...]. That is a matter of privacy.⁵²⁶

The passage is noteworthy for its reference to 'Big Brother', the metaphorical head of state surveillance in Orwellian fiction. The dystopian sentiment is further motivated by the use of the term 'nightmare'. Yet, the passage focuses even more strongly on the innate dangers of information, here described as actively 'going into' computers – seemingly without human agency. This illustrates that the theme of dystopia invariably connects social, political and technological power. Dystopia, in other words, is one of the major tropes through which a cross-fertilisation of the dangers of TECHNOLOGY and THE STATE – and a corresponding need for legislative intervention – is posited.

But dystopian themes are not always as explicit as in the references above. Consider the more indirectly allusive passage below:

[...]it is potentially the most dangerous, and that is the master file. The master file, or the master memory as it has been described in a frightening manner in other debates [...] faceless men and shadowy departments will be able to receive any or all of this information at the flick of a switch within a space of four minutes.⁵²⁷

References to 'master files/ master memories' are not quite as obviously dystopian as explicit reference to Orwellian literature. Nevertheless, they stress themes of domination, subordination and dehumanization of increasingly technocratic governments. As pointed out by Almog, the dehumanising effect evoked by regulation, control and surveillance is an essential feature of dystopia.⁵²⁸ The description of 'faceless men and shadowy departments' advances the theme of

⁵²⁶ *Bill of Rights Debate*, House of Lords, Hansard Volume 313, 26.11.1970, the Earl of Cork and Orrery.

⁵²⁷ *Ibid.*

⁵²⁸ Almog (n 516) 171.

dehumanization and picks up on themes of light and darkness as cues for safety and danger.⁵²⁹ This characterization emphasises the panoptic inequality in visibility of those who are dominated and those who rule through the use of information.

Similar allusions are achieved in the German acts of recognition. Here, one can detect claims that citizens are rendered transparent or ‘glass-like’, a description that simultaneously emphasises the vulnerability inherent in visibility and that references aforementioned concerns with objectification and dehumanization: *der Bürger werde zum gläsernen Menschen*.⁵³⁰ Throughout acts of recognition, the proverb ‘gläserner Mensch’ is developed and solidified. It most notably surfaced in discussions surrounding 1983 German Constitutional Court judgment on the population census, which afforded legal recognition to a constitutional right to informational autonomy. The proverb ‘glass human being’ was cited in the judgment as a consideration of popular concern about the government’s data collection plans, and has since become a common figure of speech in German discourses on privacy.

Allusions and references to dystopian themes also forge an intersection between TECHNOLOGY and CORPORATIONS. The category CORPORATIONS was developed inductively as it (and its analogues, like ‘companies’) repeatedly surfaced in acts of privacy recognition. Consider for example:

*We believe that there is need for legislation [...] in the invasion and definition of privacy, in the rights of individuals against powerful corporations or local authorities.*⁵³¹

The category CORPORATIONS alludes to a source of danger somewhere between the treat level of a decidedly *dystopian* ‘Big Brother’ (the below passage equivocates

⁵²⁹ See the discussion in subsection 5.3.3.

⁵³⁰ *Volkszählung*, Urteil vom 15.12.1983, BVerfGE 64, 67 at 111:
The citizen becomes a glass human/ transparent man.

⁵³¹ *Bill of Rights Debate*, House of Lords, Hansard Volume 313, 26.11.1970, the Earl of Cork and Orrery.

'Big Brother' with 'Leviathan', the Hobbesian archetypal metaphor for governmental authority), and the privacy threat of a nosy neighbor that is below the threshold of dystopian danger.

It is not always clear whether CORPORATIONS are necessarily private companies or whether they can be public bodies; they seem to occupy an increasingly powerful place that is not quite public simultaneously so removed from the category of the nosy neighbor that they must be viewed as institutional or systemic:

*Whilst in the past, we saw the greatest danger to the people's right to the personality as consisting in the state as a 'Big Brother' or as 'Leviathan', the threat has expanded: increasingly, private companies collect personal data for the purposes of control and manipulation and they use these means to exercise power and to satisfy their interest in profits.*⁵³²

Critical references to CORPORATIONS as a category of danger display similarities to the way in which THE STATE is characterised as dystopian. Such similarities include a power inequality with respect to the individual, expressed for example in UK judicial lamentations of *the constant gaze of the media*.⁵³³ After all, both CORPORATIONS and THE STATE are non-human agents who are concerned with governance of either their citizens or their employees and customers.

In contrast to THE STATE, the nature of the threat of CORPORATIONS is typically presented as entailing an added exploitative dimension. This is visible in the above passage, which stems from a parliamentary debate concerning an amendment of the Federal Data Protection Act. It explicitly criticises companies who *accumulate* personal data *for profit*. This evokes the subtext of a socialist critique of power and

⁵³² *Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Petra Pau und der Fraktion der PDS, Bundestag, 14. Wahlperiode, Bundesdrucksache 14/1527, 1.9.1999, 2: Sah man in der Vergangenheit die größte Gefahr für das Persönlichkeitsrecht der Menschen im Staat als ‚Big Brother‘ oder als ‚Leviathan‘, so hat sich die Bedrohung erweitert: Zunehmend sammeln private Wirtschaftsunternehmen [...] persönliche Daten für Zwecke der Kontrolle und Manipulation an und nutzen diese Mittel zum Zweck der Machtausübung und aus Profitinteresse.*

⁵³³ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Hope of Craighead at 80.

wealth inequalities in modern capitalist society. This finding chimes with broader discourses on data: in recent years, it has become conventional to use terminology like ‘mining’⁵³⁴ and ‘currency’⁵³⁵ with regards to data collection, thereby implying that information has an intrinsic economic value. This invites a reading of some early criticisms of commercial data gathering as having impressive foresight.

However, given the fact that these discourse extracts stem from a point of time before or during the early stages of the Internet, the assumption that they correctly anticipated contemporary information gathering practices is at risk of being anachronistic. On a more plausible reading, the concern of technologically empowered CORPORATIONS stems from a combination of dystopian visions and sociological critique – a connection that various scholars view as a core part of the dystopian genre,⁵³⁶ as the following section reveals.

6.3 Real and fictional dystopias

6.3.1 The dystopian potential of historical examples of totalitarianism

As mentioned in the previous section, a central way in which dystopian themes work to justify acts of privacy recognition is by positing THE STATE as a danger that warrants legal intervention. This section provides a closer analysis of THE STATE and considers references to fictional dystopias alongside mentions of historical instances of injustice. A qualitative analysis of passages within the category of THE STATE notably reveals that representations of THE STATE often combine references to various themes to achieve allusions of threat and danger: historical realities, critical references to the current status quo and fictitious futures are invoked simultaneously to characterise the normative significance of THE STATE in rich detail. Similar observations were made by others who qualitatively explore legal

⁵³⁴ See, for example, Ira S Rubinstein, ‘Big Data: The End of Privacy or a New Beginning?’ (2013) 3 International Data Privacy Law 74.

⁵³⁵ See, for example, Schiller (n 40).

⁵³⁶ Shklar (n 510); Sargent (n 509); Berlin (n 520); Davis (n 511).

discourse: as Cover notes,

‘the various genres of narrative – history, fiction, tragedy, comedy – are alike in their being the account of states of affairs affected by a normative force field.’⁵³⁷

Combining historical and fictionalised portrayals of unjust governments provides powerful illustrations of legally relevant dangers. Especially German acts of recognition feature many references to past experiences of National Socialism, which are typically invoked as a cautionary example for a world that fails to protect civil liberties. Closer analyses reveal, however, that those passages do not make the claim that Nazis lacked developed information privacy laws: as pointed out by Whitman, the legal concept of the personality – an important anchor for German privacy recognition – was well entrenched in German civil law by the late 1930s.⁵³⁸ Rather, the point of references to National Socialism in debates regarding the legal recognition of privacy is to emphasise the imaginable horrors of a technologically empowered dystopian Fascist state. Findings thus contain explicit references to the *NS-Zeit* or *NS-Diktatur* as examples of the kind of dangerous STATE that justifies the necessity of legal protections of privacy.

More commonly though, references to National Socialism are more implicit and allusive:

*Furthermore, it leads to the cementing of the respective government, be it black, red or brown. An information system is value-neutral and serves anyone who can access it.*⁵³⁹

‘Brown regime’ is a colloquial reference to Fascism in general and National Socialism

⁵³⁷ Robert M Cover, ‘The Supreme Court, 1982 Term - Forward: Nomos and Narrative’ (1983) 97 Harvard Law Review 4, 10.

⁵³⁸ Whitman (n 75) 244.

⁵³⁹ *Schutz der Privatsphäre: Debatte*, Bundestag, 6. Wahlperiode, Drucksache VIII/131/162 15.7.1972:

Darüber hinaus bedeutet es die Zementierung der jeweiligen Regierung, sei sie schwarz, rot oder braun. Ein Informationssystem ist wertfrei und dient jedem, der darüber verfügen kann.

in particular. ‘Red regime’ typically refers to Communism, though we may wonder whether the use of the term ‘red’ in the above passage was intended with that meaning: the colours of the German flag are black, red and gold (*schwarz-rot-gold*), so the replacement of ‘gold’ with ‘brown’ in this context can be read as conveying the concern that Fascism is a particularly German political risk.

The above passage furthermore describes information systems – TECHNOLOGY – as a value-neutral tool of governance. In this respect, it differs somewhat from other passages, which portray the relationship between regimes of historical injustice and modern information technologies as more interdependent. Consider, for example:

*A government that possesses an effective information system must behave rather foolishly to run the risk of being overthrown. [...] Because [the information system] primarily supplies leading information ("Führungsinformationen") for the government [...]*⁵⁴⁰

This passage, taken from a parliamentary debate on the codification of federal data protection laws, supplies a case where the reference to National Socialism is so subtle that it is only made visible by careful analysis of discourse. In the first sentence, the speaker posits that ‘overthrowing a governmental regime’ could be what *ought to be done*; presumably in a situation where the possibility to displace radically unjust regimes is a last resort of ensuring governmental accountability. However, as the passage notes, the task of overthrowing a government is rendered all the more difficult when the regime in question is empowered with relevant information processing systems.

The conception of the nexus of THE STATE and TECHNOLOGY as dystopian is further enhanced by the portmanteau of ‘*Führerinformation*’, a term that

⁵⁴⁰ *Schutz der Privatsphäre: Kleine Anfrage der Fraktionen SPD, FDP, Bundestag, 6.*

Wahlperiode, Drucksache VI/3826 7.7.1972:

Eine Regierung im Besitze eines effektiven Informationssystems muß sich darum schon sehr ungeschickt anstellen, wenn sie noch gestürzt werden soll [...]Denn es stellt vor allem Führungsinformationen für die Regierung bereit [...]

alludes to the National Socialist head-of-state (*Führer*). We may wonder about the meaning of the conflation of the reference to National Socialism with ‘information’: it seems ambivalent whether *Führerinformation* belongs to, or empowers, unjust leadership in the same vein imagined by the previous passage, or whether it is the information itself that ‘leads’ (*führt*) in a technocratic sense. Either way, the subsequent sentence of the passage iterates that it is the specific combination of TECHNOLOGY (stored and processed ‘information’, in our case) and THE STATE (or the governmental institutions who rely on it), which constitutes a normatively relevant danger:

*There is no such thing as neutral, user-independent information.*⁵⁴¹

A contrasting example that describes information as ‘scientifically reliable’ and thus impliedly value-neutral can be found in the passage below:

*The potential complete recording of the population supplies [...] government with scientifically useful information, for example [...] for the removal of certain ethnic groups, like Jews. We currently have no tools to fight this possibility; the existing data protection legislation is insufficient.*⁵⁴²

Here, the emphasis is not on the normative nature of information itself, but on the risks of how it might be used. The dystopian example of a dystopian use is evidently drawn from German history; it concerns the ‘picking out’ or ‘removal’ (*Aussonderung*) of Jews. Again, though information itself is here viewed as

⁵⁴¹ *Schutz der Privatsphäre: Kleine Anfrage der Fraktionen SPD, FDP, Bundestag, 6. Wahlperiode, Drucksache VI/3826 7.7.1972:*

Es gibt keine neutrale, benutzerunabhängige Information.

⁵⁴² *Schutz der Privatsphäre: Debatte, Bundestag, 6. Wahlperiode, Drucksache VI/3828 15.5.1973:*

Die potentiell völlige Erfassung der Bevölkerung gibt [...] einer Regierung wissenschaftlich zuverlässige Informationen, etwa [...] zur Aussonderung bestimmter Volksgruppen, z.B. Juden. Gegenmechanismen gegen diese Möglichkeiten sind bisher nicht ausgebildet. Die bisherige Datenschutzgesetzgebung reicht hierfür nicht aus.

normatively neutral, the fact that it *could* be employed by a regime to exercise control and commit harm is what grounds the dangerousness of the TECHNOLOGY/ THE STATE nexus. The above passage thus explicitly speaks to the notion that legal protections of privacy, including data protection laws, have the purpose of disciplining totalitarian tendencies in government.

One might think that citing ‘the prevention of genocide’ as a reason for why we require privacy laws seems hyperbolic. And yet, in the context of the German parliamentary debate in which they were voiced, the concerns raised in the above passage were not met with objection, suggesting they were read as plausible. What is it that makes such worries about totalitarianism seem apt and acute, rather than paranoid and exaggerated? My analysis suggests that it is the fusing of experiences of historical injustice with dystopian visions that makes these projections palatable.

On this point, it may be objected that it remains unclear why references to National Socialism should fall within the genre of dystopia; after all, they are historical *reality* rather than *fiction*. But the above passages each illustrate that it is never just historical experience that justifies a conception of THE STATE as dangerous; instead, the fear always relates to a (fictionalised) projection of a past government that is equipped with the technological powers of the future.

This blending of the real and the fictional can be ascertained in findings: in German acts of privacy recognition, discussions of historical injustice are enriched by references to technological innovation, as well as explicit references to dystopian fiction. In this way, history is reimagined and forecast in a way that is more acute—and that demands regulatory attention. A similar effect can be observed in UK lawmaking discourse:

Does the right hon. Gentleman not appreciate that the limitation of these terms of reference to intrusions by private, as opposed to public, bodies or their servants is contrary to Magna Carta and constitutes yet another step on the slippery slope to the Socialist State?⁵⁴³

⁵⁴³ *Committee on Privacy*, House of Commons, Hansard Volume 801, 14.5.1970, Sir L. Heald.

*There are two worries which I think the public is justified in having: the first is the danger that some day we might have an extreme Left or Right Wing Government who would think it very convenient if all Government information was on one computer [...]. Here we should be getting on towards 1984 and we must be ever vigilant against anything of that kind.*⁵⁴⁴

The passages indicate that the forms of political injustice imagined in UK law-making contexts are more varied than in the German context, where the historical case of National Socialism dominates dystopian visions.⁵⁴⁵ The kind of political forms that are referred to as unjust include ‘the Socialist State’, ‘extreme Left or Right Wing Government’, ‘totalitarian government’, as well as the dystopian state in Orwell’s writings and science fiction more generally. Again, the fictional imaginations of dystopia sharpen the focus on the negative potential of the real societies that lawmakers are concerned with. At the same time, the instances of political extremism posited in the passages above are also very much *fictional*: they do not refer to any particular socialist or fascist regime, but to a hypothetical British state of that nature. Conflating dystopian regimes with real instances of historical justice renders the ‘terror of technology’⁵⁴⁶ more tangible. Framing literary dystopias as analogous to more familiar instances of political extremism has the effect of rendering the vision of a ‘Big Brother’ state more credible.

6.3.2 Conflating the real and the fictional: history influencing fiction

The conceptual conflation between historical reality and fiction is equally visible when it comes to references of dystopian fiction. The following passage is an example where Orwell’s Big Brother is posited as ‘the big danger’ of the past, whereas a metaphorical twist – Big Brother’s younger siblings – is used to describe the distinctive danger for the present and future:

⁵⁴⁴ *Privacy: Younger Committee’s Report*, House of Lords, Hansard Volume 343, 6.6.1973, Lord Gardiner.

⁵⁴⁵ Interestingly, despite being known for surveillance practices, findings on German acts of privacy recognition show relatively few references to the GDR regime.

⁵⁴⁶ Kieran Tranter, ‘Terror in the Texts: Technology – Law – Future’ (2002) 13 *Law and Critique* 75.

*The menace is not the Big Brother of “1984”; it is all sorts of little brothers—the private inquiry agent, the newspaper which attempts to invade the privacy of the individual [...].*⁵⁴⁷

Compare again the above-mentioned passage:

*Whilst in the past, we saw the greatest danger to the people’s right to the personality as consisting in the state as a ‘Big Brother’ or as ‘Leviathan’, the threat has expanded: increasingly, private companies collect personal data for the purposes of control and manipulation and they use these means to exercise power and to satisfy their interest in profits [...] Big Brother has gotten siblings [...].*⁵⁴⁸

The second passage was already featured in the previous section since it exemplifies that CORPORATIONS are a modern category of dystopian danger. There, it was mentioned that Leviathan is an archetypical metaphor for state authority. Recent scholarship on Hobbes’ political thought prompts the view that the work *Leviathan* itself belongs within the utopian genre:⁵⁴⁹ originally conceived as a biblical threat or Anti-Christ, Hobbes reworked the Leviathan metaphor to justify authoritarian, undivided government.⁵⁵⁰ However, much classical scholarship on political liberalism was explicitly formulated as a response to, or rejection of, this Hobbesian Leviathan, leading to a more critical contemporary reading of the term. So, when the term is used as synonymous with Orwell’s ‘Big Brother’, it is this modern, dystopian meaning of Leviathan that is invoked.

⁵⁴⁷ *Privacy: Younger Committee Report*, House of Commons, Hansard Volume 859, 13.7.1973, Mr. Maurice Edelman.

⁵⁴⁸ *Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Petra Pau und der Fraktion der PDS*, Bundestag, Bundesdrucksache 14/1527, 1.9.1999, 2.
Sah man in der Vergangenheit die größte Gefahr für das Persönlichkeitsrecht der Menschen im Staat als ‚Big Brother‘ oder als ‚Leviathan‘, so hat sich die Bedrohung erweitert: Zunehmend sammeln private Wirtschaftsunternehmen, [...], persönliche Daten [...] Big Brother hat Geschwister bekommen [...].

⁵⁴⁹ Richard Tuck, ‘The Utopianism of Leviathan’ in Tom Sorell and Luc Foisneau (eds), *Leviathan after 350 Years* (Clarendon Press 2004).

⁵⁵⁰ Thomas Hobbes, *Leviathan: Cambridge Texts in the History of Political Thought* (Richard Tuck ed, Cambridge University Press 1996) 9, 117.

The continuity between dystopian themes in fiction and political thought – here implied by the comparison of ‘Leviathan’ and ‘Big Brother’ – has been pointed out by various literary critics and political scientists.⁵⁵¹ As argued by Rogan, critical utopias must always be viewed as responses to existent social conditions and ideology.⁵⁵² Thus, while containing *fictitious* elements, dystopian imaginations are themselves heavily dependent on *real* themes of historical injustice and oppression.

In Orwell’s case, it is evident that *real* – that is, historically existent – forms of political injustice have influenced fictional dystopian work. Orwell wrote extensively in a non-fictional way on political regimes, including Nazi Germany and the Soviet Union, commenting extensively on the way governments employed technology for their purposes. This led him to question the enlightenment narrative of science-as-progress: in a 1941 essay entitled ‘Wells, Hitler and the World State’, Orwell challenges the author H. G. Wells’ romantic and progressive portrayal of technology. Orwell writes,

‘But unfortunately the equation of science with common sense does not really hold good. The aeroplane, which was looked forward to as a civilizing influence but in practice has hardly been used except for dropping bombs, is the symbol of that fact. Modern Germany is far more scientific than England, and far more barbarous. Much of what Wells has imagined and worked for is physically there in Nazi Germany.’⁵⁵³

Orwell’s suspicion of the merits of technologically empowered regimes played out in his fictional as much as in his non-fictional work. This suggests that the blending of real and fictional imaginations of political injustice is woven into dystopia as a genre.

⁵⁵¹ See, for example, Shklar (n 510); Sargent (n 509); Berlin (n 520); Davis (n 511).

⁵⁵² Wells, Hitler, and the World State, in Rogan (n 506).

⁵⁵³ George Orwell, *The Collected Essays, Journalism and Letters of George Orwell Volume II: My Country Right or Left 1940-1943*, vol II (Sonia Orwell and Ian Angus eds, Penguin Books 1971).

Pastiche, or imitation, is a common rhetorical tool in science fiction writing, as well as in postmodern thought more generally.⁵⁵⁴ The totalitarian themes that dystopian texts reference and parody are often grounded in real political and historical events.⁵⁵⁵ Booker suggests that this veiled political criticism is central tenet of dystopia as a genre when he writes that ‘dystopian literature is [...] a particular kind of oppositional and critical energy’.⁵⁵⁶ The fact that lawmakers employ utopian visions as a lens to criticise social and legal developments completes the circle: the fact that fiction-based imaginative critique is applied to the social and political realities may be viewed as predictable: it is those very social and political realities that that inspired dystopian imagining in the first place.

The observation that lawmakers engage in dystopian imagining reveals that lawmaking is not an isolated form of rational normative negotiation: legal thought and talk is deeply embedded in culturally dominant images and visions. The strength of this link between lawmaking discourse and popular culture challenges the image of the legal system as a wholly rationalised, normatively closed social field.⁵⁵⁷ The findings presented in this section thus reveal continuities between the literary and legal vernacular. The prevalence of dystopian themes in lawmaking discourse illuminates legal change as a culturally contingent form of social action.

This section has discussed the blending of fictional dystopian themes with memories of totalitarianism that can be traced throughout my empirical findings. My qualitative analysis suggests that the conflation of the real with the fictional has effect of amplifying and substantiating fear of what might become. Relating dystopian visions to historical experiences with totalitarianism renders the perceived dangers more concrete and tangible, which frames the need for legislative

⁵⁵⁴ Andrew M Butler, ‘Postmodernism and Science Fiction’, *The Cambridge Companion to Science Fiction* (Cambridge University Press 2003) 141. See also: Booker (n 519) 3.: ‘Dystopian narrative is largely the product of the terrors of the twentieth century.’

⁵⁵⁵ Moylan (n 526) xi.: ‘Dystopian narrative is largely the product of the terrors of the twentieth century.’

⁵⁵⁶ Booker (n 519) 3.

⁵⁵⁷ Niklas Luhmann, ‘Operational Closure and Structural Coupling: The Differentiation of the Legal System’ (1991) 13 *Cardozo Law Review* 1419.

intervention all the more acute. The aptness for social critique is, as literary critics suggest, built into dystopia as a genre,⁵⁵⁸ so the presence of dystopian themes in late modern lawmaking allude to a set of cultural understandings that underpins both literary and legal thought and talk.

6.3.3 The future is here: 1984 and the necessity of regulatory intervention

A further way in which reality is conflated with dystopian fiction is through the treatment of the year 1984 as a target date for dystopian dangers. *Nineteen Eighty-Four* is the title of Orwell's imagination of a totalitarian surveillance, and findings reveal that lawmakers frequently treat this year as a literal deadline regarding the legal recognition of privacy. In UK acts of recognition, this tendency can already be observed in the decades leading up to 1984, such as in the below passages from UK parliamentary debates in 1969 and 1970:

*My Lords, 1984 is already here: all the components of George Orwell's sinister account of how The Machine enabled "Big Brother" to dominate people's lives and minds already exist [...].*⁵⁵⁹

*This indeed is "Big Brother" coming to life in a nightmare way, and 14 years before 1984. I do not know whether it is possible to legislate against information going into such computers [...]. That is a matter of privacy.*⁵⁶⁰

Both of the above passages employ Orwell's temporal reference to the year 1984 as a way of stressing the urgency of dystopian dangers. The passages also feature an interesting play with reality and fiction: on the one hand, they both rest on the literal interpretation of Orwell that dystopian totalitarianism is a realistic prediction for the calendar year 1984, while on the other hand, the passages both proceed to emphasise

⁵⁵⁸ Booker (n 519) 3.

⁵⁵⁹ *Computers And Personal Records*, House of Lords, Hansard Volume 306, 3.12.1969, Lord Ritchie-Calder.

⁵⁶⁰ *Bill of Rights Debate*, House of Lords, Hansard Volume 367, 26.11.1970, The Earl of Cork and Orrery.

that this date represents – just as Orwell intended his title to be⁵⁶¹ – a somewhat random and replaceable point in the foreseeable future: a dystopian future might well be, as stated above, *already here, fourteen years before 1984*.

Undoubtedly, *Nineteen Eighty-Four* is a literary work of immense significance for popular culture, leading scholars to describe Orwellian metaphors like ‘Big Brother’ and ‘sociologically impactful’.⁵⁶² Given this salience, we can presume that Orwellian fiction had an agenda-setting function for legal discourses on privacy, particularly for the calendar year 1984 and the years leading up to it. Qualitative analyses of the discourses preceding the legal recognition of privacy reveal that lawmakers in both sometimes refer to the year 1984 as the ‘Orwell-year’. This has been picked up by academic commentary: for example, in discussing the development of the first UK Data Protection Act, Bennett states, ‘the legislation passed in “Orwell’s year.”’⁵⁶³

While references to 1984 were more common in UK lawmaking discourse – this may be attributable to the fact that *Nineteen Eighty-Four* was set in Britain the novel was first published there and Orwell himself was English –, the same trend can also be observed in German acts of recognition. This is illustrated by the below passage from a 1984 parliamentary debate in Germany:

*The so-called Orwell-year 1984 has served to draw special attention to the topic of government surveillance.*⁵⁶⁴

⁵⁶¹ Though it is often assumed that Orwell simply reversed the last two numerals of 1948, the year he completed the book, publications of the facsimile manuscript of *Nineteen-Eighty Four* reveal that the date was completely arbitrary Jonathan Rose, ‘The Invisible Sources of Nineteen Eighty-Four’ (1992) 26 *Journal of Popular Culture* 93, 93.

⁵⁶² Peter Marks, ‘Imagining Surveillance: Utopian Visions and Surveillance Studies’ (2005) 3 *Surveillance & Society* 222, 12. One example that demonstrates the salience of Orwellian themes particularly in the years leading up to 1984 is the 1983 Apple Macintosh commercial that introduced the personal computer and was aired by CBS on January 22, 1984 during the Super Bowl. It featured the phrase “On January 24th, Apple Computer will introduce the Macintosh. And you’ll see why 1984 won’t be like ‘1984’”. Ted Friedman, ‘Apple’s 1984: The Introduction of the Macintosh in the Cultural History of Personal Computers’ [1997] *Society for the History of Technology Convention*, Pasadena, California.

⁵⁶³ Bennett (n 12) 93.

⁵⁶⁴ *Plenarprotokoll 85. Sitzung*, Deutscher Bundestag, 10. Wahlperiode, Bundesdrucksache

The fact that the calendar year 1984 is treated as a milestone regarding dystopian threats powerfully reveals the influence of popular culture – specifically dystopian fiction in this case – on lawmaking. This challenges the sanitised portrayal of legal change as a rationalised and calculated process and instead emphasises, as Hanne and Weisberg point out, the crucial influence of metaphor ‘not simply in legal discourse, but in the categories by which a culture conceives of itself [...] Metaphor captures what we take to be reality.’⁵⁶⁵

Furthermore, as stated above, conceiving of 1984 as ‘Orwell’s Year’ implicitly treats dystopian visions as a realistic prediction for the future, thereby conflating them with political reality. This has an effect similar to the previously discussed conflation of dystopian visions with historical experience of totalitarianism: it fuels the perceived acuteness of the danger categories of TECHNOLOGY and THE STATE. Emphasising the urgency of dangers, again, works to substantiate the claim that regulatory intervention is necessary. The below passages explicitly spell out this connection:

*This again is disturbing, because already we are into the era of mass surveillance of the population by the authorities. Indeed, 1984 is going to come well on time. The regulation of this in the public interest is essential.*⁵⁶⁶

*The Bill’s core is in the first schedule, which sets out eight splendid data protection principles. If all computerised information were to follow those principles, 1984 would be a year from which we in the United Kingdom would have nothing to fear.*⁵⁶⁷

10/85, 20.9.1984, 6185.

