This is a draft. Final version is published as a chapter in: Data Protection and Privacy: (In)visibilities and Infrastructures
http://www.springer.com/gp/book/9783319507958

Legal fundamentalism: is data protection really a fundamental right?

The European Union, in its texts and communications, has mostly avoided using the terms 'natural rights' and 'human rights', instead adopting the phrase 'fundamental rights'. The question is, however, what this concept actually entails and whether, and if so, how it differs from the more classic understanding of human rights. This question is important because data protection has been disconnected from the right to privacy in EU legislation and has been coined a fundamental right itself. The Charter of Fundamental Rights of the European Union grants citizens the right to privacy in Article 7 and the right to data protection in Article 8. The question is what this means and whether protecting personal data should in fact be qualified as 'fundamental'.

1. Introduction

The right to data protection is currently at the center of attention, with the General Data Protection Regulation coming up, the right to be forgotten having been acknowledged by the European Court of Justice and the newly negotiated draft Privacy Shields Agreement already being challenged by many. The right to data protection has entered the legal and political discourse and is presumably here to stay for the next decades at least. It has helped that the right to data protection has been elevated to a fundamental rights level in the Charter of Fundamental Rights of the European Union, after the European Court of Human Rights (ECtHR) had already acknowledged that it partly fell under the protective scope of Article 8 of the European Convention on Human Rights (ECHR) specifying: **'**1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

The Charter, in Article 7, guarantees the right to privacy: 'Everyone has the right to respect for his or her private and family life, home and communications.' Article 8 separates the right to data protection (the right to the protection of personal data) from the right to privacy and coins it a fundamental right as well. It holds: '1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority.' Yet, it remains unclear what a 'fundamental right' really is and whether data protection should essentially be seen as something 'fundamental', similar to the protection of more classic human rights, such as the

right to a fair trial, the right to privacy and the right to freedom of expression. The question is what it means that data protection is disconnected from the right to privacy and elevated to the level of a fundamental right. In connection to that, the normative question can be asked, whether data protection should be seen as a fundamental right.

This contribution hopes to answer these questions through the following steps. Section 2 describes briefly how, over time, the right to data protection has been gradually disconnected from the right to privacy. Section 3 demonstrates that data protection has been regulated on a higher level in each legislative revision, eventually even being adopted in the list of fundamental rights. These two sections are primarily descriptive and build on the extensive scholarly literature that has already appeared on both points. The two subsequent sections are more analytic in nature. Section 4 discusses the question what a fundamental right really is: is it similar to a human right, should it be regarded as a quasi-constitutional right or is it best seen as a compromise between these two terms? Section 5 analyzes whether data protection should be seen as a fundamental right. It will thus go beyond the mere legal positivist argument that data protection is a fundamental right because it has been coined so in the Charter. It will analyze whether data protection conforms to the essential criteria of fundamental rights as developed in section 4. The conclusion is that in fact, data protection does not, or only partly so. Section 6 contains a brief conclusion.

2. The disconnection of data protection from the right to privacy

The origins of the right to data protection lie partially in the data protection rules of northern European countries,[1] which arose in several nations in the 1970s, and the Council of Europe's Resolutions on data processing[2] and partially in the USA and the realization of so called Fair Information Practices (FIPs), which were developed because the right to privacy was thought to be unfit for the 'modern' challenges of large automated data processing. The increased use of large databases by (primarily) governmental organizations raised a number of problems for the traditional concept of the right to privacy, which is aimed at protecting the private interests of citizens, among others, by giving them a right to control over private and sensitive data. First, data processing often does not handle private or sensitive data, but public and non-sensitive data such as car ownership, postal codes, number of children, etc.[3] Secondly, and related to that, privacy doctrines at that time emphasized the right of the data subject as having a unilateral role in deciding the nature and extent of his self-disclosure. However, because data processing often does not deal with private and sensitive data, the right to control by the data subject was felt undesirable, because governments need such general data to develop, among other things, adequate social and economic policies, and it was felt unreasonable, because in contrast to private and sensitive data, data subjects have no or substantially less direct and personal interest in controlling (partially) public and general information. Consequently, the term 'personal data' also included public and non-sensitive

[1] This section partly based on: Bart van der Sloot, Do data protection rules protect the individual and should they? An assessment of the proposed General Data Protection Regulation, *International Data Privacy Law*, 4 (2014).

