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of Groups and Nations**

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Structure of the European Public Sphere**

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The European Policy Unit

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From Individual Privacy to the Privacy of Groups and Nations — An Approach to the Problems of the Structure of the European Public Sphere

Mihály Szívós*

The researcher dealing with the scientific analysis of the political and legal provisions of the public sphere (*Öffentlichkeit*), as opposed to provisions for the protection of privacy, may note a curious phenomenon which has emerged primarily with regard to the Western European and American situations. The American monographic literature is generally richer in works centred on the rights of the individual to privacy; whereas in Europe, it is the history and structure of the public sphere[1] that have been studied more successfully. In the latter case, Habermas' research into the theory and history of this sphere and its wide-ranging impact in sociology could be mentioned.

Starting in the 1960s, a slow process of convergence or equalization of these tendencies began. This was signalled, in Western Europe, by the activity of inquirers such as Michel Foucault — especially by the last phase of his work, in which he was concerned with the description of the emergence of the individual, the self and its technologies of self-defence and self-construction.[2] This trend also manifests itself in the fact that, both in the U.S. and in Europe, steps have been taken towards the autonomy of social groups and, more specifically, towards

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[1] In the literature, the categories *"public domain"*, "general public" and "public at large" have also been used.

[2] It is sufficient to refer here to his project called "Technologies of the Self", of which his work "History of Sexuality" forms part. In: *Technologies of the Self. A Seminar with Michel Foucault*, edited by L. H. Martin, H. Gutman and P. H. Hutton, London: Tavistock 1988.

ensuring their right to a private sphere. Owing to the historically moulded disparities in the structure of the public sphere, the paths leading to the direct or indirect recognition of the privacy of the group have been different in Europe from those on the other side of the Atlantic.

The European public sphere and its various aspects have been major factors in the intellectual preparation for, and development of, European integration. History suggests that all the major social unions based upon voluntary association have been preceded by the emergence of some kind of public access. The potentialities implicit in the development of a European public sphere did not, however, become manifest until Europe lost its hegemonic role in world politics due to the political changes following World War II. The recognition of new political interests and of the interdependence of European nations made visible those processes which had developed in the force field of the major history-shaping factors and which had previously operated in a subordinated and quite distorted fashion. *In this paper we intend — in the context of the structure of the European public sphere — to give a schematic description of the processes leading to the indirect or direct recognition of the private sphere of groups, macrogroups and/or nations. We also provide a historical definition of privacy.* As for historical and political processes and trends in the history of ideas, we shall discuss those which are relevant to the development of the public and private spheres.

In terms of both actual social development and theoretical analysis, the emergence of individual privacy preceded the emergence of group privacy. Methodologically, that fact alone is sufficient justification for us to start our discussion with individual privacy.

In the U.S., an impressive body of literature on the topic of privacy has been produced and, in terms of legislation relating to the private spheres of individuals and groups, this country is top of the league table. That has warranted including in our analysis those facts of U.S. history which seem to explain the traditionally stronger American demand for privacy. The methodology of this paper is characterized, moreover, by the combination of the different aspects of the complex of questions relating to privacy — aspects hitherto treated separately — placing them in a historical context.

The wide-ranging controversies over the question of privacy, the considerable contraries over the interpretation of the concept, the lack of professional consensus, and the divergent approaches of the academic disciplines relevant to the subject of privacy, all impel us to expound our own concept of privacy.

The concept of privacy — a historical approach

The majority of the works focussing on privacy tend to be dominated by a juristic approach. The first truly ambitious, interdisciplinary works which scrutinize the development of privacy from its ancient forms did not emerge until the late 1960s.[3] Analysis of this kind is particularly important if only because, in the case of the public sphere and especially public opinion, the pragmatic criteria of practical research (the study of electoral behaviour, consumer behaviour, etc.) have distracted researchers' attention away from the historical dimension. As a result, these researchers have arrived at definitions which tend to be simplistic, failing to take account of historical forms, and hence leaving to one side, or perceiving as inessential certain persistent trends. Because of the close conjunction between the public sphere and privacy, theories formulated in such a way cause the definition of the former to radiate into that of the latter. This explains why the increasing importance attached to the protection of privacy has been deduced partly from the development of modern mass communication and partly from the problems of protection of data. This method has produced a drastic curtailment of the history of privacy and an oversimplification of its function. Due to multidisciplinary approaches, the situation has changed considerably, so that we now find some analyses that have moved on from that position, incorporating privacy into some sort of explicit or implicit theory of society and recognizing significant anthropological and ethological antecedents.[4] We also wish to expound our own interdisciplinary definition by outlining the crucial turning-points in history, the history of jurisprudence and the history of science.

From the juridico-historical standpoint, possibly the single most important antecedent is the period in the development of Roman law in which, firstly, Roman magistrates were required to publicly promulgate their interpretations of the statutes and, secondly, a system of public criminal proceedings was introduced.[5] These developments made the legal system predictable for the free citizen. The establishment of

[3] One of the most interesting works of this trend is Barrington Moore's *Privacy. Studies in Social and Cultural History*, Armonk: M. E. Sharpe, Inc. 1984.

[4] For instance Alan Westin, "The origins of modern claims to privacy", in: *Philosophical Dimensions of Privacy: An Anthology*, edited by F. D. Schoeman, Cambridge: Cambridge University Press 1984, p. 70.

[5] Wolfgang Kunkel, *Römische Rechtsgeschichte*, Köln/Wien: Böhlau Verlag 1980, pp. 64-67.

the public sphere of the administration of justice was a major step on the long road towards equality before the law, inasmuch as the personalized character of the administration of justice was thereby restricted. The publicly promulgated interpretation of statutes applied to a generalized abstraction of the citizen. In a given law-suit, that which fell outside the force and competence of the interpretation of the statutes could belong to the private sphere of the individual. Formerly, under the sacral practice of the administration of justice, which only recognized individual cases, the individual resorting to legal remedy had had his entire personality judged and scrutinized. The move towards the establishment of the public sphere of application of the law also brought with it the appearance of elements of the private sphere.