Das sogenannte Orwell-Jahr 1984 hat das Thema Überwachungsstaat in besonderer Weise in den Blickpunkt gerückt.

⁵⁶⁵ Michael Hanne and Robert Weisberg, ‘Introduction’ in Michael Hanne and Robert Weisberg (eds), *Narrative and Metaphor in the Law* (Cambridge University Press 2018) 18.

⁵⁶⁶ *Business Of The House*, House of Commons, Hansard Volume 21, 1.4.1982.

⁵⁶⁷ *Data Protection Bill*, House of Commons, Hansard Volume 53, 30.1.1984, Mr. Michael Meacher.

These passages, uttered in the years 1982 and 1984 respectively, both treat the calendar year 1984 as a dystopian target date and directly tie it to legislative measures. In the above passages, the temporal pressure imported by the Orwellian association creates a sense of urgency for the legal recognition of privacy. In contrast to other discursive dystopian tropes in acts of privacy recognition, references to *Nineteen Eighty-Four* do not refer to empirically existent technological or political phenomena and simply cast them in a dystopian light. Instead, the notion that the year 1984 embodies dystopian doom is based entirely on fiction, emphasising the power of metaphor in lawmakers' imaginations. The theme of the salience of metaphor is continued by the discussions presented in the following section. However, in contrast to this section and the previous one, section 4 of this chapter moves beyond the trope that law ought to offer protection from dystopian realities: instead, section 6.4 presents how concepts like democracy and privacy are imagined as concepts that counterpoint dystopia – and that these concepts are themselves characterised with references to utopian imaginations.

6.4 Utopian counterpoints: democracy and privacy

6.4.1 Democracy versus dystopia

References to dystopian themes also appear in a contrasting way alongside mentions of contemporary or historical political systems. In particular, dystopian visions tend to be juxtaposed to the theme of democracy. One example from the passages presented above is the reference to *Magna Carta* in subsection 3.1 – the document that is often venerated as the starting point of British constitutional democracy.⁵⁶⁸ *Magna Carta* is taken here to symbolise a rights-based political order that is contrasted with the dystopian counterfactual of a *slippery slope of the Socialist State*. But *Magna Carta* is also a cornerstone English history and political identity: its

⁵⁶⁸ Michel Rosenfeld, 'Constitutional Identity' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 764.

rheterical use evokes a normative commitment to democracy that is embedded in British political identity.

My qualitative analysis of the discourses preceding German and UK acts of privacy recognition indicates that lawmakers tend to employ democratic themes in a normative, rather than merely descriptive, sense: democracy is a handle for how things *ought to be*, rather than a mere description of what they are now. Furthermore, words that tend to be used in conjunction with democracy are ‘liberal’⁵⁶⁹ and ‘civilized’⁵⁷⁰, which in these contexts refer to aspirational social forms. In this way, mentions of democracy achieve a similar, though contrastive, effect as dystopian visions. Much like Orwellian allegory, democratic themes represent a set of values and normative expectations and lawmakers rely on these to contrast good and evil, dangerous and necessary. In acts of privacy recognition, the theme of democracy works as *method*⁵⁷¹ of imagining human society. This particularly evident in the following passages:

*Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual [...] The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.*⁵⁷²

We hold up the spying and bugging of the totalitarian countries to contempt and ridicule, but in the United States, the greatest and the most democratic country in the world, this dream has lately been shattered. We have been shown an example of government spying on a gigantic scale and have learned of invasions of privacy carried

⁵⁶⁹ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Nicholls of Birkenhead at 12.

⁵⁷⁰ For example, Mr Lyon stated: [...] *the right of privacy is something which significantly marks the characteristics of a civilised society and that without it we lapse a little nearer to barbarism.*,

Right Of Privacy Bill (Order for Second Reading), House of Commons, Hansard Volume 794, 23.1.1970, Mr. Alexander W. Lyon.

⁵⁷¹ Frederic Jameson, ‘Utopia as Method, or the Uses of the Future’ in Michael D Gordin, Helen Tilley and Gyan Prakash (eds), *Utopia/Dystopia: Conditions of Historical Possibility* (Princeton University Press 2010);

⁵⁷² *R v Dymnt* [1988] 2 SCR 417, 426, as cited by *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Nicholls of Birkenhead at 12.

*to extremes, accompanied by devices which measure up to science fiction.*⁵⁷³

The first example is a passage from judicial discourse. It is typical for the way privacy is linked to more widely accepted virtues, like autonomy, well-being, and, in particular, democracy: government ‘prying’ is explicitly contrasted with ‘the essence of a democratic state’. Similarly, the second passage, which forms part of a 1973 parliamentary discussion on the Younger Committee’s report on the legal status of privacy, contrasts both totalitarianism and dystopia with democracy. It thereby presents ‘government spying’ and ‘science fiction’ as deeply undemocratic.

The semantic content imputed to democracy in both passages is that of a normative ideal: for example, the descriptor ‘most democratic’ is used alongside ‘greatest’. But in the second passage, this ideal also entails a characteristically utopian aspect of unattainability;⁵⁷⁴ it is a *dream* – one that, as stated above, has been ‘shattered’. Portraying privacy invasions as harmful to democratic ideals discursively amplifies their dangerousness – and thereby works to justify legislative intervention.

Beyond the use of democracy as a counterpoint to dystopian visions, democratic themes also surface throughout findings in a more doctrinal, demanding sense. This trend is especially observable throughout German lawmaking discourses. Here, a particularly prevalent idiom in acts of privacy recognition is ‘*die für die Demokratie unerlässliche Unbefangenheit der Kommunikation*’⁵⁷⁵, literally ‘the democratically required unimpaired communication’. Consider also the exemplary extract preceding the criminalisation of privacy intrusions in the German context:

*The point of criminalising the violation of private life and of the secret sphere is to ensure that citizens have the effective and gapless protection that is democratically required and necessary for life in a liberal democracy.*⁵⁷⁶

⁵⁷³ *Privacy: Younger Committee Report*, House of Lords, Hansard Volume 653, 6.6.1973, Baroness Gaitskell.

⁵⁷⁴ Characteristically, utopian thought is marked by social *dreaming*, see Moylan (n 526) 75.

⁵⁷⁵ *Vorratsdatenspeicherung*, Urteil vom 2.3.2010, BVerfGE 125, 260.

⁵⁷⁶ *Entwurf eines Gesetzes zum verbesserten Schutz der Intimsphäre*, Bundesrat, Drucksache 164/03, 29.3.2003, 3.

The above passages reveal that in German acts of privacy recognition, the concept of democracy is more than a guiding ideal: expressions like ‘democratically *required*’ and ‘necessary for liberal democracy’ portray democratic ideals as making active demands on lawmakers. One might speculate that the discursive framing of ‘democratic requirements’ is a consequence of the constitutional recognition of democracy as a binding standard for legislative, judicial and executive powers in Article 20 I of the German Basic Law (*Demokratieprinzip* – principle of democracy).⁵⁷⁷

But the explicit *commitment to democracy* that can be traced throughout various articles of the Basic Law⁵⁷⁸ has a peculiar legal status: democracy is not quite a *right* and thus not quite *justiciable*. Instead, it has the form of a ‘constitutional objective’ (*Verfassungsziel*).⁵⁷⁹ Legal constructs like constitutional objectives, also called ‘state objectives’ (*Staatsziele*),⁵⁸⁰ present a challenge to the view that law consists only of rights and obligations.⁵⁸¹ While it is widely accepted that constitutional objectives are to be taken into account in the context of constitutional interpretation,⁵⁸² they do not create legal *obligations* in a doctrinal sense. This casts doubt on the narrative that German lawmakers are *required* to recognise privacy: a critical interpretation of my findings must note that the claim that democratic ideals demand the legal recognition of privacy is a compelling rhetorical strategy. This is so for two reasons: firstly, it is a way of evading accountability for legal change by

Sinn einer strafrechtlichen Regelung im Bereich der Verletzung des persönlichen Lebens und Geheimbereiches ist es, die für den Bürger in einer freiheitlichen Demokratie bestehende Notwendigkeit eines effektiven, lückenlosen Schutzes sicherzustellen.

⁵⁷⁷Maunz and Dürig (n 74) Art 20.

⁵⁷⁸ Lyman Tower Sargent, ‘The Three Faces of Utopianism Revisited’ (1994) 5 *Utopian Studies* 1, 3.

⁵⁷⁹ Maunz and Dürig (n 74) Art 20 Rn 14.

⁵⁸⁰ *ibid* Art 20 Rn 1.

⁵⁸¹ Wesley Newcomb Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26 *The Yale Law Journal* 710.

⁵⁸² Dworkin, ‘Taking Rights Seriously’ (n 123) 82; Alexy, *A Theory of Constitutional Rights* (n 196) 47.

fostering the trope that lawmakers are practically required to recognise privacy. Secondly, in modern legal systems, democracy is less contested than privacy, so equivocating privacy with democracy conveys some of the normative robustness of democratic ideals: in lawmaking discourses, they seem to work like a rhetorical trump card. These considerations must form the backdrop against which one interprets the appearance of democratic themes.

It is furthermore remarkable that the discourse strands that posit a link between democracy and information privacy do little to explicate any supposed relation between the two. The claim that democracy depends on privacy protection is not trivial; it remains an active topic of discussion in the academic literature.⁵⁸³ In light of this, it is all the more conspicuous that lawmakers treat it as truism that surveillance and other information privacy intrusions are undemocratic. The claim that privacy protections are required *in virtue of democracy* must be treated with skepticism, given the general lack of elaboration.

In summary, mentions of democracy surface frequently in acts of privacy recognition. Insofar they neighbor mentions of dystopian visions, their discursive purpose is one of contrast and counterpoint: the concept of democracy illustrates what is at risk of being lost in a dystopian world. This has the effect of emphasizing the dangerousness of the categories of TECHNOLOGY and THE STATE, particularly their intersection. Beyond this counter-dystopian use, findings show that democracy is also sometimes framed as actively obligating lawmakers to protect information privacy. But since there is little doctrinal basis of such an alleged *demand* of democracy, this trope ought to be interpreted with caution, especially in light of the rhetorical benefits of relying on the vagueness of virtues like democracy to justify their legal intervention.

⁵⁸³ See, for example, Paul Voice, 'Privacy and Democracy' (2016) 35 South African Journal of Philosophy 272; Paul M Schwartz, 'Privacy and Democracy in Cyberspace' (1999) 52 Vanderbilt Law Review.

6.4.2 Utopian or heterotopian spaces of privacy

The previous subsection has presented the finding that democratic themes are used in juxtaposition to dystopian visions. The present section focuses on a similar trend that can be observed regarding portrayals of privacy: beyond explicitly contrasting privacy with dystopia, lawmakers' characterisations of privacy also display features of utopian thinking.

As stated in the Introduction (1.1), the general lack of consensus on the value and meaning of privacy is part of what makes privacy laws an interesting case study when it comes to the meaning-making processes involved in legal change. Lawmakers' conceptions of the significance of privacy – why *specifically* they take it to be valuable – were thus a central focus of empirical explorations. In-depth qualitative analyses uncovered that in the lawmaking discourse preceding acts of recognition, characterisations of privacy's value often included spatial metaphors, portraying privacy as a utopian sphere of refuge and as a place that harbours idealised versions of the individual. This subsection presents and analyses these utopian dimensions of lawmakers' characterisations of privacy.

Spatial descriptors are an eponymous hallmark of thinking about utopia (and dystopia). They were particularly ubiquitous when it comes to German acts of recognition. Here, lawmakers display a distinctively topological understanding of privacy:

I agree with the Federal Constitutional Court, who expressed this very simply in its judgment on the "big eavesdropping operation: there must be a space for every human – every woman and every man – where one is left in peace and where one can behave as one pleases; as is natural to one's personality [...]"⁵⁸⁴

⁵⁸⁴ *Plenarprotokoll, 105. Sitzung Deutscher Bundestag 15. Wahlperiode, Bundesdrucksache 15/105 29.4.2004, 9537.*

Ich halte es mit dem Bundesverfassungsgericht, das das in der schon angesprochenen Entscheidung zum großen Lauschangriff ganz banal formuliert hat: Es muss einen Raum für jeden Menschen – für jeden Mann und für jede Frau – geben, in dem er in Ruhe gelassen wird und in dem er sich so verhalten kann, wie es seiner Persönlichkeit entspricht [...].

Compare also:

*The individual can only develop into a responsible personality if they are here for granted a free space from the community, from the state [...]*⁵⁸⁵

The above passages characterise the value of privacy by referring to it as a space (*Raum*, often also *Ort*- 'locus') of human existence that is defined by the presence of typically utopian attributes like peace and freedom. It is possible that the strong spatial dimension in German lawmakers' descriptions of privacy ensues from the fact that linguistically, the German term *Privatsphäre* – literally 'private *sphere*' – has an in-built topographical dimension that prompts a spatial understanding of privacy: one that is absent from the English version of the term.

Indeed, German legal doctrines of privacy protection depend on an explicitly topological 'sphere model' of privacy protection that conceives of social life in concentric spheres. According to this model, the innermost 'intimate sphere' warrants the most uncompromising legal safeguards, while infringements into the outer 'private', 'social' and 'public' spheres are more easily justifiable.⁵⁸⁶ By contrast, in English legal doctrine, the standards by which degrees of privacy are measured relate more to expectations regarding being under observation.⁵⁸⁷

Despite this, this study's findings reveal that spatial terminology also features – albeit to a lesser extent – in UK acts of recognition: *private space* and *personal space* are frequently employed synonyms for privacy, suggesting that topological characterisations are also common within UK privacy discourse. A further similarity across UK and German characterisations of privacy is that the spatial descriptions

⁵⁸⁵ *Entwurf eines Gesetzes zum verbesserten Schutz der Intimsphäre*, Bundesrat, Drucksache 164/03, 29.3.2003, 3.

Nur dann kann sich der Einzelne zu einer verantwortungsvollen Persönlichkeit entwickeln, wenn ihm hierfür ein freier Raum von der Gemeinschaft, dem Staat [...] gewährleistet wird.

⁵⁸⁶ Maunz and Dürig (n 74) Art 2 (1). For a discussion of the 'Sphärenmodell' of privacy protection, see Alexy, *A Theory of Constitutional Rights* (n 196) 236.

⁵⁸⁷ I.e. 'reasonable expectations', see subsection 7.2.2 of this thesis.

employed to characterise privacy tend to be almost always connoted with positive imagery. This includes using terms like *island* or *oasis*,⁵⁸⁸ such as in the passage below:

*The kernel of the legislation – that is, the meat of the Bill – seems to me a fresh attempt to create an oasis of individual privacy for each European Union citizen or resident in face of the octopus of largely electronic knowledge which so many others from so many walks of life now have on each and every one of us [...].*⁵⁸⁹

The symbolic imagery of *oasis* is that of a self-contained sanctuary in a hostile place. This impression is enhanced in the above passage by the contrast of an *octopus of electronic knowledge* – a sea creature that evokes similarly dystopian associations of danger as that of *Leviathan* analysed in the previous section.

Compare also the following passage from the House of Lords judgment in the case of *Campbell v Mirror Group Newspapers [2004]*, in which Lord Hoffmann references a passage from the seminal 1849 privacy case *Albert v Strange*.⁵⁹⁰ This passage makes a case for the wrongfulness of privacy invasions:

*[I]ntrusion, indeed, fitly describes a sordid spying into the privacy of domestic life - into the home (a word hitherto sacred among us) [...]*⁵⁹¹

⁵⁸⁸ The characterisation of privacy as an ‘island’ is particularly common in academic scholarship, for example, Nippert Eng writes: ‘Privacy’ and ‘publicity’ are concepts that are coupled and related to each other in the same way as islands and oceans, land and water. This is key to understanding how our culture conceptualizes privacy’. See also, Voice (n 585); Schwartz (n 585). Perhaps it is no coincidence that ‘island’ is also the spatial site of Thomas More’s *Utopia* and therefore of classical significance to the utopian genre, see Nippert-Eng (n 20) 4.

⁵⁸⁹ *Data Protection Bill*, House of Lords, Hansard Volume 585, 2.2.1998, Baroness Nicholson of Winterbourne.

⁵⁹⁰ ‘Seminal’, no less, since it is also mentioned by Warren and Brandeis’ as ‘famous’ evidence for a British law on privacy, see Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey, ‘Law and the Utopian Imagination: An Introduction’, *Law and the Utopian Imagination* (2014) 3.

⁵⁹¹ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Hoffmann at 43.

‘The home’ is an autonomous legal concept that comes with its own distinctive history of legal safeguards.⁵⁹² Insofar one carves up privacy into different dimensions (the most common division being into the categories of the privacy of the home, decisional privacy and information privacy⁵⁹³), some degree of overlap between rights concerning ‘the home’ and the legal concept of privacy is inevitable. However, it is important to note that in *Albert v Strange*, just as in *Campbell*, the respective facts of the case did not concern any intrusion into the physical home of the claimant. Rather, both cases concerned the publication of certain kinds of information: etchings in the case of *Albert*, and photographs in *Campbell*. Thus, in the respective court opinions, references to the *sanctity of the home* work as a spatial metaphor for domains of life that lawmakers view as belonging within the private sphere.

A key term in the above extract is the adjective *sacred*, which in the above passage is juxtaposed in alliteration to the dangers of *sordid spying*. Beyond any religious significance, *sacred* implies that spatial representations of privacy are imagined as pure and safe from the turmoils of public life.

This glorification of spaces of privacy extends to the characterisations of those within it. A common trope in findings across German and UK acts of recognition is the conception that private places harbour important features of our selves: our personality. Consider, by way of illustration, the following extract:

*An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate.*⁵⁹⁴

⁵⁹² These typically rest on the concept of property, but they overlap especially with spatial conceptions of privacy, see Diggelmann and Cleis (n 89) 441; Maunz and Dürig (n 74) Art 13.

⁵⁹³ Rössler (n 9) 9.

⁵⁹⁴ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Hoffmann at 75: quoting Lord Mustill in *R v Broadcasting Standards Commission, Ex p BBC* [2001] QB 885, 900.

The presumption that personal space houses the personality is mirrored in the below passage from the German Constitutional Court judgment in the case of *Mikrozensus*.

Referencing academic scholarship and legal commentaries, the passage declares:

*This kind of intrusion into the personal space must be denied to the state because the individual requires, for the purposes of freely and responsibly developing their personality, an 'inner space', where one 'owns oneself', where one can retreat and where the surroundings cannot access; a space where one is left at peace and enjoys their right to solitude.*⁵⁹⁵

The above passage defines as privacy the *area of the personality* and describes it as an inner space defined by self-ownership in which the personality can be developed freely. Although the concept of *personality* remains vague in passages such as that above, it is clear that it encapsulates something vulnerable and essential about what it is to be human: the theme of actualising and developing our personality clearly contrasts with the dystopian theme of dehumanisation discussed in section 2.2 of this chapter. One passage from a German Constitutional Court judgment explicitly refers to the information gathering associated with the population census as *hostile to the personality (persönlichkeitsfeindlich)*.⁵⁹⁶ The original Constitutional Court judgment on the population census in 1969 even featured the term *Entpersönlichung*,⁵⁹⁷ literally *de-personalisation*, thereby lending legal credence to a neologism that had become popular in the heated debates preceding the population census. In the midst of the dystopian prospect of a world defined by de-personalisation and objectification, private spaces are envisioned as the last domains of human flourishing.

⁵⁹⁵ *Mikozensus*, Beschluss vom 16.7.1969, BVerfGE 27, 1 at32-34: referencing Wintrich, Die Problematik der Grundrechte, 1957, S. 15 f.; vgl. auch Dürig in Maunz-Dürig, GG 2. Aufl., Rdnr. 37 zu Art. 1).

Ein solches Eindringen in den Persönlichkeitsbereich [...] ist dem Staat auch deshalb versagt, weil dem Einzelnen um der freien und selbstverantwortlichen Entfaltung seiner Persönlichkeit willen ein ‚Innenraum‘ verbleiben muss, in dem er "sich selbst besitzt" und "in den er sich zurückziehen kann, zu dem die Umwelt keinen Zutritt hat, in dem man in Ruhe gelassen wird und ein Recht auf Einsamkeit genießt.

⁵⁹⁶ *Volkszählung*, Urteil vom 15.12.1983, BVerfGE 64, 67.

⁵⁹⁷ *Mikozensus*, Beschluss vom 16.7.1969, BVerfGE 27, 1 at 36.

The discursive portrayal of private spaces as sheltering our human essence – our personality – displays two central tenets of utopian thought. Firstly, private places are imagined here as entirely *apolitical*, a typical feature of classical utopias.⁵⁹⁸ This portrayal is arguably endemic to the concept of ‘the private sphere’ itself, which, as Arendt points out, stems from a long tradition of Western thought that has viewed social life through the binary lens of public/private.⁵⁹⁹ In this conception, the public sphere is the domain of political life and private places are by definition free from any political coercion. Ramino Avilés alerts us to the fact that utopian thought shares some of those features: while public institutions like politics and law are valid instruments ‘to lead us from the present to utopia’,⁶⁰⁰ they are conspicuously absent from classical utopias themselves, since – and Ramino Avilés is quoting Eliav-Feldon here – ‘why should there be laws and law-enforcement in the perfect society?’⁶⁰¹

This brings us to the second typically utopian tenet of lawmakers’ descriptions of private spaces: they are euphemistic to the extent of being unrealistic, mirroring the unabashed idealism that is typical of utopian thought.⁶⁰² In particular, we may doubt whether unadulterated and pure private places are realistically achievable in modern society: social theorists have long regarded a shifting of the boundaries between public and private life as a hallmark of modern social life⁶⁰³ and the pervasiveness of modern information and communication technologies has prompted many to reject the classical conception of private spaces as isolated

⁵⁹⁸ Ramiro Avilés (n 512) 225.

⁵⁹⁹ Hannah Arendt, *The Human Condition* (University of Chicago Press 1958) 28.

⁶⁰⁰ Ramiro Avilés (n 512) 226.

⁶⁰¹ Eliav-Feldon, *Realistic Utopias. The Ideal Imaginary Societies of the Renaissance, 1630*, as quoted by *ibid.*

⁶⁰² *ibid.*

⁶⁰³ Hannah Arendt argues that in modern contexts, the boundaries between public and private life are ‘entirely blurred’, not least because ‘matters pertaining formerly to the private sphere of the family have become a collective concern’ Arendt (n 601) 28. Similarly, Jürgen Habermas has predicted a media-led break-down of public life that conflates the boundaries between public and private, see Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (MIT Press 1991) 33.

domains as increasingly unrealistic.⁶⁰⁴ Relatedly, there is reason to be sceptical that private spaces are as harmonious and as conducive to personality development as lawmaking discourses insinuate. This doubt is inspired by a tradition of feminist activism and scholarship that has drawn attention to the fact that paradigmatically ‘private’ contexts like family relations and domestic life are far from immune to power dynamics and oppression.⁶⁰⁵ The fact that awareness of these possible tensions and caveats is largely absent from lawmakers’ descriptions of private places reveals idealistic, if not utopian, undertones.

Despite these evidently utopian features, characterisations of privacy lack one crucial hallmark of the utopian genre: they do not offer *holistic* descriptions of a society, located in time and place.⁶⁰⁶ In particular, the idea of private places is that they are exceptional sites of refuge in a world that is bound to be mostly public. In the minds of lawmakers, private spaces are not designed to offer a full vision of an alternative society; they merely supplement and correct a given reality. Is it apt to describe these rather modest spatial visions of privacy as ‘utopian’? One solution may be to point out that lawmakers’ characterisations of privacy do not amount to full utopian visions, but they merely display *elements* of utopian thought. This draws attention to a contrast with the dystopian portrayals of danger discussed in subsections 6.2.2 and 6.3.1: these dystopian characterisations tend to offer more holistic descriptions of doomed societies.

Alternatively, one might employ Michel Foucault’s more specific concept of ‘heterotopia’. Foucault emphasises that in contrast to idealised utopias, heterotopias are ‘real sites’⁶⁰⁷ that cater to social contexts of exceptional cultural significance. Famous examples in Foucault’s own work include heterotopias of deviation, such as

⁶⁰⁴ For a critical review of this sentiment, see Paola Tubaro, Antonio A Casilli and Yasaman Sarabi, *Against the Hypothesis of the End of Privacy: An Agent-Based Modelling Approach to Social Media* (Springer International Publishing 2014) 3.

⁶⁰⁵ See, for example, Catharine McKinnon, *Towards a Feminist Theory of the State* (Cambridge University Press 1989) 191.

⁶⁰⁶ Sargent (n 580) 5.

⁶⁰⁷ Michel Foucault, ‘Of Other Spaces’ (1986) 16 *Diacritics* 22, 24.

prisons or hospitals. A distinguishing feature of heterotopias is that they exist as parallel worlds that supplement and interact with, rather than replace, the social status quo. This conception mirrors the finding that from the conception of lawmakers, private places are not supposed to *replace* modern public life; instead, their importance *depends on it*: it is only in the context of heightened surveillance and mediated intrusion that the legal protection of private spaces becomes necessary for the purpose of producing a ‘counter-space’.⁶⁰⁸

Like the concept ‘utopia’, ‘heterotopia’ draws out significant details about how imaginations of privacy clash with the largely dystopian reality that forms the backdrop of acts of privacy recognition in the UK and in Germany. The fact that lawmakers’ characterisations of privacy display features of utopian thought is likely indicative of a more general phenomenon: as pointed out in the introduction to this chapter, both literary and legal imaginations depend on normative creativity. As succinctly observed by Almog, ‘many legal systems draw from utopian imagination, since utopian expressions are closely linked to law’s purpose – creating norms that reflect a vision of optimal societal existence.’⁶⁰⁹ A consequence of this is that various legal concepts – be it privacy, human dignity or equality – are likely closer to normative ideals, than reflective of an empirical status quo.

In the discourses preceding acts of privacy recognition, heterotopian elements have a dual function: most obviously, they help paint a powerful normative picture of the value of privacy and why it warrants legal recognition and protection. Furthermore, much like the use of democratic themes discussed in the previous subsection, utopian characterisations of private spaces also have the contrastive effect of emphasising the dystopian dangers of TECHNOLOGY, THE STATE and CORPORATIONS. Thus, as an imaginative space that is liberated from the

⁶⁰⁸ Moylan references Lefebvre’s discussion on ‘counter-space’, Henri Lefebvre, *The Production of Space*, vol 29 (Donald Nicholson-Smith tr, Blackwell Publishers 1991) 383.

⁶⁰⁹ Moylan (n 526) 65.

constraints of public life, privacy work as a ‘mirror’ that shows the faults of contemporary society.⁶¹⁰

Furthermore, in some acts of recognition, utopian descriptions of private spaces often do not merely illustrate the value of privacy, but rather describe an idealised scenario where the legal protection of privacy would have already been realised. Envisioning the good that law could achieve is, as emphasised by Almog, a crucial component of the legal imagination.⁶¹¹ The imagination of legally protected private spheres thus helps to justify legal intervention. In this way, utopian elements in lawmaking discourse are not merely ‘useful indices of how un-utopian our world really is’⁶¹² as Rogan claims, but they reveal the transformative potential that humans attribute to legal change.

6.5 Conclusion

In the pursuit of exploring lawmakers’ reasons for affording legal recognition to information privacy, this research project has conducted in-depth qualitative explorations of the lawmaking discourses preceding acts of privacy recognition. References to dystopian themes were pervasive in both German and UK lawmaking discourses on privacy. This suggests that lawmakers, including members of legislatures as well as judges, took dystopian themes to be meaningful and institutionally relevant to legal change, treating them as one of the reasons for affording legal recognition to information privacy.