[2] Ulrich Dammann, Otto Mallmann & Spiros Simitis (eds), *Data Protection Legislation: An International Documentation: Engl.–German: eine internationale Dokumentation = Die Gesetzgebung zum Datenschutz* (Frankfurt am Main: Metzner, 1977). Frits W. Hondius, *Emerging Data Protection in Europe* (Amsterdam: North-Holland, 1975). Herbert Burkert, *Freedom of Information and Data Protection* (Bonn: Gesellschaft für Mathematik und Datenverarbeitung, 1983).

[3] Secretary's Advisory Committee on Automated Personal Data Systems, Records, Computers and the Rights of Citizens (1973) <https://www.hsdl.org/?view&did=479784>.

data, but instead of granting a right to control, the focus of data protection principles was on the fairness and reasonableness of the data processing.[4]

Although data protection instruments were introduced to complement the right to privacy, early data protection instruments were explicitly linked to the right to privacy and the right to data protection was seen either as a sub-set of privacy interests or as a twin-right. As an example, the first frameworks for data protection on a European level were issued by the Council of Europe in 1973 and 1974. They regarded the data processing taking place in the private and in the public sector and were titled Resolution 'on the protection of the privacy of individuals vis-à-vis electronic data banks in the private sector'[5] and Resolution 'on the protection of the privacy of individuals vis-à-vis electronic data banks in the public sector'.[6] Here, data processing issues are still explicitly seen as a part of or following form the right to privacy. The Resolution on the public sector also stated explicitly 'that the use of electronic data banks by public authorities has given rise to increasing concern about the protection of the privacy of individuals'.

The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981 by the Council of Europe did not contain the word privacy in its title but specified in its preamble: 'Considering that it is desirable to extend the safeguards for everyone's rights and fundamental freedoms, and in particular the right to the respect for privacy, taking account of the increasing flow across frontiers of personal data undergoing automatic processing; Reaffirming at the same time their commitment to freedom of information regardless of frontiers; Recognising that it is necessary to reconcile the fundamental values of the respect for privacy and the free flow of information between peoples'. Also, Article 1 of the Convention, laying down the object and purpose of the instrument, made explicit reference to the right to privacy: 'The purpose of this Convention is to secure in the territory of each Party [each member state to the Council of Europe] for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him ("data protection").' Also, the explanatory memorandum to the Convention mentioned the right to privacy a dozen time.[7] Thus, although the reference to privacy in the title was omitted, it is still obvious that the rules on data protection as laid down in the Convention must be seen in light of the right to privacy.

Gradually, however, the EU started to engage in the field of data protection and the European Union has traditionally adopted a different take on data protection.[8] In the EU, data

---

[4] See further: Allan F. Westin & Michael A. Baker, *Databanks in a Free Society: Computers, Record-keeping and Privacy* (New York: The New York Times Book, 1972).

[5] <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=589402&SecMode=1&DocId=646994&Usage=2>.

[6] <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=590512&SecMode=1&DocId=649498&Usage=2>.

[7] <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800ca434>.