The latitude of action of the individual ensured by a legal framework was further expanded when, to assist him in a matter under dispute, he could hire one or more representatives (advocates) versed in jurisprudence.[6] To some extent, this already separated his law-suit from his own external physical appearance and personality, enabling him to draw up a preliminary strategy and to conceal his particular *attitude* towards his earlier action or intention, which through his law-suit is made public — that is to say, in a wider philosophical sense, he defines his attitude towards his own former self. It was this type of private sphere — guaranteed only indirectly under the law — that attended the public access created and regulated by Roman law.

The Renaissance encompassed not only the propagation of the values of classical Greco-Roman civilization but also a widening of the application of Roman law — especially in Italy and in the Western European countries affected by the Renaissance. "From the eleventh century to the eighteenth and even beyond, the main feature of legal change in Western Continental Europe was the reception of Roman Law. At the beginning of that period law was above all custom, and throughout the period the main development in private law lay in the interaction between custom and Roman law."[7] — writes Alan Watson in his work *The Evolution of Law*. This system of jurisprudence was more predictable and its level of abstraction exceeded that of the other

[6] Kunkel, *op. cit.* "Die Fairneß, mit der die römischen Prozeßgesetze insbesondere dem Angeklagten Raum für seine Verteidigung gewährte, ist überaus eindrucksvoll, für unsere Begriffe sogar übertrieben. Er konnte zeitweise bis zu sechs Anwälte für sich auftreten lassen." p. 67.

[7] Alan Watson, *The Evolution of Law*, Baltimore, Maryland: The John Hopkins University Press 1985, p. 66.

European legal systems. That reception gave a major boost to the development of the private sphere.

The aspirations of cities for self-government and — after the age of the wars of religion — the greater religious and ideological tolerance created by the Peace of Westphalia (1648) led to the appearance of an internal public sphere in the big cities. The expansion of the private sphere is indicated by the considerably increased demand for reading and entertainment. These forms of activity also helped to create the self-cultivation of personality.

The individual's latitude of action engendered by a better-defined interpretation of the law was complemented, in the religious field, by a different kind of freedom of interpretation. This was produced by the religious reforms initiated by Luther and Calvin, one of whose consequences was the free interpretation of the Bible. Luther sharply rejected the suggestion that interpretation sanctioned by the church hierarchy could be of exclusive and obligatory validity.[8] The Bible was translated into the vernacular, ending the Church's monopoly over the interpretation of the Latin text. The rejection of confession,[9] required by the Catholic Church, likewise represented an unequivocal strengthening of the private sphere.

The next important stage in the evolution of law was a result of the French Revolution and particularly the subsumption of the new law system, the *Code Civil*, which, by the consistent enforcement of the principles of freedom and equality before the law, reinforced further the protection of the private sphere. This new legal development coincided with the legal guaranteeing of openness — primarily through the establishment of press freedom, which, in the 19th century, gradually gained ground in Western Europe.

The widening of the public sphere and the strengthening of public opinion in the second half of the last century prompted some liberal thinkers to turn their attention to the *protection of the private sphere*. In his work *Liberty, Equality and Fraternity*, the British lawyer and philosopher James Fitzjames Stephen writes: "Legislation and public opinion ought in all cases whatever scrupulously to respect privacy. To define the province of privacy distinctly is impossible, but it can be described in general terms. All the more intimate and delicate relations

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[8] "Captivitate Babylonica Ecclesiae", in: *D. Martin Luthers Werke*, B.8. Weimar 1888, p. 508.

[9] Barrington Moore, *op. cit.* "... the practice of oral confession aroused widespread fear, anxiety, and resentment as an intrusion into private affairs." p. 283.

of life are of such a nature that to submit them to unsympathetic observation, or to observation which is sympathetic in the wrong way, inflicts great pain, and may inflict lasting moral injury."[10] Stephen also draws attention to a less analysed aspect: "Privacy may be violated not only by the intrusion of a stranger, but by compelling or persuading a person to direct too much attention to his own feelings and to attach too much importance to their analysis."[11] Here he posits, in fact, a kind of duality within the personality, the relationship between whose poles has been disturbed by external pressure acting on the private sphere.

Stephen also points to the crucial correspondence whereby creativity depends on the presence of the private sphere.[12] Stephen's ideas have been further developed, though in the U.S. from the end of the 19th century onwards, it was the legal interpretations that came to the fore.

Juridico-historical surveys written by American authors frequently began by citations, from American legal practice, of the first court decisions in violation of privacy cases. The question of legal compensation for unwarranted intrusion into the private sphere was first raised by Samuel Warren and Louis Brandeis in 1890, in their — since then, much quoted[13] — article "The Right to Privacy"[14], in connection with a case in which a newspaper published what was considered to be private information about a particular person. Legal practice, which supported citizens seeking to protect themselves against the excesses of newspaper prying, provided, in ever greater respects, fulcrums for the protection of privacy. The primary reason for the publication of a plethora of information on private life was the fierce competition

[10] James F. Stephen, *Liberty, Equality and Fraternity*, New York: Henry Hold and Co. 1873, p. 160. Quoted by F. D. Schoeman, *Philosophical Dimensions of Privacy*, pp. 10-11.

[11] *Ibid.* p. 11.

[12] *Id.* p. 12.

[13] This article "is perhaps the most famous and certainly the most influential law review article ever written." Nimmer, "The Right of Publicity", *Law and Contemp. Probs.* 1954, 19, p. 203. Quoted by Robert C. Post, "The Social Foundations of Privacy: Community and Self in the Common Law Tort", *California Law Review* 1989, 77, p. 958.

[14] Warren and Brandeis, "The Right to Privacy", *Harvard Law Review* 1890, 4, reprinted in the volume entitled *Philosophical Dimensions of Privacy*, edited by F. D. Schoeman.

provoked by the free market, which created a demand for all types of information, for the acquisition of patterns of the successful conduct of life. Newspaper prying, in turn, tried to cater to that demand.