Most significantly – and this thread runs throughout the subsections of this chapter – it was found that dystopian visions work to emphasise, or enhance, the perceived dangerousness of the socio-political status quo. Through inductive coding, three main categories of dystopian danger were identified: TECHNOLOGY, THE

⁶¹⁰ Almog (n 516) 155.

⁶¹¹ Moylan (n 526) 97.

⁶¹² Rogan (n 506) 314.

STATE and CORPORATIONS. These, as subsection 6.2.2 has revealed, are often combined to construct the risk of a technologically empowered totalitarian state.

Why do perceived dangers and risks occupy such a prominent place in lawmaking discourse? The findings presented in this chapter indicate that lawmakers conceive of the activity of changing or recognising legal concepts as driven by social needs and issues. In particular, threat, danger and risk are taken to warrant, or demand, legal intervention. Categories of danger can thus be understood as lawmakers' reasons for effecting legal change. When it comes to the subject matter of privacy, these dangers evidently have strongly dystopian undertones – these were analytically explored and discussed in this chapter.

Dystopian blueprints are an effective tool for constructing these danger categories and allow lawmakers to make a case for why privacy warrants their legal recognition. References to dystopian themes give normative significance to practices like data gathering, because they build on a rich, culturally specific fabric of shared understandings and imaginations of badness and danger. That lawmakers invoke the images and aesthetics of a terrifying state allows them to frame social situations as threatening.

Insights discussed in this chapter include the fact that references to dystopian fiction were, as mentioned in subsection 6.3.1, often tied discursively to historical and other forms of political totalitarianism, thereby rendering the dangerousness of TECHNOLOGY and THE STATE all the more realistic. Subsection 6.3.3 explores yet another trope in which the fictional tends to be conflated with the real: inspired by Orwell's work, lawmakers treat the calendar year 1984 as a deadline for impending dystopian doom, thereby emphasising the supposed need for regulatory intervention.

Section 6.3.2 has considered the fact that famous fictional dystopias tend to imitate historical instances of political injustice, suggesting that it explains why dystopian thought lends itself so well to social criticism. As Booker writes, 'dystopian

literature is [...] a particular kind of oppositional and critical energy.⁶¹³ The insight that legal and dystopian (or utopian) imaginations have much in common is another theme that can be traced throughout this chapter: the introduction to this chapter already points out that both dystopian and legal thought share a propensity towards normative imagination. Isaiah Berlin once remarked that utopia is an ‘archetype of normative thought, of thinking about how society ought to be, at least in a western tradition’.⁶¹⁴ The making of law, too, is a creative human activity that requires the imagination of a better society as a guiding ideal. The analyses in this chapter reveal that the technique of dystopian speculation⁶¹⁵ supplements legal imagination, whether through aiding the construction of dangers that frame legal intervention as necessary, or through enriching the ‘the construction of legal fictions and counterfactuals, which are essential to the functioning of law’.⁶¹⁶

This second role is discussed in more depth in section 4 of this chapter, which focuses on counterpointing and utopian concepts like democracy and privacy. Subsection 6.4.2 illustrates how utopian dreaming motivates lawmaking action, revealing – contrary to the claims of Sarat et al., who claim that modern legal thought lacks utopian inspiration⁶¹⁷ – that utopian elements feature visibly in the legal conceptualisation of privacy. The structural similarities these findings reveal between legal and utopian thought allow the speculation that utopian and dystopian elements might be a more general and pervasive phenomenon in the social construction of law. The findings presented here, particularly in subsection 6.4.2, strongly indicate that lawmakers are still committed to the view that ‘law will be the instrument used to lead us from the present to Utopia’,⁶¹⁸ or that it may, at the very least, help protect us from dystopian dangers.

⁶¹³ Booker (n 519) 3.

⁶¹⁴ Berlin (n 520).

⁶¹⁵ Peter Marks, *Imagining Surveillance: Eutopian and Dystopian Literature and Film* (Edinburgh University Press 2015) 6.

⁶¹⁶ Hanne and Weisberg (n 567) 18.

⁶¹⁷ Sarat, Douglas and Merrill Umphrey (n 46) 1.

⁶¹⁸ Ramiro Avilés (n 512) 226.

Furthermore, the findings of this chapter allow some more general observations about legal change as a social process. In particular, the pervasiveness of lawmakers' references to works of fiction to characterise the social status quo challenges the conception that modern lawmaking is a rationalised, fact-based enterprise that responds to objectively existent social needs. Instead, close-up sociological investigations shed light on the fact that categories of danger are themselves a matter of social construction. They furthermore reveal the centrality of emotion (like fear, as discussed in subsection 6.2.1), metaphor, popular culture and the literary vernacular in the discursive construction of these danger categories. This emphasises that the normative negotiations that underpin legal change are not insulated but instead connected to a rich environment of cultural meaning, illustrating that, as socio-legal scholars often point out, legal language 'normally draws on and interacts with 'ordinary' and specialised 'non-legal' discourses.'⁶¹⁹

⁶¹⁹ William Twining, 'Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context' (2005) 1 *International Journal of Law in Context* 5, 8.

7. Global Pressures and National Legal Identities

This chapter presents the empirical finding that legal discourse on information privacy in both the German and UK systems includes references to norms and concepts from other legal systems, as well as to international law. This is deemed a particularly interesting finding because it indicates that legal change in late modern legal systems is far from insular. This chapter addresses the ways in which deliberations of other legal orders feature in lawmakers' reasons for privacy recognition. German and UK lawmakers tend to view foreign and international law as normatively compelling and, in some cases, as explicitly obligating them to develop the legal recognition of privacy. At the same time, my findings reveal some resistance to these global pressures, usually entailing appeals to cultural distinctiveness. Given that lawmakers tend to discursively frame these considerations within a nationalist paradigm, I propose to interpret them as part of the social construction of national legal identity.

7.1 Introduction

The qualitative analysis of lawmakers' reasons for recognising information privacy involved coding of considerations that were brought into lawmaking discourse. The frequent surfacing of referrals to other legal systems and institutions (i.e. 'German Law', 'American Law' etc.), as well as to international law and legal institutions (i.e. 'the European Convention') led to the development of corresponding qualitative coding categories. The present chapter is based on an analysis of the rich semantic content in these categories. The apparent awareness that privacy laws are also produced elsewhere – in other countries and by other legal institutions – conveys that legal change in late modern societies takes place in a globalised context. This chapter illustrates how the phenomenon of globalisation and its manifestations in international law, international trade and international legal communication and exchange, impacts legal change in late modern legal systems. Specifically, the following subsections discuss how considerations of and beyond the nation state feature within lawmakers' reasons affording legal recognition to privacy.

Section 7.2, *Other laws, our laws*, tackles the significance of the above-mentioned frequent references to other legal regimes. It is clear that in both German and UK legal discourse, there is a sense of competition and ‘keeping up’ with foreign developments in privacy and data protection laws. The mere fact that other legal systems have elected to afford more extensive legal recognition to privacy seems to be taken as an automatic reason to follow suit – or at least as a reason to justify divergence. This entails an interesting insight into the normativity of foreign or ‘other’ law in late modern legal contexts. My empirical findings indicate that the fact that a concept is legally recognised in a different legal system has normative relevance and exerts pressure on lawmakers. My qualitative analyses support the conclusion that this relevance is particularly salient when the foreign legal system shares structural or normative commonalities with the respective domestic legal system.

A further pressure towards legal harmonisation that is discussed in section 7.3 stems from international law and legal institutions, particularly human rights instruments. Section 7.3 explores the ways in which international law, particularly the European Convention on Human Rights, featured as a consideration for domestic lawmakers. My empirical findings reveal that UK courts often claim that when they afford legal recognition to privacy, they merely meet their obligations under the European Convention. Section 7.3.3 critically evaluates this claim and explores additional more subtle and indirect ways in which Convention rights feature as considerations that weigh in favour of recognising privacy. The finding that international legal resources feature as reasons for lawmaking chimes with the extensive academic literature on globalisation and legal harmonisation. Section 7.4 keeps with the theme of international law but considers how another area of international law – data protection – has featured as a reason in favour of extending the legal protection of privacy in Germany and the UK. This section specifically considers how the legal instruments of the Council of Europe and the European Union featured in parliamentary discourses preceding the making and reform of data protection acts. This section reveals that international law is extremely normatively

compelling – in part because rules on cross-border data flows affect commercial opportunities and thus have the power to confer advantages or disadvantages with regard to trade relations.

However, the conforming and harmonising pressures identified in sections 7.2 and 7.3 are not the only meaningful aspect of lawmakers' concerns with foreign and international law. Section 7.5, *National legal identities and lawmaking*, focuses on the considerations and justifications for resisting the legal choices of others. Chief amongst these are notions of cultural distinctiveness. In the academic literature, culture is often signposted as a challenge to the idea of international or global law and the discussion in subsection 4 echoes some of these concerns.

A salient finding discussed throughout section 7.4 is that lawmakers tend to imagine and discursively construct notions of cultural distinctiveness within a nationalist paradigm. In particular, I focus on how understandings of concepts like 'the British people' or 'German legal values' feature as reasons for and against privacy recognition. Although the erosion of the nation state has often been predicted, it is clear that it still occupies a central position in lawmaking. Thus, following Benedict Anderson's conceptualisation of 'nation-ness' and 'nationalism' as 'imagined communities', subsection 7.4.1 proposes an interpretation of these findings as parts of *national legal identity*. Subsections 7.4.2 and 7.4.3 critically assess this interpretive lens with view to research findings.

Section 7.5 concludes by summarising the insights that I present and discuss in this chapter. The chapter ends by proposing that the tension between foreign and international normative pressures and national legal identities is part of the broader phenomenon of globalisation in late modern societies.

7.2 Other laws, our laws: references to foreign law

7.2.1 The normative force of foreign law

In the qualitative coding of lawmaking discourses preceding acts of privacy recognition, foreign law emerged as one of the central themes. This was particularly true of UK judicial and legislative contexts. It could also be detected in German judgments and parliamentary debates. It is clear that the privacy laws of other legal regimes are generally taken to be a reason weighing in favour of affording legal recognition to information privacy, albeit with different degrees of authority, as this subsection will show. Consider, by way of exemplary illustration, the following passage:

*[N]ations such as Holland, Germany and the United States, among others, all have privacy legislation. If they can draft it, why cannot we?*⁶²⁰

The finding that comparisons to foreign legal regimes are a common feature of legal discourse chimes with the existing literature on the development of privacy laws⁶²¹. It also echoes more general scholarship on adjudication.⁶²² A review of the last few decades of the highest court in the United Kingdom, the UK Supreme Court (formerly the Appellate Committee of the House of Lords) found that foreign law is extensively cited extensively.⁶²³ Though it has been suggested that German higher courts contain comparatively fewer references to foreign legal material, those are by no means unusual.⁶²⁴ The comparativist outlook of such references to foreign law

⁶²⁰ *Freedom And Responsibility Of The Press Bill*, House of Commons, Hansard Volume 217, 29.1.1993.

⁶²¹ Bennett (n 12) 91. Greenleaf (n 1) 4.

⁶²² The use of foreign law by the US Supreme Court is controversial even amongst justices. Some judges, including Breyer, take the consideration of foreign law to be necessary in a globalised world, while others, like Scalia, reject it as constitutionally unsound, see Ryan C Black, Ryan J Owens and Jennifer L Brookhart, 'We Are the World: The U.S. Supreme Court's Use of Foreign Sources of Law' (2016) 46 *British Journal of Political Science* 891, 891.

⁶²³ Tamas Gyorfi, 'The Supreme Court (House of Lords) of the United Kingdom' in Andràs Jakab, Arthur Deyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (2017) 705.

⁶²⁴ Michaela Hailbronner and Stefan Martini, 'The German Federal Constitutional Court' in Andràs Jakab, Arthur Deyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017) 379.

reflects a globalising trend in law that has been a topic of socio-legal scholarship.⁶²⁵ As Halliday and Osinski note, ‘modern legal norms demonstrate a remarkable tendency toward global convergence.’⁶²⁶ Thus, the finding that foreign legal regimes and concepts feature as considerations in lawmakers’ reasons for recognising privacy did not come as a surprise.

And yet, this finding prompts the question of why foreign law is taken to be so relevant by domestic lawmakers. What, in other words, endows foreign law with this normative force? Answers to this question are not obvious because usually, there is nothing strictly binding or obligating about foreign law; at least not from the institutional perspective of domestic lawmakers.⁶²⁷ This is partially because legal systems typically confine their jurisdiction, institutional concern and claim to authority to the nation state: German law is only binding in Germany, French law is only binding in France and so on. The paradigmatic focus on the nation state is sometimes referred to as ‘methodological nationalism’: Michaels, who points to its prominence in legal discourse, defines methodological nationalism in the following way: ‘[It] translates into what is called the Westphalian Model – the idea that the state presents the ultimate point of reference [...]’.⁶²⁸ It is true that legal concepts and principles typically only claim legitimacy – or bindingness – within the boundaries of their respective jurisdictions. Correspondingly, positivist traditions in legal theory have argued that what counts as legally valid is strictly determined by a given national legal system’s rule of recognition.⁶²⁹ From such a system-dependent point of

⁶²⁵ William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009) 269.

⁶²⁶ Terence C Halliday and Pavel Osinsky, ‘Globalization of Law’ (2006) 32 *Annual Review of Sociology* 447, 451.

⁶²⁷ However, advisory bodies may be obligated to consider it for research purposes: the Law Commission for England and Wales is under a duty under s. 3 (1) (f) of the Law Commissions Act 1965 to consider the law of foreign jurisdictions for its reform proposals. <https://www.legislation.gov.uk/ukpga/1965/22/section/3>

⁶²⁸ Michaels (n 38) 291.

⁶²⁹ Mitchell N Berman, ‘Of Law and Other Artificial Normative Systems’ in David Plunkett, Scott J Shapiro and Kevin Toh (eds), *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (Oxford University Press 2019).

view, foreign laws are norms that belong to entirely different normative systems,⁶³⁰ meaning they *prima facie* lack normative force for domestic legal agents.

But the kind of transnational legal dialogue that this study, amongst others, empirically detects subverts the parochial framework. Data reveal that lawmakers do take note of foreign legal developments and engage them in normative negotiations within their own legal systems. Against the indisputable background of methodological nationalism in the legal field, what are the assumptions and understandings that prompt lawmakers to take up foreign legal concepts as guides? One might suspect that in late modern systems, legal validity is not exclusively determined locally, but that there is something transcendental about a concept qualifying as ‘law’ or ‘legal’.⁶³¹ That would account for the fact that agents involved in lawmaking processes sometimes attribute merit to the fact that a given concept has been afforded legal recognition in another system. But what are the conditions under which this process occurs? What, in other words, has to be the case for lawmakers to consider foreign law as a reason to effect legal change in their domestic legal systems?

Scholarship on the use of foreign legal resources in high courts reveals that we currently lack a full methodological and empirical understanding of this phenomenon.⁶³² In particular, we have little insight into what motivates judges (and other lawmakers) to refer to foreign law.⁶³³ Based on my detailed empirical analyses of acts of privacy recognition, this section explores the normative ambiguity of foreign law with view to legal change. The findings of this project can roughly be summarised in the following way: foreign law is generally referred to as a reason for the legal recognition of privacy when there appears to be an assumption on behalf of lawmakers that the respective foreign system shares commonalities with the domestic

⁶³⁰ Paul Gragl, *Legal Monism: Law, Philosophy, and Politics* (Oxford University Press 2018) 43.

⁶³¹ The theory of monism “regards all legal orders and all bodies of law as one single system” *ibid* 20.

⁶³² Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Hart Publishing 2013).

⁶³³ *ibid*.

legal system. Regarding the case of privacy, these perceived commonalities tend to be of (a) a linguistic and structural nature, such as in the case of common or civil law traditions, or (b) they are of a normative kind and entail shared democratic values or cultural traditions. Both kinds of commonalities are explored below.

It is worth emphasising as a caveat that these sets of circumstances are by no means exhaustive or mutually exclusive; they merely carve up this research project's findings on references to foreign legal material into meaningful categories. In this way, they offer some structure for discussing and theorising the role of foreign law in legal change.

7.2.2 Structural commonalities between legal systems

Structural similarities across legal systems – for example, sharing the common law tradition – play a role in prompting lawmakers to view the respective foreign privacy law as relevant to domestic legal change. German judicial decisions on privacy most often refer to Swiss law, which judges evidently take to be more generous in affording compensation for privacy invasions:

*The legal status quo is thus similar to that in Switzerland; see Article 18 of the Swiss Civil Code and Article 49 of the Swiss Law of Obligations.*⁶³⁴

*Swiss law, which has dedicated greater attention to the legal protection of the personality than the German Civil Code, also demands adequate compensation for a violation of the personality.*⁶³⁵

The extracts stem from decisions of the German Constitutional Court. In both cases, the Constitutional Court went beyond the ambit of existing legal principles to afford

⁶³⁴ *Ärztliche Bescheinigung*, Urteil vom 2.4.1957, BGHZ 24, 72, at 14.

Der Rechtszustand ist damit ähnlich demjenigen, der in der Schweiz besteht (Art. 18 Schweiz. ZGB und Art. 49 ObligationenR).

⁶³⁵ *Ginsengwurzel*, Urteil vom 19.9.1961, NJW 1961, 2059, at 14.

enhanced protection to privacy in civil law.⁶³⁶ Citations of Swiss legal codes in these instances have the effect of rendering judicial lawmaking more palatable by emphasising that an equivalent scope of legal recognition *does* indeed exist *in statute* – albeit not in German statute. Stating that similar or *adequate* (‘angemessene’) privacy protection exists in a German-speaking and structurally similar legal system likely makes these instances of developing law by judicial creation appear less bold.

A similar use of foreign law can be detected in the discursive context of UK acts of privacy recognition. References to foreign law are significantly more common in UK higher courts than in German ones, a fact some scholars attribute to the more limited availability of translations into German.⁶³⁷ Most references to legal sources in UK judicial and legislative contexts are to other Commonwealth countries, most notably the United States,⁶³⁸ Australia,⁶³⁹ New Zealand⁶⁴⁰ and Canada⁶⁴¹. This finding is consistent with the role of foreign legal material in UK judicial decision-making.⁶⁴² In the discourse surrounding UK acts of privacy recognition, that a given foreign law is part of the Commonwealth and/or part of common law is often stated explicitly. This suggests that in the eyes of legal agents, this commonality justifies references to foreign legal resources:

Von einer der Eigenart der Persönlichkeitsverletzung angemessenen Beschränkung des immateriellen Schadensersatzes [...] geht auch das Schweizer Recht aus, das dem Rechtsschutz der Persönlichkeit größere Aufmerksamkeit gewidmet hat als das Bürgerliche Gesetzbuch (vgl. Art. 49 Abs. 1 des Schweizerischen Obligationsrechts).

⁶³⁶ Balthasar (n 5) 113, 114.

⁶³⁷ Hailbronner and Martini (n 626) 366.

⁶³⁸ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Nicholls of Birkenhead at 22.

⁶³⁹ *Data Matching*, House of Lords, Hansard Volume 586, 25.2.1998, Grand Committee.

⁶⁴⁰ *Freedom Of Information Bill*, House of Commons, Hansard Volume 340, 12.7.1999, Mr. Mike O'Brien.

⁶⁴¹ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Hope of Craighead at 120.

⁶⁴² Gyorfi (n 625) 706.

In Campbell v MGN [2004] UKHL 22, [2004] 2 WLR 1232 Lord Nicholls of Birkenhead observed at para 11 that: “[...] protection of various aspects of privacy is a fast developing area of the law, here and in some other common law jurisdictions.⁶⁴³

Brooke LJ went on to consider authorities involving invasion of privacy in England, in the Commonwealth and at Strasbourg, and concluded that it was a difficult question whether the Human Rights Act required the English courts to develop a law of privacy [...].⁶⁴⁴

These exemplary passages illustrate that shared structural similarities like a common law tradition and membership in the Commonwealth render foreign legal developments *relevant*. In this way, the mere fact that privacy is already a recognised right in the respective legal system is taken to be a reason in favour of the legal recognition of information privacy in the UK. The second passage goes as far as to speculate that English courts may be ‘required to develop a law of privacy’. Though this potential ‘requirement’ is taken here to stem primarily from the UK’s obligations as a member of the Council of Europe (including its relationship with the European Court of Human Rights – the ‘Strasbourg’ court – and with the European Convention on Human Rights⁶⁴⁵), the ‘Commonwealth’ is mentioned in the same vein. This conflation is interesting: unlike the Council of Europe, the Commonwealth does not formally purport to legally bind its member states. But the reference insinuates that membership of the Commonwealth nevertheless exerts pressure on domestic legal development.

The most striking finding, it is submitted, is *the extent* to which especially UK higher courts rely on resources of structurally and linguistically similar legal systems. Qualitative analyses of my data reveal that leading UK court decisions on information privacy have developed the very core of the test of what counts as ‘private’ on a close reading of formulations coined in Canada, Australia and the US.

⁶⁴³ *Douglas and others v Hello Limited and others* [2005] EWCA Civ 595, Lord Phillips at 50.

⁶⁴⁴ *Douglas and others v Hello Limited and others* [2005] EWCA Civ 595, Lord Phillips at 64.

⁶⁴⁵ The role of legally binding international organisations like the Council of Europe and the European Union and their influence on the development of information privacy laws will be considered at more length in section 7.3.

As opposed to the German (and continental European) legal conception of privacy that espouses a spatial division of public and private life into ‘spheres’ or ‘zones’,⁶⁴⁶ the anchor of English legal protection is the ‘reasonable expectation’; a formulation adopted from US law that originated in the 1967 case of *Katz v. United States*.⁶⁴⁷

In addition to the ‘reasonable expectation’-test, lawmakers in the UK have extensively used other Commonwealth legal resources for their core definitions of privacy. Consider, for example, the citation of a passage of a leading Australian High Court decision on privacy by Lord Hope in the famous UK case brought by Naomi Campbell against the newspaper publication of a picture depicting her seeking treatment for addiction:

The trial judge applied the test which was suggested by Gleeson CJ in Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 185 ALR 1[...]:

“[...] Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private [...]. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.”⁶⁴⁸

Furthermore, consider Hope’s reference to US tort law in the same judgment:

The test [...] is taken from the definition of the privacy tort in the United States, where the right of privacy is invaded if the matter which is publicised is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public: Restatement (Second) of the Law of Torts (1977), p 383 [...].⁶⁴⁹

⁶⁴⁶ Udo Di Fabio, ‘Rechtfertigungsanforderungen an Staatliche Eingriffe in Die Privatsphäre – Spärentheorie’, *Maunz/Düring, Grundgesetz* (CH Beck 2019) Rn. 158. For a critical assessment of the ‘sphere model’ of rights protection, see Alexy, *A Theory of Constitutional Rights* (n 196) 236.

⁶⁴⁷ Peter Winn, ‘Katz and the Origins of the “Reasonable Expectation of Privacy” Test’ (2008) 40 *McGeorge Law Review* 1.

⁶⁴⁸ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Hope of Craighead at 93.

⁶⁴⁹ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Hope of Craighead at 94.

It is clear that these respective ‘tests’ are concerned with the core meaning of privacy as a legal concept. Furthermore, Commonwealth legal resources are not only employed for negotiating the scope of practical applicability of privacy, but they are also used to advocate for the value of privacy. For example, in order to spell out privacy’s connection to democratic principles, Lord Nicholls cites the Canadian Supreme Court case of *R v Dymont*:

*[...] the importance of privacy [...] lies at the heart of liberty in a modern state. [...] The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state: see La Forest J in R v Dymont [1988] 2 SCR 417, 426.*⁶⁵⁰

R v Dymont is a leading Canadian Supreme Court decision on the constitutional right to privacy under section 8 of the Canadian Charter of Rights and Freedoms. The passage of the Canadian judgment referred to in *Campbell* reads:

*[...] Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.*⁶⁵¹

The rhetoric of the Canadian judgment is dense with morally loaded concepts like ‘autonomy’, ‘constitutional protection’, ‘public order’ and ‘democratic state’. These are employed to make the case for why privacy is valuable – and, implicitly, why it warrants legal recognition. Furthermore, the citation of the Canadian case is placed at a critical passage in the *Campbell* judgment; right at before the deliberation of whether *Campbell*’s claim warrants the judges’ allegiance.

Court judgments are not the only Canadian legal resource that UK judges refer to for that purpose:

⁶⁵⁰ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Nicholls of Birkenhead at 12.

⁶⁵¹ *R v Dymont* [1988] 2 SCR 417, 426, La Forest J.

In the powerful words of the Canadian Privacy Commissioner in his report on Genetic Testing and Privacy (1995, at p 2):

“The measure of our privacy is the degree of control we exercise over what others know about us. [...] we are all entitled to expect enough control over what is known about us to live with dignity and to be free to experience our individuality.[...] Unless we each retain the power to decide who should know our political allegiances, our sexual preferences, our confidences, our fears and aspirations, then the very basis of a civilised, free and democratic society could be undermined.”⁶⁵²

The reference to the Canadian Privacy Commissioner’s report in Lady Hale’s judgment embeds privacy in a densely value-laden framework, linking it to notions like *dignity* and *democracy*. Again, this moral explication of privacy is placed at the critical section of the judgment that ascertains whether privacy rights outweigh the benefits of DNA databases. This question is at the very heart of the case, and evidently not (yet) settled by existing law. The normative negotiation that occurs at this stage in judicial deliberation on ‘hard cases’⁶⁵³ entails ‘weighing up’ different legal concepts against each other to resolve the tension at the heart of the dispute. This illustrates that in UK judicial acts of privacy recognition, foreign law does not play a merely tangential role; it is relied on for substantive legal developments.

Just as in the case of German references to Swiss legal codes, the fact that foreign legal resources feature at the core of seminal UK privacy case law may be a mechanism for veiling judges’ quasi-legislative activities in affording legal recognition to privacy. Scholars have pointed out that paradoxically, even though the common law explicitly recognises case law as a legal resource, in the highest UK courts, there remains a commitment to staying out of politics and a culture of judicial deference.⁶⁵⁴ Being able to resort to American, Australian or Canadian law enables UK judges to rely on resources that are, technically, *valid law* – though of course they

⁶⁵² *Regina (S) v Chief Constable of the South Yorkshire Police*

[2004] 1 WLR 2196 House of Lords [2004] UKHL 39, Baroness Hale of Richmond at 69.

⁶⁵³ In jurisprudence, ‘hard cases’ are those that cannot be solved exclusively in reference to existing posited legal norms, but that require judges to engage in evaluative argumentation, see Dworkin, ‘Taking Rights Seriously’ (n 123) 102–104; Dworkin, ‘Hard Cases’ (n 189).

⁶⁵⁴ *Gyorfi* (n 625) 706.

are only valid in another legal system. Still, the law-like quality of foreign legal resources allows judges to frame their moral and political arguments (such as about the value of privacy) within sufficiently doctrinal categories,⁶⁵⁵ thus mitigating the charge of judicial activism.

7.2.3 Normative commonalities between legal systems

In addition to shared linguistic or common law features, a criterion that seems to explain when domestic lawmakers view themselves as prompted by foreign law are normative commonalities, such as shared democratic values. When they reference these features of foreign legal systems, legal agents typically emphasise that legal privacy protections are morally desirable and that domestic law compares unfavourably with the progressive tendencies elsewhere:

*When one goes to Scandinavia, Germany or the United States and sees the safeguards that they have provided and is asked, "How do you regulate these matters in the United Kingdom?" one feels a sense of sheer shame that one cannot point to any regulation [...]*⁶⁵⁶

*In other countries, including the United States, Germany, Holland, Italy and France, privacy laws have worked for decades [...]. Why is it that the law in this country authorises no protection for individual privacy? Why are we so far behind? Why has not something been done already?*⁶⁵⁷

The prevalence of passages similar to the ones above in both UK and German legal discourse insinuates competitiveness when it comes to making 'good law'. Allusions to normative commonalities with other legal systems often feature alongside references to structural similarities discussed above, so these considerations overlap to a large degree. But the notion that other legal systems share values and normative commitments is arguably broader and includes a wider range of foreign legal

⁶⁵⁵ *ibid* 707.