[8] There is considerable debate on this topic. To show the ambivalence on this point, reference can be made to the reviewers for this contribution. Reviewer 1 suggested that in the EU, data protection is and has always been directly connected to the right to private life. 'actually the progressive recognition of personal data protection as an issue of the highest relevance (and thus deserving protection at the highest legal level) took place initially in EU law precisely through a connection to the right to respect for private life.' Reviewer 2 took a contrasting stance. 'The paper argues that the right data protection was increasingly disconnected from the right to privacy. While that is generally acknowledged, section 2 does not actually start that the right to DP was actually

processing was partially treated as an economic matter, the EU being the traditional guardian of the internal economic market, while the main focus of the Council of Europe was to protect human rights on the European continent. The original mandate to regulate data protection by the EU was also found in market regulation, which shall be explained in more detail in the next section. Still, however, in the rhetoric of the EU, the right to data protection was initially strongly connected to the right to privacy.[9] This is also reflected in the current Data Protection Directive, which makes reference to the right to privacy 13 times and in Article 1, concerning the objective of the Directive, holds: 'In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.'
However, in the upcoming General Data Protection Regulation, which will replace the Data Protection Directive over time, a radical shift seems at hand, as the reference to privacy seems to have been deleted entirely.[10] The latest versions seems to contain no reference whatsoever to the right to privacy; common terms such as 'privacy by design' have been renamed to 'data protection by design' and 'privacy impact assessments' have become 'data protection impact assessments'. [11] Even the considerations to the Regulation do not refer to the right to privacy. The objective of the Regulation, according to Article 1 of the draft Regulation, is as follows: 'This Regulation lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data. This Regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data. The free movement of personal data within the Union shall be neither restricted nor prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data. ' Consequently, data protection has been fully disconnected from the right to privacy, at least on a terminological level.

Obviously, this is reflected on a higher regulatory level as well.[12] In 2000, the European Union adopted a Charter of Fundamental Rights, which came into force in 2009.[13] This Charter explicitly separates the right to data protection from the right to privacy, as indicated in the introduction. Article 7 of the Charter holds that everyone has the right to respect for his or her private and family life, home and communications. Article 8 grants everyone the right to the protection of personal data concerning him or her. Also, it specifies that personal data must be processed fairly for specified purposes and on the basis of a legitimate ground laid down by law. The provision grants everyone a right of access to personal data and the right to have them rectified and it holds that compliance with these rules shall be subject to control by an independent authority. Consequently, especially in EU

integrated with, or purely based on, the right to privacy. Indeed, several statements about the very start of DP rather suggest that it was already seen as something that could not be captured by the right to privacy as such.'

[9] See on this point the book Gloria Gonzalez Fuster, *The emergence of personal data protection as a fundamental right of the EU* (Springer: Dordrecht, 2014) and in particular Chapter 5.

[10] See also: Luiz Costa & Yves Poullet, 'Privacy and the regulation of 2012', *Computer Law & Security Review*, 28 (2012).

[11] Use has been made of this version of the Regulation: http://data.consilium.europa.eu/doc/document/ST-15039-2015-INIT/en/pdf

[12] See further: Raphael Gellert & Serge Gutwirth, 'The legal construction of privacy and data protection', *Computer Law & Security Review* 29 (2013).

[13] See further: Orla Lynskey, 'Deconstructing data protection: the 'added-value' of a right to data protection in the EU legal order', *International and Comparative Law Quarterly* 3 (2014).

law, data protection is separated from the right to privacy.[14] Both on a fundamental rights level and on a lower regulatory level, it is now treated as an independent doctrine.[15]

3. The fundamentalisation of data protection

Besides the fact that data protection has gradually been disconnected from the right to privacy, it has also been regulated on an ever higher regulatory level and through ever more detailed legal regimes. This is relevant, because, as will be shown, the European Court of Justice has elevated all data protection rules to the level of 'fundamental rights'. Thus, it matters that the data protection rules have been broadened and widened over time. This trend shall be explained in further detail below.