According to an analysis published by Robert C. Post in the 1989 volume of the Californian Law Review, U.S. law — as a result of the development that has occurred in the past hundred years — distinguished four areas in the violation of the private sphere: "unreasonable intrusion upon the seclusion of another; unreasonable publicity given to another's private life; appropriation of another's name or likeness and publicity that unreasonably places another in a false light before the public."[15] All this confirms what Parent, criticizing the definitions of privacy, mentions as a fundamental factor — namely, that it is the manner of handling information about the individual which is most important.[16] Other authors also confirm this essential feature of privacy — that control over the handling of information relating to the individual is of crucial importance to the existence and maintenance of the private sphere.[17]

In defining the social background behind the legal terms, Robert C. Post relies on Erwing Goffman's theory of social psychology. He explains that U.S. law "...regards the privacy tort as simultaneously upholding social norms and redressing 'injury to personality'."[18] For "social norms", Post substitutes a term closer to the law "civility rules" which confirm the "social personality" of the individual, i.e. his/her condition as a citizen in a general sense. In the case of the invasion of privacy, the individual seeks redress at law partly because he or she has been treated disrespectfully: "The victim of the breach of a civility rule, in other words, suffers a special kind of injury: He is 'threatened' with being 'discredited' because he has been excluded from the 'chain of ceremony' which establishes the respect normally accorded to fully-fledged members of the community. Since the boundaries of a community are marked by the 'special claims which members have on each other, as distinct from others', the defendant's disregard of the plaintiff's claim to be treated with respect potentially places the plaintiff outside of the

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[15] Post, *op. cit.* p. 958.

[16] W. A. Parent, "III. Recent Work on the Concept of Privacy", *American Philosophical Quarterly* 1983, 20, p. 343.

[17] Charles Fried, "Privacy (A Moral Analysis)", in: *Philosophical Dimensions of Privacy*.

[18] Post, *op. cit.* p. 963.

bounds of the shared community."[19] On the other hand, the law gives redress to the individual for his/her own personal grievance. That duality arises from the distinction drawn between the public individual (*citoyen*) and the private individual (*bourgeois*), a distinction valid for the citizens of all societies possessing a public sphere.

This external duality between the private individual and the public individual, known to political science since Locke, also leaves its imprint in the structure of the individual, of the self. The beginnings of the internal duality of the individual have already been pointed out in our analysis of Roman jurisdiction. In Stephen's philosophy we encounter one of the first theoretical conceptualizations of that duality. Georg Simmel was the first sociologist to try and find a theoretical explanation for this phenomenon. The behavioural elements designated by the categories of "self-revelation" and "self-restraint" — his own formulations — are considered by him to be constant components of social intercourse.[20]

The duality of the self of the individual, as a fundamental internal structural peculiarity, was first described by George Herbert Mead in his theory of social psychology. Within the self, he distinguishes between the "I" and the "me": "The 'I' reacts to the self which arises through the taking of the attitudes of others. Through taking those attitudes we have introduced the 'me' and we react to it as an 'I'."[21] "The 'I' is in a certain sense that with which we do identify ourselves."[22] The "I", then, is really something internal, something more difficult to bring into focus. It is this component that constitutes the core of the singularity of the individual. As to the definition of the "me": "Now, in so far as the individual arouses in himself the attitudes of the others, there arises an organized group of responses. And it is due to the individual's ability to take the attitudes of these others in so far as they can be organized that he gets self-consciousness. The taking of all of those organized sets of attitudes gives him his 'me'; that is the self he is aware of."[23] The "me" is of an instrumental character in its relationship to the "I", which tries

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[19] Post, *op. cit.* p. 968.

[20] Simmel's theory and categories are cited by Robert F. Murphy, "Social Distance and the Veil", in: *Philosophical Dimensions of Privacy*, pp. 34-35.

[21] George Herbert Mead, *Mind, Self and Society from the Standpoint of a Social Behaviourist*, Chicago and London: The University of Chicago Press 1974, p. 174.

[22] *Ibid.* pp. 174-175.

[23] *Ibid.* p. 175.

to perform the duties of the self: "[The 'I'] fulfils his duty...The 'me' arises to do that duty — that is the way in which it arises in his experience."[24] The evolution of the "I" and the "me", as has been already pointed out, goes right back to antiquity. By the public interpretation of the law, Roman law presupposes a general abstraction of the citizen, while the various forms of public sphere presuppose a general abstraction of the participant. In European history, the response of the individual to that situation has been increasingly to evolve roles, which he could push in front of him partly for defence and partly as a means by which to press forward. The "me" is the internal coordinator of role-stereotypes; through the mediation of the "me", the individual elaborates specific "technologies" of self-preservation.

The differentiation formulated by Mead in communication theory is widely used outside social psychology as well. In social psychology, his theory was further developed by Erwing Goffman, among others. The whole theory of duality then became one of the corner-stones of theories on privacy, so that it is often applied to privacy without any reference being made to the first proponents of the theory. Arnold Simmel identifies the boundaries of privacy with those of the self, which, for its part, is made up of two components, one of them being the "charismatic self — what we perceive in ourselves as different, freedom-demanding, *ausser-alltaeglich*, unquestionable, and worthy of complete loyalty"[25]; whilst the other component is the accommodating self, turned towards the outer world. Michael A. Weinstein articulates this duality as follows: "In the end, bourgeois society leaves people with two selves: a private self with interests that cannot be pursued in public and a social mask for the conduct of human relations."[26] But the two components of the self, as is apparent from the historical overview, are not peculiar to capitalist society.

The connection between the two components of the self is the most important area of the private sphere. Information relating to it is of the most confidential character. As Stephen pointed out, any interference in the normal relationship between the two is, in itself, a violation of the private sphere. Information relating to the individual — which some-

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[24] *Ibid.* pp. 175-176.

[25] Arnold Simmel, "Privacy is Not an Isolated Freedom", in: *Privacy. Nomos XIII*, p. 73. Here the other component may, amongst other things, be deduced from the proposition that the charismatic self is what "we perceive in ourselves".