⁶⁵⁶ *Interception Of Mail*, House of Commons, Hansard, Volume 2, 1.4.1981, Mr Price.

⁶⁵⁷ *Protection Of Privacy Bill*, House of Commons, Hansard Volume 145, 27.1.1989, Mr. John Browne.

material: In both UK and German instances of recognition, we can detect mentions of other nation states, as well as more vague geographical designators like ‘Europe’ or ‘the West’. Consider, by way of example, the following passages:

In other countries of the Western world, legal developments afford financial compensation for immaterial damage to a much greater extent [...] Nowhere in the West except for Germany do illegal acts remain without sanction this often – and that only because they “merely” cause immaterial damage.⁶⁵⁸

The European Convention is quite clear in providing a right of privacy [...] Western Germany and many other Western European countries [...] have made just the kind of law proposed in this amendment. If these laws can work perfectly well in other West European countries, why should they not work here?⁶⁵⁹

It is clear that the above references to ‘the West’, ‘the Western World’ and ‘Western Europe’ are ideologically potent. They entail assumptions of a society that is, in the words of Stuart Hall, ‘developed, industrialized, urbanized, capitalist, secular, and modern’.⁶⁶⁰ Most importantly, the concept of ‘the West’ implies normative superiority. This invites critical evaluation:⁶⁶¹ couching the legal recognition of privacy as something broadly ‘Western’ likely frames it as morally desirable. A similar effect is achieved by references to the US law (especially the First Amendment provision), which English lawmakers appear to view as exemplary on standards of democracy and liberalism. Findings reveal that in UK legislative discourse, there is ample concern that privacy might conflict with traditionally liberal values like

⁶⁵⁸ *Soraya*, Beschluss vom 14.2.1973, BVerfGE 34, 269, at 43.

Sie konnte sich auf die Rechtsentwicklung in anderen Ländern der westlichen Welt berufen, die in weit höherem Maße die Möglichkeit eines Geldersatzes auch für immaterielle Schäden anerkennen [...] [N]irgendwo im Westen bleibe eine unrechtmäßige Tat so häufig wie in Deutschland ohne zivilrechtliche Sanktion, weil sie „nur“ einen immateriellen Schaden verursache.

⁶⁵⁹ *British Telecommunications Bill*, House of Lords, Hansard Volume 421, 18.6.1981, Lord Gardiner.

⁶⁶⁰ Stuart Hall, ‘The West and the Rest: Discourse and Power’ in Stuart Hall and Bram Gieben (eds), *Formations of Modernity* (Polity in association with the Open University 1992) 277.

⁶⁶¹ *ibid.*

freedom of speech. Comparisons with US law are engaged to counteract such objections:

*Even in the United States, the country of the First Amendment, there is ample protection of personal privacy under state statutes and American common law [...]*⁶⁶²

*We do not need a First Amendment to preserve the freedom of the press, but the abuse of that freedom can be ensured only by the enforcement of a right to privacy. [...] Especially since there is available in the United States a wealth of experience [...] it is to be hoped that the making good of this signal shortcoming in our law will not be long delayed.*⁶⁶³

These examples illustrate that references to foreign legal material occupy a central place in normative negotiations on privacy. Lawmakers in courts and legislative contexts frequently cite foreign law as a reason for affording legal recognition to information privacy. That foreign law has this compelling force, this section has argued, hinges on perceived structural and normative commonalities between legal systems. These, it has been suggested, may explain the circumstances under which foreign law is of relevance for domestic legal agents. This interpretation of the data chimes with the literature on legal transplants that identifies ‘affinity’ of exporting and importing legal systems as one of the factors that facilitate and motivate legal transplants.⁶⁶⁴ In light of this scholarship, one might suppose that the whole process of transnational legal exchange is more robust when legal systems share commonalities or affinities.

⁶⁶² *Human Rights Bill*, House of Lords, Hansard, Volume 583, 24.11.1997 Lord Lester of Herne Hill.

⁶⁶³ *Kaye v Robertson & Sport Newspapers Ltd* [1991] FSR 62; *The Times* 21 March 1990, Lord Justice Leggatt.

⁶⁶⁴ Halliday and Osinsky (n 628) 458.

7.2.4 Foreign law as mere inspiration?

One objection to this interpretation of findings may be to argue that references to foreign law are mere inspiration; they fall short of actually pressuring lawmakers to afford recognition to privacy. Such a perspective may sketch the normative influence of foreign legal material on domestic law as analogous to that of ideas and arguments developed in legal academic scholarship. Indeed, some findings of this research project may be read in support of that view. In particular, it is remarkable that references to foreign legal material often feature discussions of legal academic literature (sometimes even along references to foreign academic scholarship). Consider, for example, a passage of the Court of Appeal's judgment in the UK case of *Kaye v Robertson*:

This case nonetheless highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens. This has been the subject of much comment over the years, perhaps most recently by Professor Markesinis (The German Law of Torts, 2nd edn 1990 page 316) where he writes: "English law, on the whole, compares unfavourably with German law [...]"⁶⁶⁵

Similarly, in German judicial discourse preceding acts of privacy recognition, it is conventional to cite legal scholarship and foreign legal material in the same reference:

In the legal literature, Gierke and Kohler already pleaded for the recognition of an extensive right to the personality, see (Otto v. Gierke, Deutsches Privatrecht, [...]; Kohler, „Das Recht an Briefen“ in Archiv für bürgerliches Recht, [...]) And for Swiss law, compare Article 28 of the Swiss Civil Code [...]"⁶⁶⁶

⁶⁶⁵ *Kaye v Robertson & Sport Newspapers Ltd* [1991] FSR 62; The Times 21 March 1990, Lord Bingham.

⁶⁶⁶ BGH – *Leserbrief/Veröffentlichung von Briefen*, Urteil vom 25.5.1954, BGHZ 13, 334 at 14-15.

Im Schrifttum haben sich schon Gierke und Kohler für die Anerkennung eines umfassenden Persönlichkeitsrechts eingesetzt (Otto v. Gierke, Deutsches Privatrecht, [...]; Kohler, „Das Recht an Briefen“ in Archiv für bürgerliches Recht, [...]; für das schweizerische Recht vgl. Schweizer ZivGB Art. 28).

The apparent proximity between foreign law and academic scholarship could be explained on the basis that it is often simply *because* of academic scholarship that legal agents in a given legal system know of foreign law in the first place. When discussing US law, UK lawmakers often refer to the US scholars William Prosser's and Alan Westin's work on privacy.⁶⁶⁷ References to US legal scholarship are equally well documented in German legal discourse on privacy, particularly preceding the 1970 Hessian Act on Data Protection.⁶⁶⁸ Indeed, Warren and Brandeis' seminal 1890 Harvard Law Review article *The Right to Privacy* – often referred to as one of the most influential pieces of legal academic scholarship⁶⁶⁹ – itself featured an explicitly comparative approach and consulted British and French laws to construe foreign precedent for the legal protection of privacy in the US.⁶⁷⁰ To this day, references to Warren and Brandeis are very common in English discussions on privacy law; they provide the starting point for the majority of scholarly works on the matter and were also frequent in the acts of privacy recognition investigated here. Consider the exemplary passages from UK legislative and judicial discourse:

*In 1890, two distinguished jurists, one of whom subsequently became a notable member of the Supreme Court, wrote an article for the Harvard Law Review, which was of crucial importance in the development of the law in the United States, saying, in effect, "These are the cases in English common law. They are part of our law." Let us develop a law of privacy in the United States [...].*⁶⁷¹

But it was not until 1890 that in their article "The Right to Privacy" [...] Warren and Brandeis reviewed a number of English cases on defamation and breaches of rights of

⁶⁶⁷ See, for example, *Kaye v Robertson & Sport Newspapers Ltd* [1991] FSR 62; *The Times* 21 March 1990; *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Hope of Craighead at 94.

⁶⁶⁸ Spiros Simitis, 'Privacy – An Endless Debate?' (2010) 98 *California Law Review* 1989, 1995.

⁶⁶⁹ Solove cites Roscoe Pound, who states the Harvard Law Review Article 'did nothing less than add a chapter to our law.' Solove, 'A Brief History of Information Privacy Law' (n 4) 10.

⁶⁷⁰ Warren and Brandeis (n 91) 218.

⁶⁷¹ *Right Of Privacy Bill (Order for Second Reading Reading)*, House of Commons Hansard, Volume 794, 23.1.1970 Mr. Alexander W. Lyon.

*property, confidence and contract, and concluded that all were based on a broader common principle. They argued that recognition of the principle would enable the courts to [...] privacy.*⁶⁷²

In this research project's data set, lawmakers' references to academic scholarship were generally part of normative argumentation in favour of affording legal privacy recognition. This is visible in the two examples above. The fact that US scholars have afforded legal recognition to privacy on the basis of what UK legal agents take to be 'English' foundations is read as a reason to 're-import' the concept back into their legal culture of origin.⁶⁷³ All this suggests that legal academic scholarship and references to foreign law have historically worked in tandem to position privacy as warranting legal attention. It may be that privacy is special in this regard.

Does this proximity between foreign law and academic scholarship on privacy mean that foreign law is not quite as normatively influential as this subsection has suggested? Alternatively, one might argue that the appeal and influence of legal academic scholarship is often underestimated. To be sure, degrees of influence are bound to be liminal. But research findings demonstrate that agents engaged in legal change view foreign legal resources as *prima facie* compelling when they presume sufficient structural or normative commonalities with the foreign legal system in question.

That, however, does not mean that arguments that refer to foreign law as a reason for privacy recognition are necessarily successful, or even that they remain uncontested. Especially in UK parliamentary debates, references to foreign law often elicit counterarguments that justify English 'exceptionalism'⁶⁷⁴ by emphasising

⁶⁷² *Kaye v Robertson & Sport Newspapers Ltd* [1991] FSR 62; *The Times* 21 March 1990, Lord Justice Leggatt.

⁶⁷³ The phenomenon that foreign appreciation of a cultural artefact or practice can trigger a revival or 'renaissance' in its place of origin is sometimes called 'pizza effect', referencing the fact that the modern appreciation of pizza in Italy post World War One occurred as a consequence of its popularity amongst Italian immigrants in the US, see Agehananda Bharati, 'The Hindu Renaissance and Its Apologetic Patterns' (1970) 29 *Journal of Asian Studies* 267, 273. Warren and Brandeis (n 91) 218.

⁶⁷⁴ The terminology of 'exceptionalism' surfaces in my data, for example, see *Reports into Investigatory Powers*, House of Commons, Hansard Volume 597, 25.6.2015, Mark Field.

differences between the UK and the respective country of comparison. The below passage exemplifies the form of such arguments in relation to the legal protection of privacy:

*Perhaps it is not surprising that Germany, which suffered under the Gestapo with all the terrible powers of an oppressive police state, should have been determined that nothing of that kind should happen again. It may well be that the safeguards which have been thought right to be introduced in Germany are not exactly what is required here.*⁶⁷⁵

Similar discursive strategies are explored at more length in section 7.4. For the purposes of this section, it is noteworthy that lawmakers actively justify legal divergence on privacy protection in their domestic legal contexts. That lawmakers evidently feel this need to engage in justifications confirms the view that foreign privacy laws have normative relevance; they surface as reasons in favour of domestic privacy recognition.

7.3 Harmonising pressures of the European Convention on Human Rights

7.3.1 International law as a reason for privacy recognition

In addition to foreign legal resources, mentions of international law indicate that change in late modern legal systems is far from insular. The academic literature on privacy tends to emphasise the ‘harmonising’ influence of human rights laws and legal instruments in bringing legal system to adopt domestic privacy laws.⁶⁷⁶ The following passage from the House of Commons debate on the incorporation of the European Convention into domestic law is indicative of this pressure:

*The European Convention on Human Rights provides a range of rights which we ought long ago to have incorporated into British law and to which we are already committed by international agreement.*⁶⁷⁷

⁶⁷⁵ *Interception Of Communications*, House of Lords, Hansard Volume 409, 21.5.1980, Lord Elwyn-Jones.

⁶⁷⁶ Bennett (n 12) 91.

⁶⁷⁷ *Bill of Rights Debate*, House of Commons, Hansard Volume 895, 15.7.1975, Mr. Beith.

A variety of international law instruments surface in this research project's findings. One provision that stands out in privacy discourses is Article 8 of the European Convention on Human Rights, which protects the 'right to respect for private and family life'. In exploring the role of international human rights law as a reason in favour of privacy recognition, the discussion in this section focuses on this Convention. Other international law instruments that have a prominent role in German and UK domestic legal discourses on privacy recognition are those concerned with data protection; particularly the Council of Europe's Data Protection Convention 108, the Privacy and Databank Resolutions No (73) 22 and No (74) 29 that preceded the Convention 108, as well as the European Union's Data Protection Directive 95/46/EC. The role of these instruments is the subject of the following section (7.4).

Both Germany and the UK were amongst the first member states to ratify the Convention in 1951. While the Convention has enjoyed binding legal status within German law since 1953,⁶⁷⁸ remedies for breaches of Convention rights in UK courts were only made available with the coming into force of the UK Human Rights Act in October 2000. Interestingly, even though the Human Rights Act is technically domestic law, UK legal discourse still 'prefers the term "Convention rights" to constitutional or fundamental rights',⁶⁷⁹ implying legal agents remain acutely aware of its international law origins. This impression is further enhanced by frequent references to the European Court of Human Rights,⁶⁸⁰ suggesting that in applying Human Rights law, English courts view themselves as answerable to an international, rather than domestic, legal authority.

References to the European Convention were certainly less frequent in German acts of recognition. This is likely owed to the fact that the German judicial recognition of privacy rights occurred in large part before the Council of Europe

⁶⁷⁸ Bundesgesetzblatt (BGBl) (1954) II: 14; 15.12.1953

⁶⁷⁹ Gyorfi (n 625) 685.

⁶⁸⁰ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Hope of Craighead at 106.

institutions acquired legal significance.⁶⁸¹ However, in 2004, the European Court of Human Rights decided that German law afforded insufficient protection to privacy under Article 8 of the Convention, thus forcing the German Constitutional Court to overturn a judgment that permitted the publication of various photographs of Princess Caroline of Monaco in newspapers.⁶⁸² German legal agents unanimously recognise that Convention law is binding,⁶⁸³ so the Strasbourg Court's judgement was taken as an incontestable reason in favour of affording the prescribed scope of legal recognition to privacy. Admittedly, this case seems to reveal the remarkable impact of international law on domestic legal privacy recognition.

However, my qualitative analyses of German legal discourse show that the privacy recognition that was subsequently afforded by German legal agents mostly consisted in tacitly accepting the European Court's decision, meaning that the German government refrained from making an appeal to the Court's Grand Chamber. This project's research findings reveal that following an inquiry by parliamentarians, the German government justified its decision to refrain from an appeal by alluding to the fact that the enhanced privacy protection for public personas ('figures of contemporary life') that the Strasbourg Court requested was comparatively marginal and did not give rise to constitutional concerns regarding press freedoms.⁶⁸⁴ It is true that at the time of the *Von Hannover* judgment in 2004, a framework of constitutional and civil privacy rights was already in place in

⁶⁸¹ See Balthasar (n 5).

⁶⁸² *Von Hannover v Germany* 59320/00 [2004] ECHR 294.

⁶⁸³ In the German legal hierarchy, the European Convention has the status of binding federal law. While it remains unclear whether it binds the Constitutional Court, the Court himself has iterated that it takes itself obligated to employ the Convention as an interpretation aid for constitutional matters, see Christian Starck, 'Das Caroline-Urteil Des Europäischen Gerichtshofs Für Menschenrechte Und Seine Rechtlichen Konsequenzen' (2006) 61 *JuristenZeitung* 76, 79.

⁶⁸⁴ The government further explained that legal experts, including the German Constitutional Court, had agreed with the decision not to appeal, see *Antwort der Bundesregierung auf die Kleine Anfrage Abgeordneter und Fraktionen der FDP: Auswirkung des sog. Caroline-Urteils des Europäischen Gerichtshofes für Menschenrechte auf die Pressefreiheit und das Presserecht in Deutschland*, Deutscher Bundestag, 15. Wahlperiode, Drucksache 15/4210, 4.

Germany,⁶⁸⁵ so the substantive impact of the *Van Hannover* judgment is easily overestimated.

The German government also stated that it did ‘not view it as its job to assess the judgments of international courts’⁶⁸⁶ and that it did not plan to introduce privacy legislation as a consequence of the Strasbourg judgment.⁶⁸⁷ Thus, this project’s findings paint a more reserved image of the influence of the Convention on German acts of privacy recognition. The importance of Article 8 on the privacy rights of public personas under German law is undoubtedly significant. But research findings provide little evidence in support of the view that German lawmakers viewed the Convention as prompting them to actively develop more extensive privacy safeguards. However, findings indicate that the dynamic in the UK, which is discussed in the following subsections, has been very different.

7.3.2 Convention rights and judicial powers

Section 1 of the Human Rights Act incorporates Article 8 of the European Convention of Human Rights. Regarding the recognition of a right to privacy in UK law Article 8 is viewed as a paradigm change.⁶⁸⁸ It committed public bodies to respecting privacy and thereby prompted British courts to expand civil law remedies available for privacy invasions. This has not only been pointed out repeatedly by academic scholarship on the matter, but it also emerges as a finding throughout UK acts of recognition:

⁶⁸⁵ Starck (n 685) 79.

⁶⁸⁶ *Antwort der Bundesregierung auf die Kleine Anfrage Abgeordneter und Fraktionen der FDP: Auswirkung des sog. Caroline-Urteils des Europäischen Gerichtshofes für Menschenrechte auf die Pressefreiheit und das Presserecht in Deutschland*, Deutscher Bundestag, 15. Wahlperiode, Drucksache 15/4210, 2:

Die Bundesregierung sieht es nicht als ihre Aufgabe an, Urteile internationaler oder nationaler Gerichte zu bewerten,

⁶⁸⁷ *Antwort der Bundesregierung auf die Kleine Anfrage Abgeordneter und Fraktionen der FDP: Auswirkung des sog. Caroline-Urteils des Europäischen Gerichtshofes für Menschenrechte auf die Pressefreiheit und das Presserecht in Deutschland*, Deutscher Bundestag, 15. Wahlperiode, Drucksache 15/4210, 4.

⁶⁸⁸ Michael Tilbury, ‘Privacy: Common Law or Human Right?’ (2014) 1998 *Emerging Challenges in Privacy Law: Comparative Perspectives* 157, 157.; Richards and Solove (n 345) 166. Phillipson (n 346).

*Until the Human Rights Act 1998 came into force, there was no equivalent in English domestic law of Article 8 the European Convention or the equivalent articles in other international human rights instruments which guarantee rights of privacy. So the courts of the United Kingdom did not have to decide what such guarantees meant.*⁶⁸⁹

The passage from Lord Hoffmann's judgment in *Campbell* illustrates that the Human Rights Act not only represents an act of legislative privacy recognition in itself, but that it furthermore demands the cumulative recognition of various dimensions of privacy by UK courts. The suggestion that judges now 'have to decide' on privacy matters gives some insight into perceived degrees of judicial discretion on the matter. While legal scholarship generally portrays UK courts as having taken active and creative steps towards developing what has been called 'exuberant new branch of English common law',⁶⁹⁰ Lord Hoffmann's wording insinuates that judges were themselves *obligated* to grant the respective recognition. Analyses of judicial discourse surrounding acts of recognition in the UK reveal that judicial agents generally hold themselves out to be obligated by international law.

In particular, judicial agents frame the extent to which they afford legal recognition to privacy as merely meeting their duty under the Convention (or Parliament's adoption of Convention rights under the Human Rights Act). In the following passage of his judgment in *Douglas v Hello*, Lord Phillips even references Hansard to support his claim that it was the legislature's intention that judges would be entrusted with developing the law:

*The enactment of the Human Rights Act provoked a lively discussion of the impact that it would have on the development of a law protecting privacy. The Government has made it clear that it [...] anticipates that the judges will develop the law appropriately, having regard to the requirements of the Convention - see the comment of Lord Irvine LC in the course of the debate on the Human Rights Bill HL Debs Vol 583 Col 771 [...] The courts have not accepted this role with whole-hearted enthusiasm.*⁶⁹¹

⁶⁸⁹ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Hoffmann at 49.

⁶⁹⁰ Seipp (n 467) 363.

⁶⁹¹ *Douglas and others v Hello Limited and others* [2005] EWCA Civ 595, Lord Phillips at 46.

The last sentence of the above passage most obviously contrasts with the dominant view in the academic literature that English privacy is largely an activist judicial creation.⁶⁹² Furthermore, following a systematic analysis of the scope of judicial discretion under the Human Rights Act, Young has pointed out that statements in Hansard on this matter are ‘incapable of providing a clear Parliament-defined boundary to the judiciary's power.’⁶⁹³ Countervailing observations such as these shed doubt on the ‘official story’ that UK judges are obligated by international law to recognise privacy rights. A competing interpretation may be that emphasising the force, or ‘bindingness’ of the Convention allows judicial agents to conceal the scope of their own discretionary powers.

Indeed, a similar tension can be observed with regard to the higher courts in the German legal system. Here, it is typically the Basic Law, which is portrayed as effectively *requiring* the court to engage in judicial lawmaking (‘Richterliche Rechtsfortbildung’⁶⁹⁴). Consider, for example, a passage in *Lüth*, an early case on the recognition of privacy as a dimension of the right to personality. There, it was claimed that judicial agents receive ‘directives and impulses’ from existing constitutional provisions, prompting them to extend the scope of legal recognition:

*The freely developed the human personality [...] must count as a constitutional foundation for all areas of law [...] the legislature, administration and the judiciary must receive from it directives and impulses.*⁶⁹⁵

Consider, by way of comparison,

⁶⁹² Seipp (n 467) 363.

⁶⁹³ Alison Young, ‘Judicial Sovereignty and the Human Rights Act 1998’ (2002) 61 Cambridge Law Journal 53, 53.

⁶⁹⁴ *Soraya*, Beschluss vom 14.2.1973, BVerfGE 34, 269, at 17.

⁶⁹⁵ *Lüth*, Beschluss vom 15.1.1958, BVerfGE 7, 198:
[Die] sich frei entfaltenden menschlichen Persönlichkeit [...] muss als verfassungsrechtliche Grundentscheidung für alle Bereiche des Rechts gelten; Gesetzgebung, Verwaltung und Rechtsprechung empfangen von ihm Richtlinien und Impulse.

*These changes [introduction of Human Rights Act] have implications for the future development of the law. They must influence the approach of the courts to the kind of information which is regarded as entitled to protection [...].*⁶⁹⁶

Chapter 5 of this thesis has already explored how constitutional principles have shaped the recognition of privacy rights. The findings that underpin the present section suggest that a similar effect can be ascertained regarding international law – particularly Convention Rights – in UK acts of recognition. In light of the absence of a written constitution in the UK legal system, it has been suggested that the introduction of the Human Rights Act has affected judicial discretion in ways analogous to the way fundamental rights catalogues have oriented judicial powers in continental legal orders.⁶⁹⁷ Constitutional provisions are notoriously vague, so institutions that monopolise constitutional interpretation (typically the judiciary) have extensive normative powers: ‘arguably, the most efficacious power[...] is definitional power – the power to classify, interpret, and label.’⁶⁹⁸

Are UK judicial agents speaking *genuinely* when they invoke either constitutional provisions or international law as a source of authority? Did the UK Supreme Court in *Campbell* truly face *obligation* to extend the legal recognition of privacy? It is difficult to determine whether broad exercises of judicial discretion in the highest courts are ‘activist’, since, as stated by Hailbronner and Martini, ‘there is no objective measure of when the court overreaches.’⁶⁹⁹ At the same time, the involvement of courts in settling political disputes remains notoriously controversial in late modern democracies,⁷⁰⁰ so judicial agents are incentivised to downplay exercises of judicial discretion. Therefore, some scepticism is warranted when it

⁶⁹⁶ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Hoffmann at 52.

⁶⁹⁷ Gyorfi (n 625) 685.

⁶⁹⁸ Halliday and Osinsky (n 628) 451.

⁶⁹⁹ Hailbronner and Martini (n 626) 362.

⁷⁰⁰ Jeremy Waldron, ‘The Core of the Case against Judicial Review’ (2006) 115 *The Yale Law Journal* 1346.

comes to interpreting the ‘official story’; particularly the claim that judicial rights recognition merely amounts to what international law – the Convention, in our case – requires.

But even if we doubt that international law instruments like the Convention exert overriding normative force or ‘bindingness’ on the judiciary, we may nevertheless conclude that they are amongst the reasons for which privacy is afforded legal recognition in domestic contexts. Thus, informed by scepticism towards the supposed obligatory force of the European Convention, the following paragraphs explore the more subtle and specific ways in which Convention rights feature as reasons for recognising privacy in UK acts of recognition.

7.3.3 The influence of Article 8 ECHR in UK law: privacy and confidence

When scholars argue that the incorporation of Article 8 of the Convention through the Human Rights Act has changed privacy in UK law,⁷⁰¹ they typically refer to two overlapping developments in the common law. These include, on the one hand, an extension of a previously existent course of action; *breach of confidence*,⁷⁰² and on the other a terminological shift from ‘confidence’ to ‘privacy’ that some view as establishing an independent tort of ‘misuse of private information’ in English law.⁷⁰³

Judicial agents themselves have characterised their own treatment of Article 8 as ‘absorbing the rights protected by Article 8’ into the cause of action for breach of confidence.⁷⁰⁴ In this respect, the ‘official story’ on privacy recognition in the courts generally mirrors academic commentary. In *Campbell*, Lord Nicholls even references Phillipson’s article *Transforming Breach of Confidence? Towards a Common Law*

⁷⁰¹ Tilbury (n 690) 157.; Richards and Solove (n 345) 166.; Phillipson (n 346).

⁷⁰² Richards and Solove (n 345) 168.

⁷⁰³ *At least the verbal difficulty referred to in (iii) above has been avoided by the rechristening of the tort as misuse of private information: per Lord Nicholls of Birkenhead in Campbell [2004], see McKennitt v Ash [2006] EWCA Civ 1714; [2008] QB 73; [2007] 3 WLR 194; [2007] EMLR 113; The Times, 20 December 2006, Lord Buxton at 8.*

⁷⁰⁴ *Originally: A v B plc [2003] QB 195, 202, para 4, Lord Woolf CJ. See also: Campbell v MGN Ltd [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Nicholls of Birkenhead at 16-17.*

*Right of Privacy under the Human Rights Act.*⁷⁰⁵ Phillipson describes the judicial recognition of privacy as “*common law development [fused] with inspiration from Article 8 of the European Convention on Human Rights.*”⁷⁰⁶

There is further consensus on the matter that Article 8’s explicit mention of ‘private life’ has prompted a terminological shift from ‘confidence’ to ‘privacy’.⁷⁰⁷ Research findings indicate that judges themselves take note of this development:

*The language has changed following the coming into operation of the Human Rights Act 1998 and the incorporation into domestic law of Article 8 and Article 10 of the Convention. We now talk about the right to respect for private life [...]*⁷⁰⁸

But the substantive legal effects of this terminological shift are more controversial. On the one hand, findings show that judicial agents express scepticism that Convention law has effected substantive changes to the common law breach-of-confidence tort:

*I doubt whether the result is that the centre of gravity, as my noble and learned friend Lord Hoffmann says, has shifted. It seems to me that the balancing exercise to which that guidance is directed is essentially the same exercise [...]*⁷⁰⁹

Similar views on the limited influence of the Convention are expressed throughout judgments, including that of Baroness Hale in *Douglas v. Hello*.⁷¹⁰ At the same time, various passages betray that judicial agents themselves doubt that the notion of

⁷⁰⁵ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Nicholls of Birkenhead at 86.

⁷⁰⁶ Phillipson (n 71) 276. It may be pointed out that ‘inspiration’ characterises a degree of influence that is much weaker than a legal *obligation* to recognise privacy. Indeed, Phillipson himself describes the post-Human Rights Act broadening of the breach-of-confidence tort as ‘a quiet revolution’ Phillipson (n 346) 276., implying that in recognising privacy, judicial agents exercised discretionary powers rather than ‘merely’ doing their duties.

⁷⁰⁷ *ibid.*

⁷⁰⁸ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Hope of Craighead at 86.

⁷⁰⁹ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Hope of Craighead at 86.

⁷¹⁰ *Douglas and others v Hello Limited and others* [2005] EWCA Civ 595, Lord Phillips at 52.

privacy embedded in Article 8 *merely* broadens English law's conception of confidence. For example, in discussing the significance of the Convention for English judges, Lord Phillips remarks,

*[W]hen considering what information should be protected as private pursuant to art 8, it is right to have regard to the decisions of the ECtHR. We cannot pretend that we find it satisfactory to be required to shoe-horn within the cause of action of breach of confidence claims.*⁷¹¹

The notion of 'shoe-horning' suggests that the legal framework of the breach-of-confidence tort is inadequate for the kind of privacy recognition that judicial agents seek to, (or 'must', as they frame it,) afford. Does the alternative formulation of *misuse of private information* constitute a tort fully separate from that of breach-of-confidence in UK law?⁷¹² Though a matter of debate, some academic commentators seem to hold this view: Richards and Solove emphasise that courts increasingly disregarded the 'confidential relationship'-element within the breach-of-confidence tort⁷¹³ and Giliker describes the judicial recognition of privacy in the UK as 'an unusual pattern of legal development'⁷¹⁴ in which European human rights purportedly 'shape national forms of actions [...] that differ in both character and focus from traditional courts of action'⁷¹⁵. Though degrees of change may be debatable, findings clearly demonstrate that the European Convention featured as a reason in favour of the progressive legal recognition of information privacy.

7.3.4 European influences: dignity and the structure of rights

Subsection 7.3.2 has raised some caution regarding the view that the European Convention *required* English courts to develop privacy rights. In particular, I have

⁷¹¹ *Douglas and others v Hello Limited and others* [2005] EWCA Civ 595, Lord Phillips at 53.

⁷¹² *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Nicholls of Birkenhead at 14.

⁷¹³ Richards and Solove (n 345) 169.

⁷¹⁴ Paula Giliker, 'A Common Law Tort of Privacy -The Challenges of Developing Human Rights Tort' (2015) 27 Singapore Academy of Law Journal 761, 766, 767.

⁷¹⁵ *ibid.*

argued that the authority of international law may be overestimated at the expense of overlooking judicial discretion. Nevertheless, as the previous section (3.2) has demonstrated, Article 8 of the European Convention was doubtlessly an important reason in the minds of lawmakers for recognising privacy. Additional ways in which Article 8 may have featured as a reason for legal change are discussed here. Qualitative analyses of post-2000 UK acts of privacy recognition reveal an increase in mentions of dignity and autonomy. The concepts of dignity and autonomy are paradigmatic of the continental European conception of privacy⁷¹⁶, and UK legal agents often connect them to the *new approach* or *new law*, by which they mean post-HRA English law, such as in the extract below:

*[T]he new approach takes a different view of the underlying value which the law protects. [...] it focuses upon the protection of human autonomy and dignity - the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.*⁷¹⁷

In addition to the increased prevalence of values like dignity in English privacy law, discourse, international law may also have been influential in a more structural way when it comes to assessments of rights violations. My empirical findings suggest that the method by which privacy rights are adjudicated in English high courts shifted: whereas earlier decisions are often framed in binary terms of whether a privacy intrusion occurred or not, later judicial decision-making under the Human Rights Act tracks the more typically continental approach of asking, in a first step, whether a given action

⁷¹⁶ This is classically, and convincingly, argued by Whitman (n 2).

⁷¹⁷ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Hoffmann at 51. See also, *Douglas and others v Hello Limited and others*, [2005] EWCA Civ 595.

*engages privacy rights, before determining, in a separate, second step, whether this engaging is legally unjustified – and whether it amounts to an actionable privacy invasion – or not.*⁷¹⁸

This two-step analysis is typical of continental European systems. It allows judges generosity when it comes to determining the scope of constitutional rights since, as pointed out by Hailbronner and Martini, ‘the hard questions are dealt with at the justification analysis.’⁷¹⁹ Further evidence for this structural change in rights adjudication in UK courts can be gleaned from the increased emphasis of UK judges that privacy is a recognised right *alongside competing rights*, such as freedom of speech.⁷²⁰

From the perspective of the plaintiff, the difference between holding an intrusion to be ‘justified’ or holding their rights not to have been engaged in the first place may seem academic. But with a view to the legal recognition of privacy, the difference is critical: the second, more traditional approach in English jurisprudence often denies – at least semantically – that a given interest is legally protected by privacy in the first place. This may have the consequence that the outcome of a case seems to hinge on the absence of legal privacy recognition, rather than the (subsequent) justifiability of intrusions. Conversely, under the Convention-inspired two-step approach, judges may hold that legal privacy rights reach farther and encompass more interests (though of course, they may effectively be constrained at the justification stage).

Findings indicate that Convention rights feature as a dominant consideration when English judicial agents engage in the two-step of adjudicating privacy rights. This reveals an additional, more indirect, way in which the European Convention features as a reason in favour of recognising privacy rights in the UK.

⁷¹⁸ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Nicholls of Birkenhead at 20.

⁷¹⁹ Hailbronner and Martini (n 626) 382.

⁷²⁰ *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] EMLR 247, Lord Nicholls of Birkenhead at 21.

7.3.5 Cosmopolitan late modern values

While the impact of the UK Human Rights Act on UK law is the subject of much academic scholarship, it is less well known that in the parliamentary debates preceding the Act, privacy emerges as one of the most contentious issues. Findings reveal that privacy is sometimes cited as a reason *against* adopting Convention rights into domestically enforceable law (the concern here was that the vagueness of the formulation of Article 8 would leave the development of privacy up to the courts). At the same time, privacy is also cited as a reason *in favour* of adopting the Human Rights Act. Arguments raised in favour of implementing the UK Human Rights act tend to lament the general lack of protection afforded to human rights under UK law. In addition, passages that argue in favour of adopting Article 8 draw on a kind of cosmopolitan spirit and modern outlook. This is exemplified in the following passage:

*The Human Rights Act is fundamentally about modernising our society and building a new culture of rights balanced by responsibilities within UK law. [...]. The new culture that we want to build is one in which the Human Rights Act gives us a shared understanding of what is fundamentally right and wrong [...].*⁷²¹

Scholars on law and globalisation often remark that ‘globalism’ in law – a view described by Sieber as taking account of ‘the interdependence of all humans’⁷²² – is a consequence of the ‘universalistic culture of modernity’⁷²³. Correspondingly, the globalist conception of a ‘world culture’⁷²⁴ is often portrayed as paradigmatically *modern*⁷²⁵. From the perspective of legal systems, adjectives like ‘modern’ or ‘progressive’ have strongly positive connotations: they counterpoint the latent charge of being out-dated; a typical sin of legal institutions and norms when it comes to

⁷²¹ *Statutory Instruments And Human Rights* Volume 608 House of Lords Hansard 10.1.2000, Lord Bassam of Brighton.

⁷²² Ulrich Sieber, ‘Legal Order in a Global World: The Development of a Fragmented System of National, International, and Private Norms’ (2010) 41 *Max Planck Yearbook of United Nations Law* 1, 3.

⁷²³ Halliday and Osinsky (n 628) 453.

⁷²⁴ *ibid.*

⁷²⁵ Sieber (n 724) 4.

regulating technology.⁷²⁶ Halliday and Osinsky even propose that ‘a desire to appear modern’ is amongst the chief reasons for which nation states comply with international law.⁷²⁷

Findings reveal that lawmakers appeal to international law as entailing a desirable modern outlook. Regarding the case of UK judicial discourse, the above-mentioned characterisation of common law on privacy rights as *old law* and the Convention as *new law*⁷²⁸ illustrates the tendency of framing international legal resources as modern. This trend can be observed across German and UK acts of recognition.

When the supposedly ‘modern’ quality of international law is invoked in support of recognising privacy, we might interpret that international law features here as a more subtle, indirect reason for legal change: counting as ‘modern’ is a quasi-aesthetic quality and the harmonising pressures created by such conceptions of international law are probably more analogous to the pressures exerted by a role model. This means they fall short of establishing a legal *obligation* for domestic lawmakers. Nevertheless, counting as desirably modern is a subtler dimension of the ways in which Convention rights feature as considerations in favour of recognising privacy.

⁷²⁶ One concern that dominates discussions on law and technology is that law is *inapt*, at least when it comes to the challenges of international data flows and “cyberspace”. Variations of this point include the claim that law “lags behind”, or that lawmakers are technologically illiterate, see David L Faigman, ‘Judges as “Amateur Scientists”’ (2006) 1 Boston University Law Review 1207.

⁷²⁷ Halliday and Osinsky (n 628) 465.

⁷²⁸ Times Law Reports /Campbell v Mirror Group Newspapers plc - (2004) Times, 7 May Lord Hoffmann, at 53.

7.4 Harmonising pressures of international data protection instruments

7.4.1 From data protection to information privacy: the relevance of international legal instruments

The previous section of this chapter has presented and explored my empirical finding that international human rights law, particularly Article 8 of the European Convention on Human Rights, played a role in the recognition of privacy in German and UK law. A related area of international law that is relevant in this respect is that of data protection. The present section explores additional empirical analyses of how data protection instruments of the Council of Europe and the European Union feature as reasons in my data set for the domestic legal recognition of privacy in Germany and the UK.

The term “Datenschutz” (‘data protection’) originated in German law⁷²⁹ and has traditionally been portrayed as “an element of information privacy”.⁷³⁰ Its legislative origins – particularly in international law documents – arguably established a “special linkage with ‘a right to privacy’”⁷³¹: data protection documents include provisions that grant and protect privacy interests, and their texts, preambles, and explanatory memoranda typically include references to information privacy as a fundamental right.⁷³² In these ways, the concept of data protection has contributed to the status of information privacy as a legally recognised principle.

The two international organisations whose data protection efforts are explored below are the Council of Europe (section 7.4.2) and the European Union, formally European Community (section 7.4.3). Rather than analysing the genesis of data protection instruments in these institutions, the focus of the present study is the impact these international law developments had on domestic legal developments in Germany and the UK. Thus, the present subsection only provides an overview over the main data protection efforts in these institutions and identifies the domestic data protection developments in Germany and the UK that ensued as a response.

⁷²⁹ Hondius (n 321) 109.

⁷³⁰ González Fuster (n 6) 86.

⁷³¹ *ibid* 88,89.

⁷³² *ibid*.

Fritz W. Hondius, one of the Council of Europe's data protection experts⁷³³ who helped draft the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (henceforth Convention 108), explains "data protection has been from the outset an international matter".⁷³⁴ Though the first designated data protection act was enacted by the German state of Hesse in 1970, it was not long after this that the Council of Europe became active in this area of law: Hondius describes its Resolutions of the Committee of Ministers No (73) 22 and (74) 29, adopted in 1973 and 1974 respectively, as the "first international instruments" in the area of data protection, and Convention 108 as the "first international treaty" in the field.⁷³⁵ Due to its pioneering work on developing data protection rules – and its subsequent influence on national legal developments – Spiros Simitis calls the Council of Europe "the most influential international organisation in the field of data protection".⁷³⁶ While resolutions (73) 22 and (74) 29 merely appealed to member states to adhere to a range of principles when they processed data, Convention 108 represented a binding international agreement whose ratification required conforming national laws to be enacted.⁷³⁷ In particular, the convention allowed data protection authorities to refuse the transborder flow of data into countries that lacked adequate data protection.⁷³⁸ Section 7.4.2 discusses the ways in which the Council of Europe's international law instruments – particularly Convention 108 – featured as a reason in favour of the domestic legal recognition of privacy.

A second international organisation of immense importance when it comes to data protection is the European Union. In October 1995, Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data came into effect. Directive 95/46/EC soon came to be known as the 'Data Protection

⁷³³ *ibid* 87. Fuster cites the Explanatory report to the Convention for the protection of individuals with regard to automatic processing of personal data, European Treaty Series, no. 108 of 28 January 1981, paragraph 24.

⁷³⁴ Hondius (n 321) 104.

⁷³⁵ *ibid* 103., p.106

⁷³⁶ Simitis (n 275) 138.

⁷³⁷ *ibid* 139.

⁷³⁸ Bennett (n 12) 141.

Directive⁷³⁹ and significantly affected domestic law in EU member states, including Germany and the UK. In the UK, the directive prompted an amendment of the Data Protection Act that led to the 1998 UK Data Protection Act. In Germany, transposition into national law was slower than expected:⁷⁴⁰ indeed, after a persistent failure to transpose the directive, the Commission initiated proceedings against Germany, amongst other states, in 1999.⁷⁴¹ The case was eventually closed after Germany reformed the Federal Data Protection Act in 2001 and notified the Commission.⁷⁴²

Much like conventions of the Council of Europe, EU directives are binding on member states. EU directives also generally have to be transposed into domestic law through legislation in order to acquire a domestic legal effect. One exception – and a contrast to instruments of the Council of Europe – is that the Court of Justice of the European Union established that under certain circumstances, EU directives may be “directly” effective,⁷⁴³ meaning they may confer enforceable rights to citizens even when member state governments have failed to transpose them into domestic law. Furthermore, according to EU treaties, the European Commission may take legal action against a EU country that fails to implement EU law, threatening financial consequences.⁷⁴⁴ These two features make legislative compliance with EU law even more compelling, as this research project’s findings show (subsection 7.4.3).

7.4.2 The Council of Europe’s data protection instruments

The first federal data protection act in Germany was adopted in 1977 (and came into force in 1978)⁷⁴⁵, so it preceded Convention 108 by a few years. Legal discourse

⁷³⁹ González Fuster (n 6) 130.

⁷⁴⁰ *ibid* 147.

⁷⁴¹ Commission of the European Communities, First report on the implementation of the Data Protection Directive (95/46/EC), Brussels, 15.2.2003, 3.

⁷⁴² González Fuster (n 6) 153.

⁷⁴³ *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (Case 26/62); [1963] ECR 1; [1970] CMLR 1

⁷⁴⁴ Article 258 of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2010], Official Journal of the European Union, C83/1

⁷⁴⁵ Gesetz zum Schutz vor Mißbrauch personenbezogener Daten bei der Datenverarbeitung (Bundesdatenschutzgesetz— BDSG) (Federal Data Protection Act) of 27 January 1977, Bundesgesetzblatt (BGBl) 1 p. 201.

during the 1970s and 1980s contains occasional references to the Council of Europe's data protection instruments, and it usually emphasises the comparatively advanced level of data protection in Germany. Consider, for example, the following passage:

*Data protection is an international problem. In an international comparison, our level of data protection is exemplary. Therefore, we should be keen to make our level of data protection the international standard. Without uninhibited data flow, there is no international trade of goods and services [...] Additionally, we have to take care that our citizens are not left without protection when their data is processed abroad. That is why we have been working so intensely to achieve international conventions and resolutions for the protection of cross-border data transfers. On the 28th of January of this year, our Federal Minister of the Interior signed the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. [...] Convention 108 will have no impact on our domestic data protection law: our legislation already adheres to the rules of the Convention.*⁷⁴⁶

The above passage reveals that instead of viewing the Council of Europe's data protection instruments as a guide for domestic legislative activity, German lawmakers primarily treat it as a convenient tool for exporting their own data protection rules to other legal systems. When it comes to the Convention's relevance for domestic law, passages like the following suggest that it is because of Germany's role model position as a data protection pioneer that swift ratification of the Convention is required.

Naturally, there is an expectation that those countries that have so far assumed a leading role in data protection will not hesitate to ratify the Convention. That is why it

⁷⁴⁶ Plenarprotokoll 21. Sitzung, Deutscher Bundestag, 9. Wahlperiode, Bundesdrucksache 9/21, 12.2.1981

Datenschutz ist auch ein internationales Problem. Unser Datenschutzniveau kann sich international sehen lassen. Um so größer muß unser Interesse sein, daß dieses Niveau auch zum internationalen Standard wird. Ohne ungehinderten Datenfluß gibt es keinen internationalen Waren- und Dienstleistungsverkehr. [...] Um so mehr müssen wir aber auch dafür Sorge tragen, daß der Bürger nicht schutzlos wird, wenn seine Daten im Ausland verarbeitet werden. Deshalb arbeiten wir seit längerer Zeit auf internationaler Ebene mit Hochdruck an Leitlinien und Abkommen zum Schutz des grenzüberschreitenden Datenverkehrs. Am 28. Januar dieses Jahres hat der Bundesinnenminister beim Europarat das Übereinkommen zum Schutz der Menschen bei der automatischen Verarbeitung personenbezogener Daten un- terzeichnet, [...] Die Europäische Datenschutzkonvention wird auf unser nationales Datenschutzrecht keinen Einfluß haben. Wir haben die Regeln der Konvention bereits in der Gesetzgebung verwirklicht.

*is desirable that the federal government soon submits a draft legislation to ratify the Convention.*⁷⁴⁷

The above passage also contains the claim that Convention 108 would not have any substantive effect on German law due to its existing data protection scheme. Stressing that a legal change required to ratify a convention has no substantive consequences is a way of portraying it as low-risk and thereby motivating lawmakers' support. It is also possible that the repeated emphasis that the German legal status quo would not be affected is a response to an earlier brief though intense discussion on whether international data protection laws might dilute the comparatively high level of data protection afforded in Germany:

*Regarding the worry that the ratification of the Convention by the German government might carry the danger of diluting stricter national protections, the Committee of Internal Affairs has found that this would constitute a mistaken interpretation of the Convention [...] Compared to other countries, the level of data protection in Germany is so advanced that it would be incomprehensible if Germany were to refuse legislation to ratify the Convention [...]*⁷⁴⁸

This passage furthermore demonstrates that by pointing out that German data protection laws already meet the Council of Europe's standard, the ratification of Convention 108 is presented as a low-hanging fruit because it presents an attractive vehicle through which German data protection standards may be imposed upon other countries. This is viewed as benefitting the protection of German citizens'

⁷⁴⁷ *Beschlußempfehlung und Bericht des Innenausschusses (4. Ausschuß) zu dem von der Bundesregierung eingebrachten Entwurf eines Gesetzes zu dem Übereinkommen vom 28. Januar 1981 zum Schutz der Menschen bei der automatischen Verarbeitung personenbezogener Daten, Bundesdrucksache 10/2593, 7.12.1984.*

Naturngemäß wird von Ländern, die schon bisher im Datenschutz eine Führungsrolle einnahmen, erwartet, daß sie auch die Ratifikation des Übereinkommens nicht zögerlich betreiben. Deshalb ist es wünschenswert, daß die Bundesregierung in absehbarer Zeit den Entwurf eines Ratifikationsgesetzes vorlegt.

⁷⁴⁸ *Beschlußempfehlung und Bericht des Innenausschusses (4. Ausschuß) zu dem von der Bundesregierung eingebrachten Entwurf eines Gesetzes zu dem Übereinkommen vom 28. Januar 1981 zum Schutz der Menschen bei der automatischen Verarbeitung personenbezogener Daten, Bundesdrucksache 10/2593, 7.12.1984.*

Bezüglich der Befürchtung, daß bei einer Ratifikation des Übereinkommens durch die Bundesrepublik Deutschland die Gefahr einer Aufweichung des schärferen nationalen Rechts bestehe, hat der Innenausschuß festgestellt, daß eine entsprechende Annahme eine falsche Interpretation des Übereinkommens darstellen würde. [...] Der Datenschutzstandard der Bundesrepublik Deutschland sei im Verhältnis zu den anderen Staaten so hoch ausgeprägt, daß es unverständlich wäre, von einer Zustimmung zum Ratifikationsgesetz [...] abzusehen [...]

privacy abroad, as well as facilitating cross-border data flows. These two considerations – privacy rights protection on the one hand and commercial interests that depend on uninterrupted international data flows – are generally portrayed as compatible objectives in German legal discourse. Indeed, in the previous passage, cross-border data flows are described as an inevitable necessity in late modern economies, so the levelling-up of other countries’ data protection regimes is presented as a precondition to ensure fundamental rights protection under these conditions.

Beyond emphasising the protection of privacy rights in the information society, cross-border data flows also surface as a motivator for encouraging data protection efforts internationally:

Nach der Ratifikation durch alle Mitgliedsländer wird es in Westeuropa keine „Datenparadiese“ mehr geben.⁷⁴⁹

The use of the term “data paradise” is reminiscent of ‘tax haven’⁷⁵⁰ and reflects the concern that the fact that other countries have having less demanding data protection regulations may be an economic disadvantage for Germany. In this way, the high level of data protection required by German law is viewed as a potential barrier to trade, at least insofar trade depends on processing personal data. The above passage also expresses German lawmakers’ expectation that international law – particularly Convention 108 – will provide a convenient remedy. This demonstrates that in German references to the Council of Europe’s data protection instruments, the apparent pride of being a data protection pioneer exists alongside the worry that rigorous rights protection comes at an economic expense.

While the German federal data protection act preceded Convention 108, it is widely agreed that the Council of Europe’s data protection efforts were a core motivating reason for the passage of the first piece of data protection in the UK in 1984: Bennett claims that “[i]t was generally assumed in Britain that the final passage of the 1984 Data Protection Act took place for economic rather than libertarian

⁷⁴⁹ *Plenarprotokoll 21. Sitzung*, Deutscher Bundestag, 9. Wahlperiode, Bundesdrucksache 9/21, 12.2.1981

⁷⁵⁰ The German term for ‘tax haven’, *Steuer-oase*, literally translates to tax *oasis* and thus resembles the term *paradise*.

reasons. Britain feared that personal data protection could become a legal pretext for trade protectionism, and would lead to the isolation of the country's data processing industry as well as other service sectors of the economy that relied on unimpeded communications."⁷⁵¹ Similarly, Simitis cites the history of UK data protection as "the best example" for a case where national legislation was a direct response to Convention 108 – more specifically, to the risk of not being able to participate further in international data exchange.⁷⁵²

This project's findings confirm that in the lawmaking discourses preceding the 1984 UK Data Protection Act, it is the *lack* of adequate data protection legislation that is viewed as a potential trade barrier in light of Convention 108. This concern is explicitly mentioned in the White Paper and cited frequently in parliamentary debates. Consider, for example, the following extract:

*The White Paper says: "without legislation firms operating in the United Kingdom may be at a disadvantage compared with those based in countries which have data protection legislation. When the Council of Europe Data Protection Convention comes into force it will confirm the right of countries with data protection legislation to refuse to allow personal income to be sent to other countries which do not have comparable safeguards. This could threaten firms with international interests operating in this country and the activities of British computer bureaux which increasingly process data for customers in many different countries. Accordingly, in order to conform with international standards of privacy protection and to avoid possible barriers to trade, the Government has decided to introduce legislation which will apply throughout the United Kingdom and will enable the United Kingdom to ratify the Convention."*⁷⁵³

The above extract exemplifies the importance of the prospect of facing trade barriers as a motivating reason in favour of data protection legislation in the UK. The concern here seems to be the inverse of the German arguments in favour of passing legislation to ratify Convention 108: for UK lawmakers, it is the lack of adequate data protection legislation that is viewed as a commercial disadvantage; especially once other countries ratify Convention 108. Various passages throughout my data reveal that the focus of lawmaking discourses in the UK is on trade and those affected by it. So, instead of presenting the increased protection of citizens' data as a desirable aim, the passage of the Data Protection Act (and of conforming to Convention 108) is

⁷⁵¹ Bennett (n 12) 141.

⁷⁵² Simitis (n 275) 132.

⁷⁵³ *Data Protection Bill*, House of Commons, Hansard Volume 53, 30.1.1984, Mr. Kaufman.

framed as an economic necessity to ensure that British businesses remain internationally competitive. The below passage exemplifies this concern.

*It is needed not only to ratify the convention —and I discovered today that there is only one country, so far, that has ratified the convention—but also so that our companies dealing in the appropriate areas of computer bureaux and the like will be acceptable to other people who have ratified or will ratify the convention as being companies with whom business can be done. It has, if you like, an important export role in the sense of international trade coming to us as a result of this Bill having gone through. We should not delay matters any more than we have to.*⁷⁵⁴

Our companies refers to UK companies while *other people* refers to (other) countries. In many other passages, this nationalist tone is more explicit and the use of the ‘us versus them’ binary in a way that suggests competitiveness if not antagonism is more obvious. The concern with trade impediments – or with facing “sanctions”, as it is sometimes described, such as in the below extract – seems to be an entirely strategic one. In other words, the reason for conforming to Convention 108 hinges not on the respectability of the Council of Europe or to the authority of its laws, but rather on what other countries may choose to do in light of it.

*With the convention now widely accepted as setting a necessary standard, we shall find increasingly a division between those countries with data protection, and those without. The latter will be more and more at risk of action from countries determined to prevent the undermining of their own data protection laws by the export of personal data to countries without protection. We must not allow any excuse for sanctions against the United Kingdom. That is what makes it imperative that we legislate without delay. Even if we were not already convinced of the rightness of legislation in this field, we should be compelled by this consideration to bring ourselves into line with European practice.*⁷⁵⁵

One might argue that a country’s decision to refuse the flow of data into a country that lacks data protection standards does not quite amount to a sanction. After all, the word ‘sanction’ implies a punitive intention that may well be lacking in these circumstances. In the lawmaking discourses preceding the passage of the 1984 UK Data Protection Act, however, the language of sanctions serves to emphasise the economic disadvantage of being excluded from transnational data flows. The above

⁷⁵⁴ *Data Protection Bill*, House of Lords, Hansard Volume 443, 5.7.1983, Lord Mottistone.

⁷⁵⁵ *Data Protection Bill*, House of Lords, Hansard Volume 40, 11.4.1983, Mr. Whitelaw.

extract furthermore insinuates that other countries are looking for opportunities to impose such disadvantages onto the UK (“we must not allow any excuse for sanctions”), thereby insinuating that the motivation to ensure their own citizens’ privacy rights by refusing data flows is a façade. In fact, the previous passage proposes that another reason for which other countries may act in such a way towards the UK may be to “prevent the undermining of their own laws by the export of personal data to countries without protection” (see above.) Of course, the above-mentioned German concern with “data paradises” demonstrates that this suspicion is warranted. And yet, the focus on trade and economic considerations in UK discourses does not grant – or overlooks – that the objective of protecting information privacy is a genuine and prevalent concern in the lawmaking discourses of countries like Germany.

The above paragraphs showcase that UK lawmakers overwhelmingly focus on trade as a reason to enact data protection legislation that meets the requirements of the Council of Europe. Economic considerations are so salient in these discourses that the discourses preceding the UK Data Protection Act reveal some self-aware and cynical responses. In particular, some lawmakers criticise that the focus of the reasons to legislate on data protection is not on fundamental rights in general and privacy in particular, as the passage below exemplifies:

*The principal objective of the Bill is not to protect the privacy of the data subject. As one might expect from this Government, the Bill is all about trade and money, as the White Paper on which the Bill is based admits.*⁷⁵⁶

The phrase “all about trade and money” portrays the concern with trade as narrow-minded. Furthermore, explicitly claiming that the bill is “not” about privacy protection insinuates that it ought to be about privacy *instead of trade*, thereby presenting these considerations as antagonistic. This suggests that trade considerations are an illegitimate reason for prompting data protection legislation. When it comes to reasons in favour of prompting domestic privacy recognition, economic considerations exist in tension with fundamental rights. In an article that was published in the same year as the parliamentary debate from which the above extract stems, Fritz Hondius equally describes protection of the individual and free

⁷⁵⁶ *Data Protection Bill*, House of Commons, Hansard Volume 53, 30.1.1984, Mr. Kaufman.

flow of information as “competing interests”.⁷⁵⁷ In his view, they can be reconciled “if there exists all over the world the same level of data protection”.⁷⁵⁸

Section 3 of this chapter has revealed some of the ways in which international human rights have compelled more extensive domestic legal recognition of privacy. That discussion was focussed on the role of another instrument of the Council of Europe– Article 8 ECHR – and the ways in which it featured as a reason in favour of privacy recognition; particularly in UK courts. The present subsection has revealed that the Council of Europe’s legal instruments have worked to provoke privacy-protecting legislation in yet another way: by affecting the economic dynamics between member states in such a way that lacking data protection becomes a vulnerability when it comes to trade. This illustrates the variety of channels through which international law institutions can exert normative force.