[26] Michael A. Weinstein, "The Uses of Privacy in the Good Life", in: *Privacy. Nomos XIII*, p. 90.

times applies to quite extrinsic things — assumes importance from the viewpoint of the protection of privacy by virtue of the fact that it inferentially reveals — against the will of the individual — something about that singular interrelationship. Information accumulated on things falling within the private sphere of the individual not only renders the individual vulnerable but, in the last analysis, and here we accentuate a philosophical aspect — it may deprive him of his character as a goal-setting subject, degrading him into a mere tool which serves the interests of the individual or individuals usurping and utilizing the information. The significant restriction or violation of privacy — according to this definition — may entail the restriction, distortion or transformation of one's identity.

It is through the analysis of privacy from the perspective of identity that we arrive at the negative features of this social phenomenon. Undue extension of the boundaries of privacy may lead to egoism and the oppression of others; while the inordinate reinforcement of the existing boundaries or an inflexible recognition of them will result in a lack of solidarity.

The concept of the privacy of the group

Both by proceeding from theoretical generalizations and by relying on the historical study of groups, we may now arrive at a definition of the private sphere of the group in terms of social psychology and sociology. Relying on Marcel Mauss' and Georges Gurwitch's research into the sociology of the group and their theoretical work, René König emphasizes that "Even groups, however small they may be, are total social phenomena possessing their unique dimensions of depth."[27] This explains why groups can possess a singular awareness of identity (*"Wir-Bewußtsein"*).[28] *From total social character and awareness of identity it follows that a group also possesses a private sphere*, which it strives to protect in order to maintain its identity and viability.

According to the theory of George Herbert Mead, within macro- and microgroups — religious communities, nations, and work groups —

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[27] René König, "Die analytisch-praktische Doppelbedeutung des Gruppentheorems. Ein Blick in die Hintergründe", in: *Gruppensoziologie. Perspektiven und Materialien*, Hrsg. von Friedhelm Niedhart, Opladen: Westdeutscher V. 1983, p. 59.

[28] *Id.* p. 54.

there may occur, in attitudes, a coalescence of the "I" and the "me".[29] According to the above definition of privacy, this represents — on the plane determined by attitudes — a reduction of the private sphere. Given that, in all epochs of history, individuals were socialized in groups and the majority of them belonged to some macro- or microgroup or more groups; being restricted at some level has been the normal condition of personal privacy.

Friedrich H. Tenbruck and Wilhelm A. Ruopp — in their article which scans the changing patterns and development of groups in a historical dimension — state that "The relevant social changes of the 19th century had already been in place, in a preliminary form, in the *18th-century* movement for association which had developed from the demands for a rationally based society — demands provoked by religious development and established by the Enlightenment."[30] The authors assume that this process takes place in the same way in our time, too. If these groups did not exist and, we might add, in the absence of the public domain that could serve as the framework for their regulated rivalry, modernization can, for the most part, be initiated only from above, with rather variable results.[31] The rivalry between groups or associations which offer alternatives to society as a whole, is attended by conflicts and, in the long run, by the formulation of strategies designed to protect the private spheres of these groups. In regard to the preservation of privacy and the continuation of creativity, a certain parallel can be drawn between the significance of the private sphere of the individual and that of the group.

The right of combination and assembly, regarded as a fundamental right by the French Revolution, only provided the framework for the organization and competition of social groups. The demand of groups for privacy is brought to the forefront of daily consciousness partly under the pressure of a strong competitive situation and partly by excessive state control. The modern manifestation of the former is newspaper prying, which, in its drive to satisfy the general hunger for information, does not spare groups, either; while the most pronounced

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[29] G. H. Mead, *op. cit.* "I now wish to discuss in more detail than previously the fusion of the 'I' and the 'me' in the attitudes of religion, patriotism, and team work." p. 273.

[30] Friedrich H. Tenbruck - Wilhelm A. Ruopp, "Modernisierung - Vergesellschaftung - Gruppenbildung - Vereinswesen", in: *Gruppensoziologie. Perspektiven und Materialien*, p. 72.

[31] *Id.* p. 54.

manifestation of over-regulation by the State is the excessive collection of data about citizens and their groups.

In the case of the privacy of associations and, more generally, of all groups, the same legal dimensions can be postulated as those described by Post for American legal practice relating to individual privacy. In the United States, amidst strong ethnic and racial conflicts, it has become particularly important — in the interests of reducing and preventing prejudice — to legally ensure that particular social groups are not placed in a false light, and that their members or the groups in their entirety cannot be subjected to injury through distortions of the values they cherish. It is, moreover, an essential ingredient of the group's right to privacy that those of its affairs which are subject to its own internal rules, rather than to the laws applying to all members of society, should be let to be deliberated behind closed doors, which may result even in the total exclusion of the general public. *The protection of the privacy of groups is thus also the self-defence of society as a whole, in the sense expounded above, that it ensures, at both the micro- and the macrolevels, the possibility of the development of alternatives necessary for shaping its future.*

From the standpoint of privacy, the overwhelming majority of political parties may, in a certain respect, be regarded as exceptions because aspirations for power and the rules of the political game demand that the internal public sphere be laid bare to the general public. Nevertheless, certain personal or financial affairs may be treated and regarded as private. In their case, we may talk about limited privacy.

As was mentioned above, the competitive situation between groups, together with the development of the groups' awareness of identity, brings with it an intellectualized awareness of the boundaries of the private sphere, as well as developing the instrumentalities for its protection. The same is true of macrogroups such as those represented by nations, ethnic groups, and societies. It is a significant historical example that the Napoleonic Wars aimed at self-defence and subsequently European unification under French domination were a prominent ingredient in the crystallization of a heightened awareness of national particularity: "There was a second consequence, albeit an unexpected one, of the assertion of the Rights of Man and the Citizen. When Frenchmen had to defend the gains of the revolution against the coalition of international rulers, they became highly conscious of their Frenchness. By repercussion, and to a point by imitation, in the revolt against Napoleonic conquest that also happened to be French, other varieties of European man, German, Italian, and Spanish for example,

developed an intensified awareness of national difference."[32] — writes Albrecht-Carrié, in his work on European unity. That process was promoted by the operation of public and secret organizations formed earlier in which, as Tenbruck and Ruopp pointed out, "... the notions of free, secular coexistence were prefigured and mechanized."[33] This period of the formation of national consciousness brought with it a decisive change, too, in the mutual relations between nations. Conflicts proceeding from consciously recognized economic and political interests also had a reciprocal effect on the internal life of nations, as a result of which the developmental model outlined by Tenbruck and Ruopp was modified in a way which allowed — at moments when the nation was under increased threat — a particular group to acquire absolute control. In the history of the United States — not least because of the absence of such a major threat from outside — we find no examples of this type of scenario.