7.4.3 Directive 95/46/EC of the European Parliament

An analysis of the role of Directive 95/46/EC – the “Data Protection Directive” – in the discourses preceding acts of privacy recognition reveals that national lawmakers treat it as a norm relating to their lawmaking activities. In the lawmaking discourses in Germany and the UK, it is unambiguous that the Directive is considered a reason to amend or expand existing data protection laws. The Directive is often described as *binding*, such as in the following passage:

*I suggest that it is our duty to do our best to ensure that the Bill properly implements binding European law, including the EC directive.*⁷⁵⁹

Similarly normative language used to refer to the Directive includes that of *obligations*, as the extracts below exemplify.

*The directive was adopted on 24th October 1995. Member states were given three years from that date to bring it into national law. The pressing purpose of this Bill is to fulfil our obligations by October of this year.*⁷⁶⁰

⁷⁵⁷ Hondius (n 321) 118.

⁷⁵⁸ *ibid.*

⁷⁵⁹ *Data Protection Bill*, House of Lords, Hansard Volume 587, 24.3.1998, Lord Lester of Herne Hill.

⁷⁶⁰ *Data Protection Bill*, House of Lords, Hansard Volume 585, 2.2.1998, Lord Williams of Mostyn.

*[T]his Bill is very important. It gives effect to this country's obligations under European Community law.*⁷⁶¹

UK lawmakers leave no doubt that they take themselves to be bound by *European law*. Similarly, German lawmakers openly admit that the Directive imposes duties on their lawmaking pursuits. In the parliamentary discussions directly preceding the amendment of the Federal Data Protection Act in 2001, the Directive is often referred to as a *mandatory programme (Pflichtprogramm)*:

*With this change of legislation, we not only complete our mandatory programme of conforming to the 1995 EU Directive which the previous government had failed to transpose, but we also set our own course, which I will elaborate [...]*⁷⁶²

This use of the term *Pflichtprogramm* is arguably somewhat ironic; the German term *Pflichtprogramm* is established in sports and the performing arts like gymnastics or dance, where it is contrasted with *Kür*, which refers to the freestyle portion of the performance. In this way, the term *Pflichtprogramm* reflects the fact that German lawmakers decided to reform the 1977 Federal Data Protection Act in two phases; the first stage was designed to implement the demands of the 1995 Directive, and the second phase was supposed to introduce other modernisations that had been on the agenda for a while.⁷⁶³ The split into two phases had been motivated by the pressure of the infringement proceedings against Germany by the European Commission because of a failure to implement the directive that began in 1999. As a response to these pressures, the “first phase” of data protection reform was aimed at speeding up the implementation of the Directive. It resulted in the 2001 amendment of the Federal Data Protection Act,⁷⁶⁴ a piece of legislation that Simitis calls “strange... since the government legislated with the explicit intention to revise the reform very

⁷⁶¹ *Data Protection Bill*, House of Lords, Hansard Volume 587, 24.3.1998, Lord Falconer of Thoroton.

⁷⁶² *Plenarprotokoll 165. Sitzung*, Deutscher Bundestag, 14. Wahlperiode, Bundesdrucksache 14/165, 6.4.2001.

Mit dieser Gesetzesänderung erledigen wir nicht nur unser Pflichtprogramm; die Anpassung an eine EU- Richtlinie von 1995, deren Umsetzung die alte Bundesregierung versäumt hatte, sondern wir setzen eigene, wichtige Akzente, auf die ich jetzt im Einzelnen kurz eingehen werde.

⁷⁶³ Simitis (n 275) 115.

⁷⁶⁴ *ibid* 114.

soon.”⁷⁶⁵ The term *Pflichtprogramm* refers to this first phase of amendments and references the fact that German lawmakers view it as their duty to legislate in a way that gives effect to the Directive.

By prompting lawmakers to split their reform ambitions into two phases, the pressures of European law had, on the one hand, the effect of speeding up the legal recognition of privacy on a national plane. On the other hand, the time pressure created by the infringement proceedings meant that many more radical and far-reaching proposals for reforming the 1977 Federal Data Protection Act were effectively postponed to a second, later stage, which proved surprisingly sticky and only resulted in an amendment to legislation as late as 2009.⁷⁶⁶ The worry that adherence to EU law overshadows reform ambitions is expressed by lawmakers themselves, such as exemplified in the below passage:

*I regret that the issue of timely implementation of the Directive before the specified deadline became the centre of reform discussions and nearly overshadowed substantive problems.*⁷⁶⁷

The contrast between *Pflichtprogramm* and its antonym *Kür* also emphasises that German lawmakers will only be able to exercise their full discretion during the second phase of data protection reform.⁷⁶⁸ This betrays the subtle resentment of having one’s lawmaking discretion curtailed. A similar tone can be read between the lines of UK lawmaking discourse. Here, the resistance towards the European Union and its institutions often more explicit:

As the Home Secretary said, the directive emerged because different countries applied the data protection convention in different ways. The European Commission, as is its

⁷⁶⁵ *ibid* 115.

⁷⁶⁶ *ibid*.

⁷⁶⁷ Unterrichtung durch den Bundesbeauftragten für den Datenschutz Tätigkeitsbericht 1997 und 1998 des Bundesbeauftragten für den Datenschutz, 14. Wahlperiode, Bundesdrucksache 14/850, 4.5.1999
Zu meinem Bedauern sollte die Frage der fristgerechten Umsetzung der Richtlinie im Berichtszeitraum denn auch in das Zentrum der Reformdiskussion rücken und die materiellen Probleme beinahe überlagern.

⁷⁶⁸ The “second phase” of data protection reform, Simitis (n 275) 116.

*tendency, wanted to homogenise everything. [...] We did not vote for [the Directive], but we have it, and we are now under an obligation to see that it is put into our law.*⁷⁶⁹

This passage displays that lawmakers harbour some resentment towards being – quite literally *directed* – by EU institutions. The remark that UK lawmakers are bound by the directive even though they *did not vote for it* references the supremacy of EU law. Thus, despite its critical tone, the above extract leaves no doubt that lawmakers conceive of themselves as being, as the above passage states, *under an obligation* to give effect to EU law.

One may wonder why, despite such criticisms, there are no more explicitly subversive tendencies. Why, in other words, do lawmakers in the UK and Germany view the 1995 Directive as having such a strong and unquestionable normative force? A closer analysis of passages that describe it as *binding* or *obligating* reveals two reoccurring themes: firstly, the prospect of facing litigation for the failure to transpose the directive, and secondly, considerations of legal certainty.

That the objective to avoid litigation is a prominent point of discussion in German legal discourses preceding the 2001 amendment of the Federal Data Protection Act is unsurprising. After all, at that stage, infringement proceedings had already begun. In fact, as the below passage reveals, the objective to avoid litigation already featured in parliamentary discussions as early as 1998:

*Even those who are not moved by the content of this government coalition's reform proposal should be frightened by the prospect of facing infringement proceedings in front of the European Court [of Justice] if the EU Directive is not transposed before the deadline.*⁷⁷⁰

In this passage, it is suggested that EU law should count as a reason for lawmakers to expand data protection laws and the passage explicitly warns lawmakers of violation proceedings. After infringement proceedings against Germany had formally started, the tone of calls for implementing the Directive became even more urgent. For

⁷⁶⁹ *Data Protection Bill*, House of Lords, Hansard Volume 310, 20.4.1998, Sir Brian Mawhinney.

⁷⁷⁰ *Plenarprotokoll*, 214. Sitzung, Deutscher Bundestag 13. Wahlperiode, Bundesdrucksache 13/214, 16.1.1998.

Wenn schon die inhaltlichen Anliegen der Regierungskoalition kein Herzensbedürfnis sein mögen, so sollte sie doch vielleicht die Aussicht schrecken, bei Nichteinhaltung der Frist zur Umsetzung der EU-Richtlinie, sich ein Vertragsverletzungsverfahren vor dem Europäischen Gerichtshof einzuhandeln.

example, the below extract describes swift legislation as *the only chance* to avert a conviction:

*The White Paper focuses on transposing the Directive to the extent required [...] With the approval of the Bundestag today, we will enable a quick passage of the act. This is the only chance to escape Germany's conviction in the context of the already pending infringement proceedings by the European Court of Justice.*⁷⁷¹

EU infringement proceedings are an important reason for why German lawmakers have amended their data protection laws in accordance with the directive in 2001. Interestingly, despite the fact that the UK government did not face such proceedings, the prospect of litigation was an equally salient theme in UK lawmaking discourses before the 1998 amendment of the UK Data Protection Act. The below passage is exemplary in that it summarises the concern over legal consequences:

*If and to the extent there is a failure to give domestic effect to European law that will lead to legal uncertainty and unnecessary litigation in our courts. That may be litigation before both European courts. On a worst case scenario failure to implement the directive properly could give rise to a claim for damages against the United Kingdom with the British taxpayer having to foot the bill.*⁷⁷²

One notable feature of EU law is that EU institutions set out clear and tangible consequences for the failure to abide by EU treaties. It is perhaps for this reason that themes of being a data protection role model were conspicuously absent from legal discourses concerning Directive 95/46/EC, particularly in Germany. One might have expected embarrassment to be expressed in discussions of the infringement procedure, especially in light of the fact that in preceding acts of recognition, German lawmakers had frequently referred to the fact that Germany was a data protection pioneer (see subsection 7.4.2). Instead, arguments in favour of transposing the directive in both UK and German legal discourses seem calculated and legalistic.

⁷⁷¹ *Plenarprotokoll 165. Sitzung*, Deutscher Bundestag, 14. Wahlperiode, Bundesdrucksache 14/165, 6.4.2001.

Der Gesetzentwurf konzentriert sich darauf, die Richtlinie im erforderlichen Umfang umzusetzen. [...] Mit der heutigen Zustimmung des Bundestages werden die Weichen für ein schnelles In-Kraft-Treten des Gesetzes gestellt. Nur so besteht eine Chance, der Verurteilung der Bundesrepublik Deutschland in dem bereits anhängigen Vertragsverletzungsverfahren vor dem Europäischen Gerichtshof zuvorzukommen.

⁷⁷² *Data Protection Bill*, House of Lords, Hansard Volume 587, 24.3.1998, Lord Lester of Herne Hill.

This equally applies to the concern with *legal certainty*, which also features commonly in UK legal discourses preceding the 1998 amendment to the Data Protection Act (such as in the passage above). Legal certainty (or the lack thereof) also arises as a concern in German legal discourses before the 2001 amendment. In both cases, we may presume that the reason for why it is such a prominent consideration is because of the above-mentioned possibility of “direct effect”, which may lead to EU directives endowing citizens with legally enforceable rights even when member states have failed to transpose the directive before the respective deadline. In German legal discourses, the federal data protection commissioner repeatedly elaborated this concern in the yearly progress reports. Already in 1999, the progress report states that:

*According to the settled jurisprudence of the ECJ, EU directives are directly effective after the expiry of the time-limit for transposition where member states have failed to transpose them into domestic law; at least in the relation between citizens and the state. [...] The conditions of direct effect are met in the case of a range of the provisions of the Data Protection Directive.*⁷⁷³

It is understandable that lawmakers aim to avoid a situation where there is a lack of clarity over which legal rules are applicable. This concern furthermore relates to the domestic legal situation – rather than to European Union institutions and proceedings – and showcases that alongside the concern about litigation, there are legitimate reasons in favour of transposing the directive that arise on a national plane.

Furthermore, like in the lawmaking discourses concerning Convention 108 in the UK, trade features as an important consideration in the course of the implementation of Directive 95/46/EC. One notable point of difference to the role of trade in discussions surrounding Convention 108 is that particularly amongst the contributions of UK lawmakers, the objective of facilitating trade within the

⁷⁷³ Unterrichtung durch den Bundesbeauftragten für den Datenschutz Tätigkeitsbericht 1997 und 1998 des Bundesbeauftragten für den Datenschutz, 14. Wahlperiode, Bundesdrucksache 14/850, 4.5.1999.
Nach ständiger Rechtsprechung des EuGH finden Regelungen einer Richtlinie nach Ablauf der Umsetzungsfrist auch ohne Umsetzung in nationales Recht zugunsten der Bürger in ihrem Verhältnis gegenüber dem Staat [...] unmittelbare Anwendung. [...] Die Voraussetzungen direkter Wirkung liegen bei einer Reihe von Regelungen der Datenschutzrichtlinie vor.

European Union is now portrayed as compatible with fundamental rights protection. As discussed in subsection 7.4.2, the aim to standardise rules on data flow faced the criticism of detracting from or competing with the more genuine objective of protecting privacy rights. The below passage demonstrates that this tension is no longer apparent in the context of the Data Protection Directive:

The promotion of trade with our European colleagues is, of course, an objective of the single market within the European Union. By 1990, some, but not all, of our EU partners had introduced data protection laws. With the impending introduction of the single market the European Commission decided that a Union-wide approach was essential and introduced a draft data protection directive. Its purpose was to establish common standards of data protection, first, to enhance individuals' personal information privacy and, secondly, to provide a sound basis to permit the free flow of personal data within the single market. The directive was adopted on 24th October 1995. Member states were given three years from that date to bring it into national law. The pressing purpose of this Bill is to fulfil our obligations by October of this year.⁷⁷⁴

In the above extract, privacy and *the free flow of personal data within the single market* are portrayed as entirely complimentary ambitions. Furthermore, the single market is mentioned three times; leaving no doubt that the speaker considers data flow to be an essential component thereof. Directive 95/46/EC uses as its legal basis for implementation Article 100a of the EC Treaty (concerning the functioning of the internal market),⁷⁷⁵ so in UK lawmaking discourses before the passage of the 1998 Data Protection Act, references to the single market are predictably prevalent.

At the same time, the precise relationship between data flows and the EU single market remains murky: as González Fuster points out, “[i]t remains nevertheless unclear whether the free flow (or movement) of data serves the free movement of goods, persons, services or capital.”⁷⁷⁶ In the domestic lawmaking discourses in the UK, references to the internal market and its associated fundamental freedoms slip seamlessly into the language of fundamental rights. ‘Fundamental freedom’ is an economic principle but it sounds deceptively similar to ‘fundamental right’. By envisaging the *free flow* of personal data as a ‘fundamental

⁷⁷⁴ *Data Protection Bill*, House of Lords, Hansard Volume 585, 2.2.1998, Lord Williams of Mostyn.

⁷⁷⁵ González Fuster (n 6) 156.

⁷⁷⁶ *ibid* 135.

freedom’,⁷⁷⁷ it is linguistically framed as complementary to the ‘fundamental right’ to privacy and so, previous tensions between the concern for trade and the aim of privacy protection are resolved – at least within the European Union context. It is clear that international law, specifically the European Union framework, provides a framework within which legal harmonisation objectives are fused with economic objectives.

Trade does, however, also emerge as a reason against the transposition of the directive: in this case, it is data transfers outside the European Union, particularly to the United States, that are of concern to UK lawmakers.

*My Lords, throughout the passage of this Bill multinational companies, whether British or American, have expressed concern about the regulation of data transfers between the United Kingdom and the United States under this Bill. In accordance with the EC directive, the Bill requires that there be an adequate level of protection when personal data are transferred to countries outside the European Community [...]*⁷⁷⁸

This passage is reminiscent of German lawmakers’ concerns about how a high domestic standard of data protection may adversely affect trade (see subsection 7.4.2). However, this time, it is UK lawmakers who worry about requiring third party countries to adhere to high levels of protection. The concern about trade demonstrates that a delicate balance of commercial relations forms the backdrop to much international law.

This becomes even more apparent when we consider an additional theme that arises in both German and UK lawmaking discourses: there seems to be a persistent worry about exceeding the standard of data protection required by the directive. Lawmakers, in other words, aim to do the bare minimum required and they are particularly worried about commercial disadvantages that an overly ambitious implementation might entail. Consider, for example, the below passage:

All questions concerning the three special considerations that were saddled onto the draft legislation could not be answered. That is why the F.D.P. will not support the

⁷⁷⁷ *ibid* 156.

⁷⁷⁸ *Data Protection Bill*, House of Lords, Hansard Volume 587, 24.3.1998, Viscount Astor.

*draft legislation, even though we would have liked to because of the transposition of the EU Directive.*⁷⁷⁹

Draufgesattelte Sonderpunkte literally translates to special considerations that were “saddled onto” the legislative proposal. It refers to data protection provisions that exceed those required by the Data Protection Directive and that, in the minds of some lawmakers, run the risk of creating a competitive disadvantage for Germany. The very same concern surfaces in UK parliamentary debates. There, provisions that are viewed as going above and beyond that which EU law requires are sometimes described as *gold-plated*:

*The House will want to know what steps are being taken by other countries. We have a tendency in this country to get ahead of the game, and to be conscientious in the implementation of directives. We then find that others—for a variety of reasons—are lagging behind, and our businesses find themselves at a disadvantage. We will want to know what progress is being made in other countries. ... We want to know also how much gold-plating is in the Bill, over and above what is required by the directive. [...] we will want to explore how much of the Bill flows from the directive, and how much is an opportunity being taken by the Government to add other burdens [...] That brings me back to where I started: if the Bill is gold-plated, there will not be a level playing field, and we shall add burdens to British business and industry that will not be replicated overseas.*⁷⁸⁰

The primary concern is, as the above passage puts it, to ensure a level playing field and, indeed, data protection provisions are called *burdens on British business*. Arguably, the intention behind describing allegedly excessive legislative provisions as *gold-plated* may refer to provisions that are overly luxurious (and thus unnecessary). Alternatively, it may be suggested *gold-plated* evokes associations with objects that deceptively seem more valuable than they are, so perhaps, this description alleges that a particularly strong commitment to data protection standards is only seemingly virtuous but in reality constitutes a disadvantage. Either way, the above passage leaves no doubt that the Data Protection Directive is unequivocally accepted as binding by lawmakers, thus illustrating the normative force of international law. And

⁷⁷⁹ *Plenarprotokoll 165. Sitzung, Deutscher Bundestag, 14. Wahlperiode, Bundesdrucksache 14/165, 6.4.2001.*

All solche Fragen zu den drei draufgesattelten Sonderpunkten konnten nicht mehr geklärt werden. Deshalb wird die F.D.P. dem Gesetzentwurf nicht zustimmen, obwohl wir das für die Richtlinienumsetzung eigentlich gerne getan hätten.

⁷⁸⁰ *Data Protection Bill, House of Lords, Hansard Volume 310, 20.4.1998, Sir Brian Mawhinney.*

yet, it is clear that from the perspective of lawmakers, affording legal recognition to privacy beyond the standardised level set out by European Union Law suddenly comes at a cost. In this way, the existence of international law against the backdrop of a global economy both motivates – to an extent – and cautions the legal recognition of privacy.

7.5 National legal identities and lawmaking

7.5.1 Cultural relativism and national legal identities

Sections 2, 3 and 4 of this chapter have presented research findings on the ways in which foreign and international legal resources featured as lawmakers' reasons for affording legal recognition to privacy. But the conforming pressures described above also face domestic opposition. The present section focuses on legal agents' justifications for resisting the legal choices of others. Chief amongst are notions of cultural distinctiveness that this section categorises as part of *national legal identity*. In scholarship on global law, local culture is widely signposted as a limitation to harmonising pressures,⁷⁸¹ so the observation that mentions of cultural difference are used to retort the force of foreign and international law echoes findings in the globalisation literature.

As mentioned above, scholarship on the development of privacy laws has relied heavily on the notion of cultural distinctiveness to explain differences across legal regimes. Most notably, James Q. Whitman attributes differences in American and continental European legal designs of privacy to 'older differences in social and political traditions'⁷⁸² that ground the fact that Americans are more oriented towards liberty and Europeans are more attached to dignity.⁷⁸³ Additionally, cultural differences usually (though not always⁷⁸⁴) feature in explanations for the comparative lack of privacy protection under British law. For example, Richards and Solove cite as

⁷⁸¹ Michaels (n 38).

⁷⁸² Whitman (n 2) 1160.

⁷⁸³ Whitman (n 2).

⁷⁸⁴ Wacks attributes the lack of privacy protection in Britain to structural, rather than cultural, factors: Wacks (n 81).

a reason proposed for England's 'unwillingness to protect privacy'⁷⁸⁵ that there is a 'distinctive British appreciation for privacy that inheres in the national character'.⁷⁸⁶ Similarly, Beverly-Smith et. al. look towards structural legal distinctiveness when they suggest that 'a general right to privacy does not fit easily within English law, which is generally cast in terms of breaches of duties rather than positive declarations of rights.'⁷⁸⁷ The findings presented in this section confirm the core of these claims and speculations: when it comes to the legal recognition of privacy, *culture matters*.

But how *exactly* does culture matter? The following subsections lay out in more detail how cultural imaginaries features in lawmakers' reasons for legal change. Following inquiries into what is meant by *culture* and its cognates like *history*, *tradition* and *values*, findings reveal that these notions most often surface in a nationalist reference framework, such as 'the British people' or 'German legal values'⁷⁸⁸. I call these nationalist imaginations of culture *national legal identities*.

The finding that cultural distinctiveness is tied to the concepts of 'nation' and 'nation state' is unsurprising, given that methodological nationalism is still the dominant paradigm of most legal activity.⁷⁸⁹ Indeed, it seems almost tautological to point out that German law is concerned with 'German values' and 'the German people'. In legal thought, the idea that 'a cultural unit (nation) and a political unit (state) must be congruent'⁷⁹⁰ is largely taken for granted. Perhaps, then, it should be more surprising that scholarship rarely ever views legal thought and discourse as belonging within the genre of nationalism. To be sure, the fact that modern legal orders hinge on the nation state as a political unit is the consequence of well-known

⁷⁸⁵ Richards and Solove (n 345) 168.

⁷⁸⁶ *ibid.*

⁷⁸⁷ Beverly-Smith, Ohly and Lucas-Schloetter (n 8) 77.

⁷⁸⁸ I here employ the adjective 'nationalist' as a *prima facie* value-neutral adjective that indicates a thematic relation to the concept of 'nation' or 'nation state'.

⁷⁸⁹ Michaels (n 38) 291.

⁷⁹⁰ Gellner's seminal characterisation of nationalism; summarised here by Alain Babadzan, 'Anthropology, Nationalism and "the Invention of Tradition"' (2000) 10 *Anthropological Forum* 131, 136.

historical forces.⁷⁹¹ And yet, beyond its historical origins, scholarship seems to view the current nationalist organisation of modern legal systems as a mere administrative fact. This view is largely oblivious to whether lawmaking is shaped by nationalist imaginations. What do lawmakers have in mind when they use nationalist terms (i.e. terms that thematically reference the idea of *nation*), like ‘the British people’? Do they merely refer to the sum of all those who hold British citizenship, as an innocuous demographic category?

A competing interpretation presumes that nationalist terms entail various attributes, stereotypes and a normative outlook. Presumably, there is continuity with nationalist terms employed by lawmakers and the more general imaginations of nationhood. Benedict Anderson famously conceptualised ‘nation’ as

‘an imagined political community [...] It is imagined because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them [...]’⁷⁹²

In stressing the constructivist dimension of the nation as an *idea*, Anderson alerts us to the fact that its respective contents, such as founding myths, often diverge from demographic realities and historical fact. ‘Nationalities’, ‘nation-ness’ and ‘nationalism’ are, as Anderson tells us, ‘cultural artefacts of a particular kind’;⁷⁹³ they are collective narratives with a normative flavour. So, when findings turn up notions like ‘the British people’, it is likely that these reflect lawmaker’s own nationalist imaginations. These imaginations likely include various aesthetic and normative ideals – and simultaneously exclude a multitude of lived realities.

It rings true that lawmakers’ imaginations of the societies they regulate are rarely ever verified empirically. Regarding the UK judiciary, Gyorfi points out that

⁷⁹¹ For the most prominent account on the development of nationalism in modernity, see Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 1983).

⁷⁹² *ibid* 6.

⁷⁹³ *ibid* 48.

while making empirical assumptions is ‘a pervasive feature of constitutional reasoning’⁷⁹⁴, ‘judges rarely subject their empirical assumptions to sustained analysis’.⁷⁹⁵ Thus, lawmakers’ imaginations of the societies they seek to regulate are mediated by a normative and culturally contingent lens. The point, of course, is not to say that lawmakers are wrong to see society as anything other than empirical and demographic fact. Instead, the fact that nationalist presumptions feed into the act of making law reflects – much like the presence of dystopian visions – that acts of legal change have meaning beyond their concrete purposes.

Following Benedict Anderson’s conceptualisation of ‘nation-ness’ as imagined communities, the following two subsections present the ways national legal identities are imagined and constructed from the perspective of lawmakers. They reveal an interesting tension: national legal identity both features as a reason to resist legal harmonising pressures, and as a reason that favours affording legal recognition to information privacy.

7.5.2 Resisting foreign and international law

Subsection 7.2.3 already alluded to the finding that the pressures of foreign legal regimes are often contested. The passage cited above to illustrate that point presented the lack of historical experiences with totalitarianism as justification for why the UK – in contrast to Germany – may not *require*⁷⁹⁶ the same legal privacy safeguards. References to cultural distinctiveness as a reason against recognising privacy were numerous across findings, particularly in the UK context. Consider the following extract from a House of Commons discussion on government surveillance:

[W]e have in this country a different culture regarding the security services, [...]. There is a glaring difference between the average UK citizen’s acceptance of the work of the secret intelligence agencies and the cultural approach taken to such matters in the USA,

⁷⁹⁴ Gyorfi (n 625) 702.

⁷⁹⁵ *ibid* 702, 703.

⁷⁹⁶ *Interception Of Communications*, House of Lords, Hansard Volume 409, 21.5.1980. Lord Elwyn-Jones.

*where there is a great sense of the individual being up against an all-powerful state, and in much of continental Europe. [...]*⁷⁹⁷

The claim that UK citizens are more complacent about security services did not amount to a general theme in lawmaking discourse. In that sense, it is idiosyncratic. Nevertheless, it is representative of a variety of features that surface as salient whenever lawmakers appeal to national legal identity. In particular, ‘culture’ is here taken to be synonymous with the normative attitudes (i.e. acceptance) of a distinctive set of people. Moreover, this set of people is characterised in reference to the nation-state paradigm (*this country; UK citizens*). Perhaps most significantly, it is evident that lawmakers’ conceptions of people’s attitudes rest on a particular kind of imagination: that of *the average UK citizen*. Who is *the average UK citizen*? Within the meaning of the above passage, ‘average’ presumably does not refer to a statistical measure, since the claim about citizens’ attitudes is not at all based on empirical data. But how else do we know to whom *the average UK citizen* refers – and to whom it does not?

The absence of further clarification betrays the underlying presumption that the meaning of *average British citizen* is taken to be obvious: it indicates the speaker’s confidence that other discourse participants will be aware of the implied norms of signification that determine to whom the term refers. In that way, *average British citizen* is reminiscent of the famous (and famously elusive) standard of the ‘reasonable man’; a fixture in legal discourse that represents a culturally contingent fiction.⁷⁹⁸ Throughout the data corpus, passages that feature similarly abstract notions such as *the Englishman*⁷⁹⁹, *Staatsbürger*⁸⁰⁰ (and the more commonly used *the*

⁷⁹⁷ *Reports into Investigatory Powers*, House of Commons, Hansard Volume 597, 25.6.2015, Mr Mark Field.

⁷⁹⁸ Ronald KL Collins, ‘Language, History and the Legal Process: A Profile of the Reasonable Man’ (1977) 8 Rutgers Camden Law Journal 8, 314.

⁷⁹⁹ *Privacy And Media Intrusion Relevant document: The Fourth Report from the National Heritage Committee of Session 1992–93 on Privacy and Media Intrusion*, House of Commons Paper No. 294, Hansard Volume 226, 10.6.1993.

⁸⁰⁰ *Volkszählung*, Urteil vom 15.12.1983, BVerfGE 64, 67.

British/ English people and *English law*) are equally employed without further elaboration. In all these cases, it is the implied understandings that invoke the respective national legal identity.

Although findings are generally silent on the more specific meaning of British national legal identity, we can detect some claims regarding what does and what does not fall within its remit. In particular, a central claim that is advanced in the discourses surrounding the legal recognition of information privacy is that privacy is *not* part of British national legal identity. The most-cited incident of a flat-out rejection of privacy as a legal concept in English law is that of Lord Hoffmann in the case of *Wainwright v Home Office*.⁸⁰¹ But similar passages also surface in tribunal decisions⁸⁰² and parliamentary debates, such as:

*I suggest that privacy is a novelty for United Kingdom citizens.*⁸⁰³

In passages like these, the respective ‘subject’ that, in the eyes of lawmakers, lacks an appreciation for privacy varies. Sometimes, it is fictions such as *the British people* or *UK citizens* (see above), and sometimes, it is lawmakers’ conception of *the British legal system* or *English law*. Correspondingly, some passages that contain claims about whether privacy is part of the national legal identity are concerned with lawmaker’s imaginations of (fictional) human attitudes and emotions, while others passages, such as those presented below, point more towards systemic legal features:

⁸⁰¹ *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 AC 406; [2003] 3 WLR 1137; [2003] 3 All ER 943, Lord Hoffmann at 28-35.

⁸⁰² *Investigatory Powers Tribunal Application No. IPT/01/629*, [2004], The President and the Vice-President:

The determination of the Tribunal on this point is that the Complainant has failed to establish that there is in public law a fundamental or basic common law right of privacy of communications.

⁸⁰³ *Data Protection Bill*, House of Commons, Hansard Volume 53, 30.1.1984, Mr Robert Maclennan.

*My Lords, I know that certain other countries have laws of privacy, which are part of their legal system. [...] But here we are accustomed to legislating in considerable detail.*⁸⁰⁴

This argument for resisting foreign legal choices refers to the nature of British legislating. The below passage, taken from an extract that discusses the Younger Committee's privacy recommendations in the House of Commons, similarly refers to systemic legal arrangements:

*I agree that we should pay close attention to the experience of other countries. However[...] It may be simpler for countries with written constitutions to proceed in that way than it is for those such as Britain, without one.*⁸⁰⁵

I am sceptical that the absence of a written constitution renders the legal recognition of information privacy more cumbersome. But this is not the concern of this subsection. Instead, the present analysis focuses on the criteria that – in the minds of lawmakers – feed into the kind of distinctiveness that justifies resistance towards foreign legal pressures. Categories like domestic legal particularities and fictions of citizens' attitudes both surface here. They each have strong conceptual links to the imagination of a (British) nation. Though different, I am proposing to read them all as parts of a 'national legal identity'. Is this a plausible interpretation of arguments that seek to resist foreign and international law? One might view constitutional arrangements and citizens' attitudes as disparate factors; in one case sociological, in one case legal. Thus, one might object that it is overly inferential to claim that they relate to a shared conceptual basis like 'national legal identity'.

The objection is a valid caveat. However, it still remains a matter of empirical fact that the considerations lawmakers imagine the factors they take to demonstrate cultural distinctiveness (i.e. citizens' attitudes, lack of written constitution) within a nationalist paradigm. It is furthermore empirically noticeable in the above passages

⁸⁰⁴ *House of Lords Debate*, Hansard Volume 563, 6.4.1995, The Lord Chancellor.

⁸⁰⁵ *Interception Of Mail: New Clause 8*, House of Commons, Hansard Volume 2, 1.4.1981, Mr Lloyd.

that legal agents argumentatively employ these considerations in parallel ways: in both cases, the point is to resist the normative power of foreign or international law. The kind of cultural distinctiveness that lawmakers view as a shield against foreign legal pressures is part legal and part sociological. The framework of national legal identity accommodates this and picks out continuities between seemingly disparate social and legal dimensions of nationalism.

In some instances, the sociological and legal dimensions of national legal identities are blended and resistance is articulated more explicitly, such as illustrated by subsequent two passages. While the first judicial passage is a response to the pressure of the European Convention in favour of privacy recognition, the second passage from legislative discourse focuses on foreign legal systems:

*[W]hen one moves on to consider the question of objective justification under Article 8(2) the cultural traditions in the United Kingdom are material. [...]*⁸⁰⁶

*It is perfectly legitimate and proper for each country to determine how, within its culture and history, it gives different weight in its laws to each of those values. Ireland, New Zealand, Canada, the United States and other countries [...] should not be regarded as templates forcing us down a particular route. We must seek our own solution in robust debate in this House and in this country.*⁸⁰⁷

Both passages flag up terms like *culture*, *history* or *tradition*. Again, the meaning of these terms presented as nation-contingent; it is the culture of a (nation) state or country. In both of the above cases, *culture* does not quite refer to the respective legal arrangements (as in, 'legal culture'), but it nevertheless bears a strong thematic connection to law.

A further argument in favour of viewing lawmakers' conceptions of constitutional arrangements, cultural traditions, as well as citizens' attitudes as belonging within the broader concept of national legal identity is the fact that they all

⁸⁰⁶ *R (on the application of Marper and another) v Chief Constable of South Yorkshire* [2002] EWCA Civ 1275, Lord Steyn at 27.

⁸⁰⁷ *Freedom Of Information Bill*, House of Commons, Hansard Volume 340, 12.7.1999. Mr Mike O'Brien.

appeal to (national) self-determination. In all the exemplary extracts featured in this subsection, the upshot is that the decision of whether or not to afford legal recognition to privacy ought to be determined nationally and autonomously. This is brought out most clearly by the last passage, which explicitly rejects the normative *force (forcing)* of foreign legal choices. In the academic literature, especially on the matter of European Union membership, the tensions between international law and domestic legal autonomy are often discussed in terms of concepts like ‘national sovereignty’⁸⁰⁸ and ‘constitutional identity’.⁸⁰⁹ Just like idea of nation itself, the idea of constitutional identity is ‘constructed and projected by what Benedict Anderson has labelled ‘imagined communities.’⁸¹⁰ Just like its neighbouring concepts of national sovereignty and constitutional identity, ‘national legal identity’ captures the nationalist overtones of late modern legal change.

7.5.3 National legal identity as a reason for recognising privacy

The previous subsection has presented the finding that lawmakers sometimes advance the claim that privacy is not part of British national legal identity. But at the same time, findings show that preceding acts of legal recognition, lawmakers also make contrary claims: they propose that British citizens do in fact value or respect privacy, or that British laws and legal institutions already afford (some) legal recognition to privacy:

*The British people value privacy. We have a tradition whereby an Englishman's home is his castle.*⁸¹¹

⁸⁰⁸ Julie Dickson, ‘Towards a Theory of European Union Legal Systems’, *Philosophical Foundations of European Union Law* (Oxford University Press 2013) 47.; Neil MacCormick, ‘Democracy and Subsidiarity in the European Commonwealth’, *Questioning Sovereignty* (Oxford University Press 1999) 142.

⁸⁰⁹ Alejandro Saiz Arnaiz and Carina Alcoberro Llivina, ‘Why Constitutional Identity Suddenly Matters: A Tale of Brave States, a Mighty Union and the Decline of Sovereignty’ in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia Publishing Ltd 2013).

⁸¹⁰ Rosenfeld (n 570) 758.

⁸¹¹ *Privacy And Media Intrusion: The Fourth Report from the National Heritage Committee of Session 1992–93 on Privacy and Media Intrusion*, House of Commons Paper No. 294, Hansard Volume 226, 10.6.1993.

*The right to be left alone may not sound a very exciting freedom, but it is the one about which the British people care most.*⁸¹²

*[W]e are dealing with the fundamental right of the subject to privacy, a right which has long been safeguarded in this country.*⁸¹³

Qualitative analyses of these passages show that whenever lawmakers make a claim regarding what does and what does not form part of national legal identity, they face little explicit opposition. At the same time, when one takes an overview – as this study does – over the varied contents of these claims, contradiction is evident. The discrepancy between these passages and the ones presented in the preceding subsection is intriguing: if we take them to represent empirical claims, that is, quasi-sociological claims about what British people value, they cannot both be right.

In the preceding subsection, I have argued that lawmaker's claims that invoke national legal identity have a normative flavour. In this way, propositions about what *the British people* do or do not value are not empirical sociological hypotheses, but instances of normative negotiation. In this way, the use national legal identity rhetorically conflates what *ought to be* with what *is*. This strategy can also be detected in German acts of legal recognition, where dimensions of national legal identity – such as citizens' attitudes and emotions – are often presented as a reason in favour of recognising privacy:

*The data collection mandated by this law has caused concern even in those parts of the population, who are loyal citizens, and who respect the right and the duty of the state to acquire information necessary for planned action [...]*⁸¹⁴

⁸¹² *Right Of Privacy Bill: Order for Second Reading*, House of Commons, Hansard Volume 794, 23.1.1970, Mr. Brian Walden.

⁸¹³ *Interception Of Communications*, House of Lords, Hansard Volume 409, 21.5.1980 Lord Elwyn-Jones.

⁸¹⁴ *Volkszählung*, Urteil vom 15.12.1983, BVerfGE 64, 67, at 215:

Die durch dieses Gesetz angeordnete Datenerhebung hat Beunruhigung auch in solchen Teilen der Bevölkerung ausgelöst, die als loyale Staatsbürger das Recht und die Pflicht des Staates respektieren, die für rationales und planvolles staatliches Handeln erforderlichen Informationen zu beschaffen.

It is a well-known feature of German constitutional law that courts and legislatures treat *the people* as the democratic sovereign.⁸¹⁵ It is thus fitting that people's attitudes and emotions play a role as a reason for legal change in German acts of privacy recognition.⁸¹⁶ But the above passage reveals the normative valence of national legal identity quite explicitly. Here, it is not just German citizens, whose attitudes and opinions lawmakers take to be relevant: the judges of the Constitutional Court explicitly refer to the *loyal citizens of the state*. Firstly, the statement is conjecture: we can presume it is not based on an empirical study that maps the correlation of citizen loyalty with discontent regarding data sourcing practices. Secondly, the statement is explicitly normative: the relevant subjects here are imagined as *loyal* in virtue of respecting the state's interest in gathering information. The category of *loyal citizen* is thus a construct that reflects political allegiance: the attitudes of *loyal (German) citizens* are privileged because legal agents have encoded this notion with presumptions of conformity and obedience.

Beyond references to the German people, national legal identity arises in German acts of legal recognition in the form of *objective values*. In *Herrenreiter*, a ground-breaking German Federal Supreme Court judgment on the recognition of privacy in civil law,⁸¹⁷ a central passage states:

*Articles 1 and 2 of the Basic Law protect – with binding effect also for the judiciary – that which we call the human personality; they recognise it as one of the objective values of the German legal order [...]*⁸¹⁸

⁸¹⁵ Hailbronner and Martini (n 626) 386.

⁸¹⁶ For example, consider the reference to *the increased concern amongst citizens, Volkszählung*, Urteil vom 15.12.1983, BVerfGE 64, 67, at 108.

⁸¹⁷ Balthasar (n 5) 106.

⁸¹⁸ *Herrenreiter*, Urteil vom 14.2.1958, BGHZ 26, 349, at 17.

Die Art. 1 und 2 des Grundgesetzes schützen, und zwar mit bindender Wirkung auch für die Rechtsprechung, das, was man die menschliche Personhaftigkeit nennt; ja sie erkennen in ihr einen der übergesetzlichen Grundwerte der deutschen Rechtsordnung an [...]

The notion of an *objective order of values* ('Objective Werteordnung') is a central concept of German constitutional law⁸¹⁹ and reflects the broad systematic normative significance of constitutional rights.⁸²⁰ The extent to which it can be read as an expression of nationalism may be debatable; after all, every legal system has a set of values that it treats as axioms. But with respect to the recognition of privacy, findings reveal some connection to the imagination of *nationhood*: just as in the passage, these values are often explicitly described as 'German' and as binding 'German' public institutions. This suggests that the view that references to the 'objective order of values' at least sometimes conveys aspects of German national legal identity.

7.6 Conclusions: globalised law in late modernity?

The findings presented in this chapter demonstrate that in late modern contexts, legal change is not an insular phenomenon. Instead, lawmaking discourses reveal that foreign and international law feature as salient considerations for lawmakers. From the perspective of those involved in domestic legal change, foreign and international law surface as reasons for affording legal recognition to information privacy, indicating that these legal resources evidently exert *some* normative force. The analysis and the critical discussion of findings in this chapter shed some light on the extent and conditions under which the laws of other systems and of international institutions are viewed as compelling.

In particular, coding revealed that foreign laws are often taken to be normatively relevant when legal agents presume some structural or normative commonalities between them and the domestic legal system. Examples supplied in section 7.2 range from linguistic similarity – German acts of recognition contain various references to Swiss law – to structural commonalities, such as extensive citations of common law by UK legal agents, and shared commitments to values like democracy. Subsection 7.2.4 spends some time discussing how we might characterise the perceived normative force of foreign law. There, I entertain the possible view that

⁸¹⁹ Hailbronner and Martini (n 626) 360.

⁸²⁰ Alexy, *A Theory of Constitutional Rights* (n 196) 152.

foreign law may work as mere inspiration for domestic lawmakers.

Section 7.3 explores the normative significance of international law in the eyes of domestic legal agents involved in recognizing privacy. Due to its salience throughout acts of recognition, the focus of explorations in this chapter is Article 8 of the European Convention on Human Rights. Despite the fact that the famous *Von Hannover* judgment of the European Court of Human Rights expanded the privacy rights of public personas under German law, it did not seem to have a role in prompting the subsequent (very active) development of privacy recognition.

The situation in the UK is different: findings reveal that in a variety of seminal UK privacy cases, UK judicial agents hold themselves out to be practically *obligated* under the Convention to afford progressive legal recognition to privacy rights. This ‘official story’ is subjected to critical discussion in subsection 7.3.2. Although Article 8 of the European Convention – implemented by Article 8 of the UK Human Rights Act – is doubtlessly a significant *reason* in favour of recognition, it is possible that ostensible deference to international law also veils judicial discretion. Section 7.3 furthermore details findings on the arguably more subtle ways in which Article 8 featured as a reason in favour of UK privacy recognition. These include favouring the terminology of ‘privacy’ over that of ‘confidence’ (subsection 7.3.3), the salience of the concept of dignity and the 2-step structure of assessing rights invasions (subsection 7.3.4).

Section 7.4 retains the focus on the domestic relevance of international law. Instead of focussing on human rights, it considers data protection instruments of the Council of Europe and the European Union: subsection 7.4.2 focuses on the Council of Europe’s Convention 108 and subsection 7.4.3 focuses on Directive 95/46/EC. My empirical analyses reveal that domestic lawmakers take these international law instruments to be normatively compelling and repeatedly emphasise that they ought to meet their obligations. International data protection laws are thus an important reason in favour of affording legal recognition to privacy. At the same time, it is clear that homogenising standards for data protection exist against the backdrop of a

globalised economy. Lawmakers express the concern that both an inadequate level of data protection (such as in the UK before the 1984 Data Protection Act), as well as a comparatively elaborate level of data protection (such as in the European Union after the Data Protection Directive) may impede transborder data flows and thereby have adverse effects on trade.

Section 7.5 shifts this chapter's focus onto the discursive tropes that seek to resist the normative appeal of foreign and international law. In particular, section 7.5 maps out the continued methodological nationalism of legal imaginations: lawmakers' appeals to their own systems' cultural distinctiveness are often couched within a nationalist frame of signification. Section 7.5 proposes – and critically discusses – a view that conceives of these imaginations of culture, tradition and citizenry as belonging within the category of *national legal identity*.

The findings presented here illustrate that in the act of changing law, global pressures conflict with a persistently nationalist legal vernacular. This tension between 'the global' and 'the local' is the core focus of those who study and theorise globalisation.⁸²¹ Of course, as pointed out by Twining, legal systems have always existed in pluralistic and complex normative landscapes,⁸²² so the fact that lawmakers see themselves confronted with pressures from their social environments is not novel *per se*. Nevertheless, it is likely that in post-industrial, late modern information societies,⁸²³ the complexity of the normative world is enhanced. Many scholars have noted the new challenges for lawmakers that globalisation entails: Marsden suggests that globalisation often occasions legitimacy gaps in regulatory bodies⁸²⁴ and Banakar points out that new forums for communication like cyberspace constitute multiple

⁸²¹ *ibid.*

⁸²² Zygmund Bauman, 'On Glocalization: Or, Globalisation for Some, Localization for Some Others' (1998) 54 *Thesis Eleven* 37..

⁸²³ William Twining, 'Normative and Legal Pluralism: A Global Perspective' (2010) 20 *Duke Journal of Comparative & International Law* 473, 476.

⁸²⁴ Marsden cites scholars like Beck, Manuel Castells, Mueller, Braithwaite, Lessig, Wu and Zittrain. See Banakar, *Normativity in Legal Sociology: Methodological Reflections on Law and Regulation in Late Modernity* (n 198) 3.

normative communities and have given rise to contested ‘hybrid legal spaces’.⁸²⁵

This chapter has explored some global pressures vis-à-vis the legal recognition of information privacy. Of course, my empirical focus on the privacy laws is too narrow to allow for grand generalisations about how globalisation affects legal change. Nevertheless, it would be an omission to overlook the fact that the phenomenon of globalisation is at play – albeit in ways that are likely so complex that they exceed the scope of the here conducted investigations. For the purposes of understanding legal change sociologically, it is noteworthy that global pressures and national legal identities represent yet another set of factors that challenge the perfunctory conception of late modern lawmaking as rationally calculated problem solving enterprise.

⁸²⁵ Christopher T Marsden, *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace* (Cambridge University Press 2011) 12.

8. Conclusions

This final chapter highlights this research project's insights and critically considers its empirical and theoretical contributions to the academic literature on privacy developments, as well as on legal change. The final chapter also reflects carefully on the generalisability of the reasons for legal change identified in previous chapters. For this purpose, I address the limitation that empirical insights are confined to legal operations in a late modern context. I also consider whether insights into the legal recognition of privacy can be extended to other areas of legal regulation, and to legal systems beyond Germany and the UK.

8.1 Introduction

*Laws are like sausages. It is better not to see them being made.*⁸²⁶

All human societies depend for their existence on social norms and shared social concepts. These social norms and concepts are amenable to change over time. Sometimes, such social change is radical, sometimes, it is incremental. Sometimes, it depends on individual norm-entrepreneurs and sometimes, it depends on the practice of large social groups. Legal norms and concepts – especially those that are part of late modern legal systems – are special kinds of social facts: they tend to be more consciously reflected and deliberated. More effort is typically put into linguistically expressing and systemising them. Legal norms and concepts also face the contradictory expectations of being morally exemplary on the one hand, and being an authentic reflection of community mores on the other.

The content of late modern legal norms and concepts is guarded and maintained by institutions; any changes typically occur through professionalised discursive procedures like court judgments and legislative processes. These are

⁸²⁶ The origin of this popular proverb is unknown, though it is commonly (and possibly incorrectly) attributed to Otto von Bismarck. Incidentally, a photograph taken of Otto von Bismarck on his deathbed was involved in court case that led to an important act of privacy recognition in German law, see section 5.5.3.

presumed to ensure and preserve values such as democratic participation, rationality and consistency. The point of institutionally confining legal change to a group of professional lawmakers is to ensure quality and legality. After all, we must be able to trust that legal norms can be used as guides for beneficial human behaviour. Being recognised as law or, as legal scholars prefer to say, being 'legally valid', is a stamp of approval that carries immense social significance: it is because of their institutional pedigree that late modern legal norms and concepts are generally presumed to be fair and rational. This presumption enhances their authority and their ability to command our allegiance; in the eyes of many, it is what makes them legitimate. Given that so much hinges on the way laws are made, it is surprising that the qualitative details of these processes have not commanded more attention from social scientists.

This research project has aimed to contribute towards addressing this lack of scholarship on legal change by offering a sociological analysis of the legal recognition of privacy as a case study of legal change in late modern societies. The motivation for this research stems from a curiosity about how the proverbial 'sausage' is made. Specifically, this research project has focussed on *reasons* lawmakers have for engaging in legal change. Modern legal systems encourage the view that professional lawmakers have ways of ensuring that the norms they produce are objectively justifiable and rational; much like professional scientists are presumed to rely on scientific methods to ensure their findings are valid.

Upon reflection, however, it seems naive to suppose that the normative negotiation of legal content is a straightforward, instrumentalist response to an objectively existent social issue or problem. This is because the view that some given social scenario counts as 'problematic' already entails a normative judgment: what are the social understandings that lead lawmakers to understand data-gathering practices as 'problematic' in the first place? How do they decide what counts as a regulatory issue, and when, whether and how legal intervention is warranted?

Answers to these questions are a matter of social construction. This thesis has explored these social meaning-making processes within a particular focus on lawmakers' reasons for legal change. Unsurprisingly, lawmaking in modern societies is not a wholly rational process that produces correct normative solutions for problems 'out there': the findings of this research project have illuminated that lawmakers – the judicial, legislative and other agents who participate in lawmaking discourse – assume an active role in constructing and negotiating the issues they seek to regulate.

In the case of privacy violations, I have proceeded from the neutral presumption that data gathering and dissemination practices are not intrinsically problematic; rather, normative significance is attributed to them by lawmakers on the basis of interpretive meaning-making processes. Just as deciding what counts as socially problematic, lawmakers also assume active roles in demarcating what warrants their specifically *legal* attention – and intervention. The decision that a given social issue is, or ought to be, of 'legal relevance' is not an impartial, objective diagnosis. Rather, as this research project has demonstrated, it is a judgement that depends on a balance between normative assessments of social life and a particular conception of the role of law and legal institutions in society. This research project finds that, in lawmaking, this balance is constantly re-negotiated.

The following sections highlight this research project's insights and critically consider its empirical and theoretical contributions. Section 8.2 explains how the findings of this study challenge and supplement the academic literature on the development of information privacy laws. Section 8.3 summarises how this research project has contributed to a better sociological understanding of legal change as a type of meaningful social action. This section also highlights some significant insights from the findings of the empirical component of this project. While section 8.4 details the theoretical contributions of this thesis, the final section – 8.5 – returns again to the empirical findings and reflects carefully on their generalisability to other legal systems and other areas of lawmaking.

8.2 Empirical insights into the development of information privacy laws

The empirical investigations of this study have explored on the legal recognition of information privacy, focussing on the latter half of the twentieth century. It is worth repeating that I have neither aimed to provide a defence of privacy as a moral principle, nor to offer a normative critique of privacy laws. Instead, my sociological explorations have teased out and analysed the *reasons* lawmakers had for affording legal recognition to privacy. I have done this, as chapter 4 details, by conducting qualitative analyses of the lawmaking discourses that preceded *acts of privacy recognition*, that is, moments where privacy laws were changed. This, it should be clarified, did not lead to a chronology of privacy law developments, or to a biography of privacy as a right. Some such accounts exist for German and UK law,⁸²⁷ and I have critically reviewed them in section 2.1 of this thesis. Instead of telling a story about how privacy laws came to be, my research objective was to gain empirically informed insight into the reasons that mattered to lawmakers and prompted their legal recognition of privacy.

In fact, as section 2.1 emphasises, the fact that many of the doctrinal-historical accounts of the development on information privacy lack this rigorous social-scientific dimension was one of the objectives that drove this the present research project. At the same time, I did not aim to discredit the often very insightful arguments that exist in this body of literature. Instead, this thesis has relied on empirical investigations to gain more nuanced understandings of whether and how the various explanations for privacy law developments offered in the existing literature are convincing and fit together. For the most part, my findings mirror the salient narratives on the development of information privacy laws that the review of the literature in section 2.1 has presented. This may in itself be regarded as a valuable contribution: the empirical scrutiny offered by this research project bolsters the accounts of Balthasar, Whitman, Bennett and others.⁸²⁸

⁸²⁷ In particular, see Balthasar (n 5); Pratt (n 35); González Fuster (n 484).

⁸²⁸ Balthasar (n 5); Whitman (n 2); Bennett (n 12).

But the more crucial contributions of my qualitative empirical analysis are twofold: firstly, my findings provide a detailed explanation for how exactly factors like technological change or historical experiences with totalitarianism *directly enter into* lawmaking processes. Section 2.1 has criticised that the existing literature offers little insight into how broader social concerns feed into the legal recognition of privacy. In particular, my analysis has enabled the insight that many of the factors for privacy development that existing scholarship refers to feature as reasons in lawmaking discourses: they are of immediate concern to lawmakers themselves. Secondly, building on empirical insights, my discussion of findings in chapters 5-7 paints a nuanced picture of how the different reasons that prompted the legal recognition of privacy intersect. For example, section 6.2.2 reveals that lawmakers' concerns about technological innovation on the one hand and about totalitarian governments on the other are frequently merged into an overarching trope of a dystopian, technologically empowered danger. Although both technological change and historical experiences of totalitarianism are mentioned in the existing literature on privacy developments (see sections 2.1.3 and 2.1.4), the relevance of this intersection has – until now – gone unnoticed.

8.3 Contributions to understanding legal change sociologically

In addition to enabling a more nuanced and empirically informed understanding of why privacy was afforded legal recognition, this research project was informed by a second objective: to contribute towards understanding legal change *sociologically*. Section 2.2 has described this objective in detail. I have enabled interpretive insights into why lawmakers have engaged in acts of legal recognition. These are already summarised and discussed in the conclusions of chapters 5-7. Rather than repeating them all here, this subsection merely highlights some insights that I take to be particularly important or critical contributions to our understanding of legal change.

This research project has allowed insight into the circumstances that lawmakers view as warranting their intervention. While part of this concerns

diagnosing a social problem or danger (see especially chapter 6 on this), chapter 5 reveals another consideration that receives comparatively little attention in the literature on regulation:⁸²⁹ the expectations lawmakers hold with regard to the products of their lawmaking efforts. Two of those discussed in this thesis are the expectations that law ought to be *authoritative* (that is, it ought to regulate human behaviour effectively) and that law ought to be *just*, or counter injustice (see subsections 5.4 and 5.5).

Section 5 has described these fundamental expectations relating to law's nature as *law's claims*. This was designed to flag up an interesting continuity between a body of jurisprudential scholarship that views law as possessing the capacity to make claims⁸³⁰ and the empirical findings of this study: as section 5.3 explains, it is not only legal theorists who attribute this peculiar kind of agency to law, but this study reveals that lawmakers frequently talk of law as a kind of thing that can 'claim', 'know', or 'want' certain things. This imbues law with significant agential power.

Various legal theorists consider the here-mentioned *claims to be just* and *to be authoritative* a crucial feature of law's nature.⁸³¹ At the same time, what exactly is meant by the assertion that law makes claims continues to mystify others who stress that, in practice, laws and legal systems may well be ineffective or unjust and thus fall short of these claims.⁸³² My research findings demonstrate that thought and talk about law as making claims and as making other demands are common in lawmaking discourses. I suggest that it is in these contexts that the view that law makes claims is of particular relevance. My suggestion that features of laws and legal systems – such as the view that law makes claims – that are strongly contested in the jurisprudential literature may be re-thought as features of legal change, rather than of

⁸²⁹ See, for example, Bennett (n 12).