In the case of social groups, too, we do find the duality that pervades the private sphere of the individual. The group elaborates a strategy towards the public sphere, with the purpose of influencing the image and judgements formed of it by others. These peculiar strategies and the group's defence against external pressures, as well as its internal self-building, may, be called the "technologies of the group", to borrow Michel Foucault's term.

In his work *Gemeinschaft und Gesellschaft* (Community and Society), published in 1887, Ferdinand Tönnies distinguishes between the community that represents "genuine and organic life" and the kind of society that he evaluates as "an ideal and mechanical formation". Tönnies did recognize the breakup of traditional communities and the rise of new communities based on association, which gained momentum in the latter half of the 19th century. The community, in his view, is united by ties of blood and a pattern of feeling anchored in common traditions. He defines society like this: "...we conceive of this aggregate, united by convention and natural law, as a mass of natural and artificial individuals whose volitions and territories have numerous contacts between them and are yet independent of each other, and remain

[32] René Albrecht-Carrié, *The Concert of Europe. 1815-1914*, New York: Evanston and London: Harper Torchbooks 1968, p. 3.

[33] Tenbruck - Ruopp, *op. cit.* p. 72.

without mutual *internal* effects."[34] This sharp contradistinction has been discredited by the findings of sociology and social psychology, because unconscious meshings and interactions, as well as instances of traditionformation, can be identified in the activity of all groups. Common traditions and the components which pertain to the self-definition of a group constitute the inner core of the private sphere; whereas the components of "society", as defined by Tönnies, form the elements of an outer shell or carapace, acting as a buffer. The "invention of traditions" which also shaped the external image of the given nation corresponds to the activity of the "me", of the collective self, of the national identity.

The presence, at the end of the last century, of the public sphere of nations and their attendant rivalry is shown by other trends as well. One of the most striking is the idealization of the national past, whereby a part of the national tradition is used to create an essentially fictitious national identity. During that process, the spiritual outlooks of the two types of groups within nations — came into interaction, as the new parties and associations built up a new "system of traditions" out of particular elements of the traditions generated by the earlier, natural community of the nation. They did so, for the most part, in the service of a strongly nationalistic ideology, and, in the competition between the groups, this new system of traditions played to their advantage. Hobsbawm shows that the mass production of traditions falls in the 1870-1914 period — the very point in history which saw the unfolding of competition between the nations.[35] At the time of the appearance of the need for the protection of national identity and the national private sphere — the time of the mass production of traditions — the social sciences, because of their lack of sophistication or adequate analysis, proved unequal to the task of countervailing this extremely irrationalistic trend in intellectual life.

In defining the private sphere of micro- and macrogroups, primarily using the results of contemporary sociology and social psychology, we arrived at positing the existence of group privacy and at the definition of the concept. In the process, while discussing the private sphere of the nation as a macrogroup, we indicated that, within the European matrix,

[34] Ferdinand Tönnies, *Közösség és társadalom* (Community and Society), Budapest: Gondolat 1983, p. 73.

[35] "Mass-Producing Traditions: Europe, 1870-1914", in: *The Invention of Tradition*, edited by Eric Hobsbawm and Terence Ranger, Cambridge: Cambridge University Press 1989, pp. 263-307.

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the public sphere of macrogroups as well as that of societies within nations and multi-ethnic state-formations has been and still is operative. The existence of the latter we shall demonstrate by historical arguments, in what follows.

American privacy and immigration

It is a peculiarity of the development in the United States that, in the course of a more or less spontaneous legal codification, the concept of group privacy also appears. European development has been slower in this field, but certain of the conditions for ensuring the private sphere of the group were nevertheless gradually created within the compass of the European public sphere.

It is worth examining briefly some of the relevant aspects of U.S. history — relevant, that is to the topic in hand — which may help us illuminate the origin and the results of the strong demand for privacy there. At the same time, it would enable us to compare the structure of the public sphere in the U.S. with the structure of the European public sphere.

The striking differences between the Western European countries and the United States as regards the interpretation and legal implementation of privacy have often been analysed.[36] When we try to explain the origin of the stronger American demand for privacy, we do not do so with the aim of making far-fetched comparisons between the United States of America and Europe.

It is a well-known fact that the overwhelming majority of the population of the United States are the descendants of immigrants. Some sources put the figure at 89 per cent, with the remaining 11 per cent made up of Indian aboriginal inhabitants and blacks forcibly resettled from Africa.[37] The repeated waves of immigrants involved continuous assimilation, i.e. Americanization.[38] The position of the new

[36] By the *Nomos XIII* and the *Philosophical Dimensions of Privacy* most recently.

[37] Maldwyn A. Jones, "Immigration to the United States: A General Overview", in: *American Immigration. Its Variety and Lasting Imprint*, Editor Rob Kroes, Amsterdam: Amerika Instituut 1979, p. 3.

[38] According to Maldwyn A. Jones, the first, second, and third generations of the immigrants affected by the process of Americanization, i.e. assimilation, never exceeded 35 per cent in the major cities, resulting in the numerical superiority of the Americanized population. *Op. cit.* p. 17.

citizens undergoing assimilation was extremely difficult, as the necessity of earning a living and the pursuit of higher living standards required rapid adaptation by them. *Amidst the pressures of expectations declared both publicly and in a legal form, they had an emphatic need for the preservation of their private sphere, as the customs and traditions they had brought with them could no longer be publicly experienced. All that bound them to their old national life had been condensed into the private sphere of either the individual and family group or the national/ethnic group.*[39] As a result, the private spheres expanded, since — given that complete or partial assimilation took several generations to achieve — this demand for privacy persisted. Because of long-drawn-out assimilation[40], expanded private spheres became embedded in the overall social development, becoming traditions and exerting a persistent influence in cultural, political, and everyday life. The U.S Constitution itself ensured a wide latitude to autonomous communities and self-administration, which the particular immigrant communities of various nationalities (which subsequently became minorities) duly used to their advantage.[41]

From the perspective of American privacy and the public sphere, it is most instructive to note that, even as late as the turn of the century, the leaders of immigrant national minorities were simultaneously advocating segregation and integration.[42] The former represented the maintenance and protection of the private sphere of the minority group as a unit, and, by the same token, the maintenance and protection of

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[39] John Bodnar, Roger Simon and Michael P. Weber, *Lives of Their Own. Blacks, Italians and Poles in Pittsburgh, 1900-1960*, Chicago, London: University of Illinois Press 1982. The authors reveal that, for all the strong urbanizational effects, the old cultural-civilizational element brought from the mother country persisted, making its influence felt in occupational choices and in the choice of life conduct strategies, as well as in child-rearing. pp. 264-265. The authors quote, moreover, numerous researchers who have revealed the lasting imprint of the occupational and life-conduct culture brought over from the mother country. p. 5. "We compare the experience of two generations of Poles, blacks, and Italians living in the city of Pittsburgh between 1900 and 1960 and suggest that the family and premigration attitudes played a major role in the migration patterns, occupational choices, and housing accommodations of both first- and second-generation Poles and Italians." pp. 6-7.

[40] *Ibid.* "...sociologists such as Herbert Gans, Nathan Glazer and Daniel Moynihan demolished the notion of easy and rapid assimilation of immigrants." p. 3.

[41] Victor R. Greene, *American Immigrant Leaders 1800-1910. Marginality and Identity*, Baltimore and London: The John Hopkins University Press 1987, p. 142.

[42] *Ibid.* p. 142.

the private sphere of the individuals. The latter — the invitation to integration — was prompted by the desire to help immigrants fulfil the requirements publicly laid down by the authorities and the Americanized population. These leaders recognized that the condition for successful adjustment was the maintenance of some measure of separation, within the *cocoon* of which the necessary measure of assimilation could take place. Here there developed an interaction between the strategies of assimilation, of public adjustment, on the one hand, and on the other the preservation, within the private sphere of individuals and groups, of the culture, idiom, and customs brought from the mother country — an interaction whose impact was to declare itself in later development. This is confirmed, for instance, by the social-psychological theory of the genesis of the private sphere which was formulated by Erik Erikson, the renowned American psychiatrist. According to his theory, the private sphere of a child growing up in an open family is larger than that of children with a closed family background. The open family "...is easily accessible to the surrounding community."[43] It is, moreover, characterized by the fact that "... the open family is likely only in situations where there is a high degree of homogeneity in the population, where parents do not worry about their children being exposed to influences much at variance with their own values, where, in fact, the activities people engage in are rather similar from family to family."[44] Families possessing ethnic ties, in which often even the choice of occupation is determined by the ethnic background,[45] will, therefore, more likely come under the rubric of open families. It is not uncommon for these to be linked together by some minority organization, which holds joint events and takes a share in bringing up the children. The private sphere of these children, who grow up in a narrower community (family) and in a wider community (ethnic community) is, accordingly, larger than the private sphere of

[43] Erik Erikson's theory is quoted and applied by Arnold Simmel in his article "Privacy is Not an Isolated Freedom", in: *Privacy. Nomos XIII*, New York: Atherton Press 1971, p. 76.

[44] *Ibid.* p. 76.

[45] *Lives on Their Own*. In the case of Italians, Poles, and blacks, the authors identify some occupational choice pattern persisting through several generations. pp. 263-267.

children growing up in closed families.[46] This enlarged private sphere — formed also by the aforementioned educational circumstances — predestines one for the kind of self-definition that is perfectly capable of accommodating a wholehearted acceptance of being part of the ethnic community, the preservation of the language and part of their customs as well.

As we move into the early Sixties, we see a steady decline in the influence of particular ethnic organizations in the United States. Their organizations faded away or struggled to survive, and there was a sharp drop, too, in the sales of newspapers written in the language of the mother country. But this was also the period, that saw the burgeoning of the Black Civil Rights Movement and a concomitant discovery of the minority past, with the aim of building some kind of historical consciousness. Indeed, a term has been coined, in the monographic literature, to describe this sociological syndrome: in a reference to Alex Healey's famous novel, it has been called the "roots"-phenomenon. Inspired by this movement, numerous native-born Americans embarked on a quest for their ancestors and their original culture[47], thereby expressing their identity to the full. The movements of minorities acquired fresh vigour, finding scope for their activity thanks to American legal and social traditions. They were protecting not only their interests but also their private sphere, and in this they also found a legal background. The opportunity was handed to them, as it happened, by the development in legislation ensuring individual privacy. Newspaper prying, reacting to the changes, extended to the internal affairs of these groups, too. *This seems to be behind the fact that the Sixties and the period following them saw the appearance of the first works on group privacy.*[48]

Privacy — which had been steadily developing until the Sixties — and its legal protection thus led to a new branch of law and, through the sociology of law, to a new trend of sociology and other social sciences as well.

To sum up, we may state that the peculiarities of the American development primarily draw attention to the fact that there is a

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[46] According to Erikson's theory, children from closed families are characterized by a smaller private sphere, but by greater sensitivity.

[47] *Lives of Their Own*, p. 140.

[48] Edward Bloustein, *Individual and Group Privacy*, New York: Transaction Books 1978.

close-knit reciprocity between immigration and assimilation processes, on the one hand, and the emergence of a strong private sphere, on the other. The old culture and customs of the immigrants are preserved in the expanded private sphere. A strong private sphere, combined with a legal tradition supporting the self-government of communities, promotes the aspirations of particular groups for segregation and the enforcement of the demand of these groups for a private sphere. The strong competitive situation has created a need for prying not only in the case of individuals — where it is catered for by the mass media — but also in the case of groups.