⁸³⁰ See section 5.1 for a critical discussion of the view that law makes claims.

⁸³¹ See, in particular, Gardner (n 399).

⁸³² D'Almeida and Edwards (n 401).

the validity or existence of law itself, offers a novel perspective on sticky debates in jurisprudence that concern the relation between law and morality.⁸³³

My research findings show that lawmakers' expectations of law's nature (i.e. *law's claims*) surface as reasons for, and sometimes against, the legal recognition of privacy: the concern that law may be ineffective at protecting privacy interests has evidently fuelled regulatory pessimism in UK acts of privacy recognition. Conversely, the expectation that law ought to be just, or practically correct, entails that a legal state of affairs is considered morally offensive is viewed as warranting legal change. Furthermore, the expectation that law is just (or that it ought to promote a just state of affairs) manifests in a discursive trope that frames law as a mechanism of 'protection from dangers'.

When it comes to how these 'dangers' are discursively constructed, this study has found that dystopian themes were particularly salient (see chapter 6). My finding that references to works of fiction are prominent preceding acts of privacy recognition challenges the conception that modern lawmaking is a rationalised, fact-based enterprise that responds to objectively existent social needs. This study's findings remind us that the categories of danger that prompt engagement in law-changing acts are themselves a matter of social construction. The salience of dystopian themes also showcases that making and changing law is, like other forms of producing cultural artefacts like works of art, a social process that is informed by emotion, metaphor and popular culture. In this way, the here-conducted sociological analysis of legal change demonstrates that the changing of law is embedded in and draws on a broader environment of culturally specific meanings. By providing in-depth analyses of some of these meanings, chapter 6 allows unique insight into how these broader social themes and considerations feed into the legal vernacular.

Finally, chapter 7 alerts us to the insight that in late modern contexts, legal change is not an insular phenomenon. Instead, lawmaking discourses reveal that

⁸³³ I elaborate on this point in section 2.2.2

foreign and international law are important considerations for lawmakers and count as reasons for affording legal recognition to information privacy in domestic legal contexts. This indicates that foreign legal resources are compelling – they exert normative force – beyond the nation-state boundary. The same is true of market considerations, as Section 7.4 shows. Retaining the focus on international legal initiatives, section 7.4 considers international data protection instruments and finds that part of the motivation behind the adoption of the Council of Europe’s Convention 108 and the European Union’s Directive 95/46/EC is to remain competitive in a global economy: Lawmakers express the concern that both an inadequate level of data protection (such as in the UK before the 1984 Data Protection Act), as well as a comparatively elaborate level of data protection (such as in the European Union after the Data Protection Directive) may impede transborder data flows and thereby have adverse effects on trade.

At the same time, chapter 7 also emphasises that there is tension between these ‘global pressures’ and local contexts of making law: section 7.5 discusses evidence for resistance against the normative appeal of foreign and international law. In these discursive tropes, cultural distinctiveness emerges as a reason for, and sometimes against, affording legal recognition to privacy. Section 7.5 suggests that lawmakers’ discursive portrayals of cultural distinctiveness, as well as of tradition and citizenry, belong within the broader category of *national legal identity*, thus drawing our attention to a persisting methodological nationalism in late modern legal change.

The insights highlighted above demonstrate that this study’s empirical focus on lawmakers’ reasons yields significant socio-legal insights into lawmaking processes. My interpretive approach allows for a more nuanced sociological understanding of the meanings that lawmakers attribute to their own acts of legal change. At the same time, it is important to point out that due to the study’s design and outlook, the here-presented findings are subject to various limitations. Chapter 4, particularly section 4.5, has already discussed these in depth, but I will point out one caveat that is important for contextualising this research project’s contribution:

my analysis of lawmakers' reasons for affording legal recognition to information privacy has focussed on official, public and professionalised discourses in the legal field. This means that my study is unable to account for the various hidden private motivations and clandestine objectives that influence legal change: those that happen 'off the record', so to speak. Had this project been situated in a more *critical* legal tradition,⁸³⁴ this caveat might have counted as a more serious shortcoming.

But as stated above, my purpose was to *understand*, rather than evaluate, the reasons for which privacy became a recognised legal concept. And though my findings do not reveal anything scandalous, they allow fascinating insight into the understandings, presumptions and norms that inform the institutional context of late modern lawmaking. I have approached my qualitative data analysis with the acute awareness that statements uttered in official contexts are subject to strategies of presenting the respective institutions favourably. In many instances, my discussion of findings questions the genuineness of lawmakers' claims and offers multiple, sometimes sceptical, interpretations. This approach has been helpful in allowing me to read between the lines.

Beyond that, my findings demonstrate that there are merits to researching official, institutional processes, particularly in areas that have so far attracted little socio-legal attention.⁸³⁵ More critical understandings of the social processes involved in lawmaking are warranted, and they are not antithetical to the aims of my study: I envisage that this research project's contributions to our understanding of legal change in modern societies will be integrated with – and constructively challenged by – more critically oriented future research.

⁸³⁴ Such approaches may seek to offer a more critical perspective on lawmaking; Roberto Mangabeira Unger, 'The Critical Legal Studies Movement' (1983) 96 *Harvard Law Review* 561, 565.

⁸³⁵ Section 2.2 has outlined the need for a deeper, socio-legal understanding of legal change. The lack of attention to the making of privacy laws was already criticised in 2006 by Leith (n 2).

8.4 Theoretical contributions: conceptualising legal change

In addition to the empirical insights outlined in the previous two sections, this research project makes various theoretical contributions. Section 2.2 has outlined the ambition of contributing to a more general, socio-legal understanding of legal change. There, I surveyed existing socio-legal and jurisprudential literature for insights before I proposed to develop an interpretive understanding of legal change as meaningful social action. I have suggested that this approach is not only conducive to a socio-legal investigation into legal change such as this research project, but that focussing on lawmakers' reasons for changing law may also be useful for analytical jurisprudence. Section 2.2.2 has explained how jurisprudentially contested theories about the nature of law – such as the claim that law depends on considerations of merit – may usefully be recycled as theories about legal change. I have proposed that law cannot be changed for the aim of making it more unjust as an example of an analytical theory about legal change; emphasising at the same time that such a theory would be fully compatible with the positivist notion that the products of those law-changing actions – the laws themselves – may still turn out unjust or otherwise qualitatively deficient. Though this is merely a rough conjecture about what an analytical theory of legal change may look like, it suggests that the theoretical work done in the context of this research project may be of use to socio-legal, as well as jurisprudential, approaches to theorising law.

I took up the challenge of theorising legal change in chapter 3. This chapter responds to the problem of how we may identify legal change empirically. Chapter 3 has developed and contrasted two concepts of legal change. Each of these corresponds to a different viewpoint on what it means for law to exist or to be *valid*. Chapter 3 supplied a theoretical framework to the empirical component of this research project, but its insights and propositions may also be viewed as a theoretical contribution in their own right:

The FIRST CONCEPT OF LEGAL CHANGE proposed a conceptualisation of moments of legal change as acts of legal recognition. I defined legal recognition as an affirmative communicative act, usually contained in speech or writing, by an official legal institution that has some command and authority over deciding *what*

the law is within a given social context. Meanwhile, the SECOND CONCEPT OF LEGAL CHANGE retained many of the useful features of the FIRST CONCEPT's strategy in picking out moments of legal change, but it included the added requirement that to count as law-changing or *transformative*, acts of legal recognition must also establish the legal status of a concept whose legal validity was previously either not settled. In this way, the SECOND CONCEPT OF LEGAL CHANGE helps filtering out those acts of legal recognition that lack a discernible effect on the legal status quo. This allows the SECOND CONCEPT OF LEGAL CHANGE to conform to an orthodox, binary perspective on legal validity that presumes that norms and concepts *are either valid law* in the respective legal system, or they are *not*.

In contrast to this orthodox perspective on legal validity, section 3.4 has argued that a social constructivist view in relation to the question 'when do legal norms exist?' is more intuitive for socio-legal scholars. From such a perspective, legal norms are continuously affirmed and maintained through legal thought and talk is more sociologically intuitive. On this view, legal norms exist in virtue of being continuously perpetuated through recognition by agents within the legal field. This conception provided the theoretical framework for the empirical component of this research project. Revealing that typically jurisprudential and socio-legal approaches may require slightly different conceptualisations of legal change is itself an important theoretical insight generated in chapter 3.

By retaining both concepts of legal change, chapter 3 has offered two theoretical alternatives: those who view the existence of law as a binary matter might prefer the SECOND CONCEPT OF LEGAL CHANGE while those who consider existence-as-law a cumulative matter may rely on the FIRST CONCEPT OF LEGAL CHANGE's capacity to account for all discursive contributions to the social construction of law.

8.5 Limitations of generalisations about reasons for legal change

This research project has engaged in both qualitative empirical research and in theorising grounded in this research and in academic literature in order to contribute towards an understanding of legal change. In section 2.2.4, I have argued that the lack of systematic scholarship on legal change may be attributed to the presumption that the making of law is too idiosyncratic in its many manifestations to warrant conceptualisation in the form of a general explanation. I have challenged this view and maintained that speculating about the more general reasons for which lawmakers engage in legal change is an important component of theory building. Thus, a central question that remains to be answered concerns the extent to which the empirical insights that were generated by my research and highlighted in section 8.3 of this concluding chapter can be generalised.

In light of the design of the empirical component of this study, generalisations about reasons for which law is changed on the basis of my findings are limited in three main ways: firstly, my investigations are confined to the late modern period, secondly, empirical investigations have only focussed on two modern legal systems (i.e. UK and German law), and thirdly, the thematic focus of this study is confined to the subject matter of information privacy laws. These limitations are addressed in more detail in the following paragraphs.

Due to the historical context of the subject matter of information privacy, most instances of legal change analysed within this study are set between the latter half of the twentieth century and today: a time period in Western history that is commonly characterised as late modernity, as section 1.3 of this thesis has explained. The analysis and discussion of research findings has paid special attention to typically late modern features, such as the insight that lawmakers display high degrees of reflexive awareness (as section 5.4 has revealed), or that reasons for recognising privacy often include references to dystopian fiction (as chapter 7 has demonstrated). Furthermore, the ways in which lawmakers' reasons for legal change

were informed by foreign and international legal developments (see chapter 8) are likely dependent on the late modern, globalised context in which they were set.

This suggests that the insights into legal change supplied by this study are presumably of limited applicability to lawmaking in societies that are not appropriately characterised as 'late modern' and that do not display late modern features, such as many non-Western societies, or to historical instances of legal systems. But the flipside of this limitation is that it provides a defined focus for my investigations. I have framed this research project as a study of legal change in late modern societies in order to sharpen the lens on the historical situatedness of the legal recognition of privacy.

A second concern that arises regarding the generalisability of my findings is the fact that this research project's empirical findings on lawmakers' reasons for recognising information privacy are only based on investigations of lawmaking processes in Germany and the UK. Do my insights extend to other legal systems? Section 4.4 has described my comparative approach in more depth. There, I have explained that focussing on two late modern legal systems represents a justifiable trade-off that allows in-depth investigations into lawmaking discourses, while using a comparative outlook to pick up on system-specific idiosyncrasies in lawmaking. Future research into additional modern legal systems may reveal more idiosyncrasies and similarities. In this way, the present study may be viewed as contributing insights to a broader comparative agenda.

Examples for features that are presumably specific to the legal systems here investigated are the tendency towards regulatory pessimism in UK acts of privacy recognition (see section 5.4), the inter-institutional tensions between judiciary and legislature in UK lawmaking (see sections 5.2.2 as well as 7.3.2) and the fact that in German lawmaking discourses, dystopian themes were often linked to historical experiences of totalitarianism (section 6.3). Section 7.2 furthermore explains that the normative relevance that lawmakers in Germany and the UK attribute to foreign legal developments varies depending on whether those foreign legal systems have

structural and normative commonalities with the respective domestic legal context. These examples alert us to some ways in which reasons for recognising information privacy may differ in other late modern legal systems.

At the same time, it is worth pointing out that many kinds of reasons for the legal recognition of privacy were mirrored in both UK and German lawmaking discourses. Fascinating examples include the salience of dystopian themes, and the fact that in response to globalising pressures in late modern lawmaking, reasons for legal recognition in both German and UK lawmaking contains references to national legal identity (section 7.4). These commonalities allow us to speculate that similar reasons for legal change may be detected in US or French lawmaking discourses. Thus, while I am unable to make definitive claims about reasons for recognising information privacy laws in other legal systems, the insights of this study lend themselves to being employed as useful and meaningful hypotheses for subsequent case studies.

The third question that arises concerns the extent to which the findings of this thesis can be extended to areas of lawmaking that do not concern privacy. Do the reasons for which lawmakers engage in other areas of legal regulation also fit into the categories of legal antecedents, dystopian dangers and global pressures? Answers to this question are bound to be speculative. But it seems plausible to presume that concerns like making just and effective law, as well as the pressure to ‘keep up’ with foreign and international legal developments, are more universal features of late modern lawmaking discourses.

By contrast, it is less obvious that the construction of regulatory problems or ‘dangers’ in other areas of law will draw as heavily on dystopian themes as the legal discourses on privacy. It may well be, as chapter 6 has suggested, that dystopian themes of surveillance exist in thematic proximity to privacy in particular, and that they are thus much less present – or at least less explicit – in other areas of lawmaking. Then again, it is worth keeping in mind that, as section 6.1 has pointed out, we can observe some interesting continuities between the technique of

imaginative speculation involved in utopian/dystopian fiction and legal thought: as Isaiah Berlin points out, utopia, the idea of the perfect society, is a ‘very old dream’ of Western normative thought.⁸³⁶ After all, lawmaking is a creative human activity that requires the imagination of a better society as a guiding ideal – and of the dangers that threaten those visions. So, even though explicit references to Orwell’s *Nineteen Eighty-Four* may be largely absent from, say, discourses on environmental regulation, we may still find that dystopian imagining *as a genre* is a more general and pervasive phenomenon in the social construction of law – and that it therefore provides useful interpretive lens for the socio-legal analysis of acts of legal change.

⁸³⁶ Berlin (n 520) 71.

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Appendix: Table of Acts of Legal Privacy Recognition

Germany

Act of Recognition	Recognising Body	Date
Preußische Postordnung	Preußen	10.08.1712
Preußische Allgemeine Postordnung	Preußen	26.11.1782
Allgemeine Landesrecht für die Preußischen Staaten (ALPS)	Preußen	27.05.1749
Verfassung des Kurfürstentums Hessen	Hessen	05.01.1831
Urteil RGZ 45, 170 <i>Bismarck</i>	Reichsgericht RG	28.12.1899
Urteil RGZ 69, 401 <i>Nietzsche</i>	RG	07.11.1908
Die Verfassung des Deutschen Reichs (<i>Weimarer Reichsverfassung</i>)		11.08.1919
Urteil JW 1921, 901f <i>Wilhelm II</i>	RG	28.05.1921
Urteil RGZ 115, 416	RG	13.01.1927
Urteil RGZ 125,80 <i>Tull</i>	RG	26.06.1929
Grundgesetz für die Bundesrepublik Deutschland	Bundesrepublik	23.05.1949
Urteil vom, BGHZ 13, 334, <i>Leserbrief/Veröffentlichung von Briefen</i>	Bundesgerichtshof (BGH)	25.05.1954
Urteil I ZR 62/54 <i>Paul Dahlke</i>	BGH	08.05.1956
Urteil BGHZ 24, 72 <i>Ärztliche Bescheinigung</i>	BGH	02.04.1957
Beschluss BVerfGE 7, 198 <i>Lüth</i>	Bundesverfassungsgericht (BverfG)	15.01.1958
Urteil BGHZ 26, 349 <i>Herrenreiter</i>	BGH	14.02.1958
Urteil, NJW 1951, 2059 <i>Ginsengwurzel</i>	BGH	19.09.1961
Urteil, BGHZ R 126/63 <i>Spielgefährtin</i>	BGH	09.06.1965
Urteil VI ZR 268/64 <i>Vor der eignen Tür</i>	BGH	16.09.1966
17. Gesetz zur Änderung des Grundgesetzes	Bundesrepublik	24.05.1969
Gesetz zur Beschränkung des Brief- Post- und Fernmeldegeheimnisses (G10 Gesetz)	Bundesrepublik	13.06.1968
Beschluss BVerfGE 27, 1 <i>Mikrozensus</i>	BVerfG	16.07.1969
Hessisches Datenschutzgesetz	Land Hessen	07.10.1970
Beschluss 2 BvF 1/69 <i>Abhörurteil</i>	BverfGE	15.12.1970
Beschluss 1 BvR 435/68 <i>Mephisto</i>	BVerfG	24.02.1971
Beschluss BVerfGE 34, 269 <i>Soraya</i>	BVerfG	14.02.1973
Einführungsgesetz zum Strafgesetzbuch (§201 StGB)	Bundesrepublik	02.03.1974
Bundesdatenschutzgesetz	Bundesrepublik	27.01.1977
Urteil 15 U 113/81 <i>Unterhaltungskünstler</i>	Oberlandesgericht (OLG)	23.03.1982

	Köln	
Urteil 6 U 107/82 <i>Organspende</i>	OLG Oldenburg	26.11.1982
Urteil BVerfGE 64, 67 <i>Volkszählung</i>	BVerfG	15.12.1983
Urteil VI ZR 28/83 <i>Schulbuchfoto</i>	BGH	22.01.1985
Zweites Gesetz zur Bekämpfung der Wirtschaftskriminalität (202a StGB)	Bundesregierung	15.05.1986
Urteil 6 U 171/85 <i>Wechselnde Freundinnen</i>	OLG Frankfurt	11.09.1986
Urteil VI ZR 244/85 <i>Operation Eva</i>	BGH	10.03.1987
Urteil - 21 U 2878/87 <i>Nacktbaden</i>	OLG München	13.11.1987
Urteil, VIZR 42/87 <i>Telefonsex</i>	BGH	24.11.1987
Urteil 36 C 294/88 <i>Radlerrunde</i>	Amtsgericht (AG) Hamburg	24.1.1989
Bundesdatenschutzgesetz Novellierung 1990	Bundesrepublik	12.11.1990
Urteil - 3 U 258/90 <i>Schauspielerin I</i>	OLG Hamburg	30.05.1991
Urteil - 324 O 3/93 <i>NENA</i>	OLG Hamburg	15.10.1993
Urteil I BvR 737/94	BGH	08.02.1994
Beschluss BVerfGE 90, 255 <i>Briefüberwachung</i>	BVerfG	26.04.2994
Urteil VI ZR 1/94 <i>IM- Liste</i>	BGH	12.07.1994
Urteil BGHZ 128, 1 <i>Caroline I</i>	BGH	15.11.1994
Änderung Bundesdatenschutzgesetz durch Postneuordnungsgesetz	Bundesrepublik	01.01.1995
Urteil 3 U 292/94 <i>Schauspielerin II</i>	OLG Hamburg	27.04.1995
Urteil 20 O 67/95 <i>Politikerwerbung</i>	Landgericht (LG) Berlin	08.06.1995
Urteil VI ZR 223/94	BGH	12.12.1995
Urteil NJW 1996, 1128 <i>Caroline III,</i>	BGH	19.12.1995
Telekommunikationsgesetz	Bundesrepublik	25.07.1996
Urteil 27 O 449/96 <i>Pornodarsteller</i>	LG Berlin	19.11.1996
Urteil 1611/96, <i>Mithörfalle</i>	BAG	29.10.1997
Urteil 15 U 171/98 <i>Galinski</i>	OLG Düsseldorf	16.06.1999
Urteil 7 U 19/99 <i>Noch keine Freundin</i>	OLG Hamburg	22.06.1999
Urteil VI ZR 264/98 <i>August von Hannover I</i>	BGH	29.06.1999
Urteil BVerfGE 100,313 <i>Telekommunikationsüberwachung I</i>	BVerfG	14.07.1999
Urteil 1 BvR 1611/99 <i>Havemann Berufung</i>	OLG Hamburg	29.07.1999
Urteil 11 U 28/99 <i>Katharina Witt</i>	OLG Frankfurt	21.09.1999
Urteil I/47/97 <i>Marlene Dietrich</i>	BGH	01.12.1999
Beschluss BVerfGE 101, 361, <i>Caroline</i>	BVerfG	15.12.1999
Beschluss 1BvR 1582/94 <i>IM-Liste</i>	BVerfG	23.02.2000
Urteil 21U3740/00 – 140.000DM für drei <i>Bussis</i>	OLG München	01.12.2000
Bundesdatenschutzgesetz	Bundesrepublik	18.5.2001

2001(Novellierung)		
Urteil U 180/01 <i>Videoüberwachung</i>	OLG Karlsruhe	08.11.2001
Bundesdatenschutzgesetz 2003 (Novellierung)	Bundesrepublik	14.01.2003
Urteil 27 O 1033/02 <i>Gerhard Schröder</i>	LG Berlin	21.02.2003
Urteil ZR 373/02- <i>Feriedomizil</i>	BGH	09.12.2003
Urteil BVerfGE 109, 279 <i>Großer Lauschangriff</i>	BverfG	03.03.2004
Beschluss 4.3.2004- 1 BvR 2098/01 <i>Geldentschädigung</i>	BVerfG	04.03.2004
Sechsendreißigstes Strafrechtsänderungsgesetz - § 201a StGB	Bundesrepublik	30.07.2004
Beschluss 2 BvR 1481/04	BverfG	14.10.2004
Urteil VI ZR 292/03 <i>Anke</i>	BGH	19.10.2004
Urteil 1 BvR 668/04 <i>Vorbeugende Telekommunikationsüberwachung</i>	BverfG	27.07.2005
Urteil – VI ZR 263/04 <i>Mordkommission Köln</i>	BGH	06.12.2005
Urteil 2 BvR 2099/04 <i>Kommunikationsverbindungsdaten</i>	BverfG	02.03.2006
Telekommunikations- Kundenschutzverordnung (TKV)	Bundesrepublik	24.02.2007
Strafrechtsänderungsgesetz (BGBl I S. 1574)	Bundesrepublik	20.07.2007
Beschluss 1 BvR 1602, 1606 <i>Caroline III</i>	BverfG	26.02.2008
Urteil BVerfGE 120, 274 <i>Online Durchsuchungen</i>	BverfG	27.02.2008
Urteil 1 BvR 2074/05 <i>Automatisierte Kennzeichenerfassung</i>	BverfG	11.03.2008
Bundesdatenschutzgesetz 2009 (Novellierung)	Bundesrepublik	29.07.2009
Urteil BVerfGE 125, 260 <i>Vorratsdatenspeicherung,</i>	BVerfG	02.03.2010
Urteil BVerfGE 133, 277-377 <i>Antiterrordatei</i>	BVerfG	24.04.2013
Neunundvierzigstes Gesetz zur Änderung des Strafgesetzbuches (201a StGB)	Bundesrepublik	21.01.2015

United Kingdom

Act of Recognition	Recognising Body	Date
<i>Pope v Curl</i>	Court of Chancery	17.06.1741
<i>Entick v Carrington</i>	High Court of Justice	02.11.1765
<i>Sir Charles Thompson and Others, Executors of Lord Chesterfield v Eugenia Stanhope, Widow, and John Dodsley</i>	Court of Chancery	23.03.1774
<i>Lord and Lady Perceval v Phipps</i>	Court of Chancery	03.06. 1813
<i>Green v Pritchard</i>	Court of Chancery	28.07.1818
<i>Yovatt v Winyard</i>	Court of Chancery	15.05.1820
<i>Green & Ors v Folgham & Ors</i>	Court of Chancery	10.06.1823
<i>Gee v Prtichard and Anderson</i>	Court of Chancery	28.07. 1818
<i>Prince Albert v Strange</i>	Court of Chancery	02.06.1849
<i>Pollard v Photographic Co.</i>	High Court of Justice	21.12.1888
<i>Duchess of Argyll v Duke of Argyll</i>	High Court of Justice	09.12.1964
<i>Boardman v Phipps</i>	House of Lords	03.11.1966
<i>Bernstein of Leigh v Skyviews & General Ltd</i>	High Court of Justice	09.02.1977
<i>Woodward v Hutchins</i>	Court of Appeal	19.04.1977
<i>Lennon v News Group Newspapers Ltd and Twist</i>	Court of Appeal	16.06.1978
<i>Malone v Metropolitan Police Commissioner</i>	High Court of Justice	28.02.1979
<i>Francome v Mirror Group Newspapers Ltd</i>	Court of Appeal	16.03.1984
<i>Telecommunications Act 1984</i>	UK Government	12.04.1984
<i>United Kingdom Data Protection Act 1984</i>	UK Government	12.07.1984
<i>Stephens v Avery</i>	High Court of Justice	26.02.1988
<i>Attorney-General v Guardian Newspapers Ltd (No2) “Spycatcher”</i>	House of Lords	13.10.1988
<i>Kaye v Robertson & Sport Newspapers Ltd</i>	Court of Appeal	16.03.1990
<i>Computer Misuse Act</i>	UK Government	29.06.1990
<i>United Kingdom Data Protection Act 1998</i>	UK Government	16.06.1998
<i>United Kingdom Human Rights Act 1998</i>	UK Government	09.11.1998
<i>R v Broadcasting Standards Commission</i>	Court of Appeal	06.04.2000
<i>Regulation of Investigatory Powers Act 2000</i>	UK Government	28.07.2000
<i>Blair v Associated Newspapers Plc</i>	High Court of Justice	13.11.2000
<i>Mills v News Group Newspapers Ltd</i>	High Court of Justice	04.06.2001
<i>R (on the application of Marper and another) v Chief Constable of South Yorkshire</i>	Court of Appeal	22.03.2002
<i>Theakston v Mirror Group Newspapers Ltd</i>	High Court of Justice	14.02.2002
<i>A v B plc (Flitcroft v MGN Ltd)</i>	Court of Appeal	11.03.2002
<i>R v. Smart [2002] EWCA Crim 772</i>	Court of Appeal	27.03.2002
<i>Campbell v Frisbee</i>	Court of Appeal	14.10.2002
<i>R v. Hardy [2002] EWCA Crim 3012</i>	Court of Appeal	18.11.2003
<i>Campbell v MGN Ltd</i>	House of Lords	06.05.2004

<i>R v. E [2004] EWCA Crim 1243</i>	Court of Appeal	26.04.2004
<i>Regina (S) v Chief Constable of the South Yorkshire Police</i>	House of Lords	22.07.2004
<i>Wainwright v Home Office</i>	House of Lords	16.10.2004
<i>Douglas and others v Hello Limited and others</i>	Court of Appeal	18.05.2005
<i>Beckham v MGN Ltd</i>	High Court of Justice	03.08.2005
<i>His Royal Highness the Prince of Wales v Associated Newspapers Ltd</i>	High Court of Justice	13.01.2006
<i>McKennitt v Ash</i>	Court of Appeal	14.12. 2006
<i>Murray v Big Pictures (UK) Ltd</i>	Court of Appeal	07.05.2008
<i>Mosley v News Group Newspapers</i>	High Court of Justice	24.07.2008
<i>Wood v Commissioner of Police for the Metropolis</i>	Court of Appeal	21.05.2009
<i>CTB v News Group Newspapers Ltd (No 2)</i>	High Court of Justice	25.11.2011
<i>AMP v Persons Unknown</i>	Technology and Construction Court	20.12.2011
<i>Phillips v Mulcaire</i>	Supreme Court	09.07.2012
<i>Halliday v Creation Consumer Finance Ltd</i>	Court of Appeal	15.03.2013
<i>Counter-Terrorism and Security Act</i>	UK Government	12.02.2015
<i>Vidal-Hall & Ors v Google Inc</i>	Court of Appeal	27.03.2015
<i>Culati & Ors v MGN limited</i>	High Court of Justice	21.05.2015