The size of ethnic and other macrogroups, in the American situation, can even reach the proportions of a small European nation. Within the European matrix, because of differences in scale, relations between population groups of a similar size already fall within the sphere of diplomacy and international law. There, development towards the recognition of the privacy of larger social groups occurred differently.

From the national private sphere to the private sphere of groups — The major landmarks in the development of the European public sphere

This very brief outline of the development of the European public sphere again requires that we sketch in the juridico-historical background, given that both the formation of the European public sphere and thinking about European unity have primarily tended to assume the character of juristic expositions.

Firstly, we must return to Roman law, which, after similar antecedents from antiquity,[49] created the institution of the *ius gentium*. The idea was such that, when the case of a non-Roman citizen was being heard, rather than administering justice within the compass of statutory Roman law, the provisions of another legal system — the one whose jurisdiction extended to the alien resorting to legal remedy — were also taken into account. The reception of Roman law, which took place in the Middle Ages and in modern times, also covered the *ius gentium*, but the "law

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[49] Wolfgang Kunkel, *op. cit.* "Der Fremde, dem nicht aufgrund zwischenstaatlicher Verträge eine mehr oder weniger umfassende Gleichstellung mit dem Bürger zugestanden war, mußte sich bei rechtlichen Konflikten ursprünglich der Hilfe eines Bürgers, seines 'Gastfreundes' bedienen." p. 73.

of nations", deduced from it, was different from it.[50] One of the striking results of that reception of Roman law was the work of Grotius *On the Law of War and Peace*, in which he defined the right to self-preservation as a fundamental principle.

Typical products of philosophical thinking paving the way to international law were schemes for eternal peace. The line of thinkers preoccupied with lasting peace begins with Erasmus. William Penn, writing at the end of the 17th century, already raised the idea not only of a European Parliament but also of an article to be included in his proposed system of treaties (providing for the verification, based on reciprocity, of military strength). This article would allow specified aspects of the life of particular states or societies to be challenged. In Penn, the strength of the army ceases to be a purely internal affair because it is precisely the reduction of armed forces that is the basis of the multilateral treaty.[51] With this definition, he indirectly ruled out other aspects from the range of topics that could have been discussed. Immanuel Kant, in his work *On Eternal Peace*, moves a step further both in the formulation of the public sphere of nations and in a conceptualization of the national private sphere. He articulates the thesis of "non-intervention in internal affairs" in a separate point, with general validity: "No single state must aggressively interfere with the constitution and governance of another state."[52] This notion was soon incorporated into political thought in the wider sense that the activity of the participants in a system of treaties may be criticized or forced to alter their behaviour only in the areas covered by the treaty.

The true watershed events in the emergence of a pan-European public sphere were the Napoleonic Wars and the subsequent signing of the multilateral political treaties in Vienna. The treaty system of the Holy Alliance, formed in 1815 to provide a counterweight to France, is regarded as a turning point both by historians of diplomacy and by researchers of the history of European political union. Thereafter, the web of relations between European countries has almost always been regulated by some sort of multilateral covenant.

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[50] Ibid. "Der Begriff des *ius gentium* hat also eine andere, umfassendere Bedeutung als der daraus abgeleitete moderne Begriff des 'Völkerrecht'." p. 74.

[51] Kurt von Raumer, *Ewiger Friede. Friedensrufe und Friedenspläne seit der Renaissance*, Freiburg und München: V. Karl Alber 1953. Penn's line of reasoning is based on a mutual regulation of armed forces. In this respect, the joint Parliament (*Staatenhaus*) would have some control. p. 333.

[52] *Id.* p. 422.

Multilateral treaties, especially if they have a long life, are subjected to prolonged and manifold analysis, primarily by diplomats and lawyers. Interpretations are allowed to clash, not only within the individual countries but also at international meetings. These treaties are, in the end, surrounded by a grid of interpretations, which links the interpreters themselves within a field of communications. Interpretations are published in the press, causing wider public opinion to join in the process. *Via communication-inducing processes, multilateral treaties thus have a public-sphere-forming effect.*

Particularly from the second half of the 19th century onwards, political treaties were soon followed by agreements establishing international scientific, artistic, and other organizations. Taken separately, these agreements were of far smaller significance, but, due to their number, their impact — as regards the emergence of a pan-European public sphere — far out-weighed the influence of the larger agreements. The existence of a European academic and artistic public sphere was a powerful factor in the development and differentiation of a regulated political public sphere. A similar influence was exerted, too, by the international organizations of various labour movements.

In the evolution of the European multilateral treaty system into the political public sphere, an important stage is marked by the historical changes that — because of the divergent political interests — ended the leading great powers' united monopoly on power. An elementary condition of the functioning of the public sphere is that it should be multipolar, because a single, exclusive centre of power otherwise transforms the entire public domain into its own domain of interest. These changes can be traced back to the Berlin Conference of 1878, and are expressed forcefully in the political settlements following the two World Wars — settlements which, however, failed to produce a complete breakthrough in the question of national self-determination.

In the last third of the 19th century, the practice of "inventing traditions" flourished and was accompanied by experiments to assimilate minorities into the leading nation. At this time several minority leaders were concerned with the establishment of an independent national state. The peace agreement concluding the First World War put an end to some multinational empires (Russian Empire, Austria-Hungary) and contained clauses regulating the treatment of minorities.

One of the effects of the manifold international treaty arrangements was the ever wider application of a diplomatic concept — that of "non-interference in internal affairs", first introduced by Kant in his "Eternal Peace" scheme. In the wake of actual subsequent political and

social development, multilateral treaties came to cover more and more aspects of life, linking the nations of Europe on ever more levels. The demand for a private sphere, as well as self-determination, appears however, when there is a conscious recognition of a competitive situation taking place within the clearly defined constraints of the public sphere. The demand also arises when curiosity or prying, in the general sense of the word — in all its scientific, artistic, and journalistic forms — appears in a manifold manner, as a demand for access to additional information.

The separation of church and state has made religion a private affair. That regulation has also created a more appropriate legal status for smaller churches and denominations. Legal guarantees as to freedom of religion, and particularly those enabling smaller groups to worship without reference, represented a recognition, in this sense, of the private sphere of the given group.

A new and important stage in the development of a European and international public sphere was marked by the recognition, in international treaties, of the rights of various minorities — itself the result, in no small measure, of a conscious recognition of the events that had led up to World War II. At this point, European development entered a phase similar to that which American legal development had entered, by ensuring the privacy of the group. For the societies of the states integrating into a progressively diversified European public sphere, for the individual nations and minorities, it is not a matter of indifference as to what opinion is formed about them by the audience of that public sphere. Even today we can hear and read about complaints — voiced in diplomatic and other forms — that concern cases where certain nations, groups or persons have been placed in a false light or where supposedly unjustifiable disapproval has been expressed over something that has happened within a country.

One of the most characteristic manifestations of the functioning of the European public sphere was the success of the voluntary movements working for European Union after World War II. These movements were mostly organized by intellectuals from various countries. The public sphere of individuals in this case exerted a regulating effect on the public sphere of nations.

These movements also influenced diplomacy by limiting its secrecy. The creation of European Union takes place behind closed doors to a lesser extent than other diplomatic actions.

The movements for Union fostered the support of equality and self-determination of nations, ending with the acceptance of UN Resolution 1514. This confirms the right to self-determination of

colonial countries. It was followed by the convention of 1966 which declared the equality of all nations and ethnic groups.

Decolonisation, European integration and the consolidation of the European public sphere meant a growing freedom for minorities. The strength of minority movements has been remarked upon by several scientists and journalists in the past twenty years. Pierre Kende wrote: "One had expected the development of a new European consciousness but one actually experienced the growth of an ethnic-regional particularism which refutes the idea of the nation — in the name not of a larger unity but that of a much smaller."[53] Two basic tendencies can be observed of these macrogroups: a fundamentalist one, which is attached to tradition and a "fundamental" continuity of national identity, and a liberal one, which interprets national or ethnic identity and conflicts with others more flexibly.[54] The sensibility of these macrogroups is, however, more the consequence of the vulnerability of their private sphere and identity than an ambitious and aggressive nationalism.

Conclusions

In the course of a process that can be traced back to classical antiquity, the rudimentary, fragmented forms of the public sphere and privacy gradually gave place to more complex configurations. In the course of the emergence of individual privacy, the structure of the self, of the individual, divided into two basic components. The undisrupted interaction of these two components is an important condition for the building of the personality and, in general, for the preservation of creative power. The vital core of the private sphere is the operational

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[53] Pierre Kende, "La France et l'intégration européenne", in: *Commentaire*, Paris 1979, 6, cited by Werner Weinfeld in: *Die Identität Europas*, Bonn: Bundeszentrale für politische Bildung 1985, p. 73.

[54] James Mayall sees two political tendencies interpreting national self-determination: "The most that can be said for the conventional (i.e. anticolonial) interpretation of national self-determination is that it is a sensible compromise. Given the indeterminacy of the idea of the collective self on the one hand, and the impossibility within the contemporary stock of political ideas of arriving at an alternative justification of political authority on the other, it represents some kind of deal, albeit a somewhat shabby one, between the entrenched forces of liberal rationalism and those of historical essentialism." *Nationalism and International Society*, Cambridge: Cambridge University Press 1990, p. 57.

space generated by the dissociation between the two components; it is here that their interaction takes place. In the course of a historical process, it became a recognized right of the individual to control all the information relating to this sphere.

The recognition of the private sphere of groups followed by a considerable delay the legal safeguarding of individual privacy. This delay is at least partly attributable to the various ambitions held by social groups — ambitions often directed at the acquisition of total control — and, moreover, to the absolute power of the state. From the behaviour of the historically actualized formations of groups, one may extrapolate a structure of privacy that is similar to the structure of the individual private sphere.

Both the American and the European development did ultimately lead, in one way or another, to the practical, statutory or indirect protection of the private sphere of major social units (micro- and macrogroups, religious denominations, associations, nations) — to some kind of legal or diplomatic or scientific definition or delimitation of their private sphere. As regards the legal recognition of group privacy, there is also a substantial difference — albeit one which cannot be absolutized — between the development seen in the United States and similar processes in Europe.

The traditionally strong demand for privacy in the United States may be traced back to difficulties in the long-drawn-out assimilation processes. The safeguarding of group privacy was arrived at primarily through the legal protection of individual privacy, which had again been directly necessitated by newspaper prying, satisfying the need for information. As a result of a successful assimilation process, the internal public sphere of the United States was ultimately dominated by the public sphere of individuals; although, in all the areas of social life, various minority groups — including the ethnic groups which had developed from immigrant groups — were also asserting their rights, including their right to privacy.

In Europe, we see a more complicated development. After centuries of anticipation — in the fields of jurisprudence, philosophy, and historiography — we see the gradual development of a public sphere that is the public sphere not only of individuals but also of societies of rival nations and/or states comprising several nations. This other level of the public sphere gradually became multi-centred, allowing the smaller nations to slowly emerge from the shadow of the major powers. Owing to the two-level structure of the European public sphere, the concept of group privacy was first expressed in formulations that had a bearing on macrogroups, such as the Kantean maxim of "not to

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interfere in the constitution and governance of another state". This maxim later became a standard political formulation under the more modern diplomatic phrase of "non-intervention in internal affairs". The development of the public sphere of nations and state-formations encompassing nations is marked, on the side of privacy, by phases such as the appearance of national consciousness, the practice of "inventing traditions", the diplomatic protection of national minorities and their protection based on international law, and the demand that their cultural identity be guaranteed. As a consequence of participation in the European public sphere of nations, two basic tendencies, a liberal-rationalist and a fundamentalist one, emerged in each nation, minority or ethnic group, interpreting very differently the national identity, as well as policy, and making from time to time vulnerable compromises.

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