First, it should be noted that the concept of 'personal data', which demarcates the material scope of the data protection instruments, has been broadened quite significantly since its introduction. The two Resolutions for data processing from 1973 and 1974 simply defined 'personal information' as information relating to individuals (physical persons). Here, the individual and subjective element in the definition of personal data is still prominent, similar to the approach adopted by the ECtHR, in which data protection is linked to the right to privacy, and in which personal data are in principle only protected when they have an impact on the individual and his interests. Already by 1981, however, in the subsequent Convention, 'personal data' were defined as any information relating to an identified or identifiable individual.[16] The explanatory report stressed that an 'identifiable person', an element which was new to the definition, meant a person who can be easily identified through the data.[17] In the Data Protection Directive, the definition of personal data was enlarged by specifying that 'an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.'[18] This not only introduces a very wide, and non-exhaustive, list of possible identifying factors, but the possibility of 'indirect' identifiable data was also inserted. Finally, in the proposal for a General Data Protection Regulation, personal data are defined in an even slightly broader manner.[19]

Not only the material scope, but also the provisions in the instruments have extended quite significantly. The two Resolutions from 1973 and 1974 contained 8 and 10 articles respectively. The Convention (1981) contained 27 provisions, the Directive (1995) 34 and the proposed Regulation (2016) 99. While the two Resolutions were literally one-pagers, the proposed Regulation consists of almost 100 pages. This is caused by the fact that the number of rights for data subjects has increased, among others by introducing the right to forgotten, the right to data portability and the right to resist profiling, and by the fact that the number of duties for data controllers has been significantly widened, inter alia, through the introduction of an accountability duty, duties relating to Data Protection Impact Assessments, appointing a Data Protection Officer and a notification duty after a data breach has taken place. However, the most important cause of the explosive expansion of data protection rules can be found in

[14] Still, the CJEU often discusses the right to privacy (Article 7) and the right to data protection (Article 8) together and in close connection.
[15] See on the interpretation of the CJEU and the ECtHR Juliane Kokott and Christoph Sobotta 'The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR', *International Data Privacy Law* 3 (2013).
[16] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 28 January 1981, article 2 sub a.
[17] <http://conventions.coe.int/Treaty/EN/Reports/HTML/108.htm> accessed 24 June 2014.
[18] Article 2 sub a Directive 95/46/EC.
[19] Article 4 Regulation.

the widened rules on compliance and enforcement of the rules. While the initial Resolutions of the Council of Europe were code of conduct like documents, containing duties of care for data processors, with no or very limited rules on enforcement and compliance, current instruments almost have the character of a detailed market regulation.

The two Resolutions of the Council of Europe merely recommended member states of the CoE to adopt rules to protect the principles contained in the Resolutions. It was at their liberty to implement sanctions or rules regarding liability. Only in the Convention of 1981 was it explicitly provided that: 'Each Party undertakes to establish appropriate sanctions and remedies for violations of provisions of domestic law giving effect to the basic principles for data protection set out in this chapter.'[20] Moreover, the Convention explicitly provided a number of rules regarding the application and enforcement of the rule on transborder data flows,[21] the cooperation between states and the national Data Protection Authorities.[22] Adopting an EU-wide Directive in 1995 aimed at bringing uniformity in the national legislations of the different countries, which was promoted, among others, by providing further and more detailed rules for cross-border data processing.[23] The Working Party was installed,[24] the enforcement of the rules was further promoted by providing that each state should install an independent DPA, endowed with investigative powers, effective powers of intervention and the power to engage in legal proceedings. The Directive also specified that they shall hear claims lodged by any person and that they may carry out prior checks of data processing which is likely to present specific risks.[25]

The most important change is that the Regulation will bring about is that a Regulation, in contrast to a Directive, has direct effect and needs not be implemented in the national legal frameworks of the different countries.[26] Besides extended rules for cross-border data processing,[27] the Regulation grants DPAs more and wider powers[28] and introduces the possibility of a leading supervisory authority investigating a EU-wide data processing activity.[29] The Working Party is to be replaced by a European Data Protection Board, which is granted wider powers,[30] and the Commission may adopt specific Regulations on a number of the provisions entailed in the Regulation, to provide further clarity and details on the interpretation of the rights and obligations contained therein. Both elements ensure that a further and increased level of harmonization and effective protection of the data protection rules are achieved. The Regulation also introduces fines and sanctions connected to the violation of the provisions in the Regulation. For example, the supervisory authority can, in certain circumstances, impose a fine of up to € 20,000,000 or, in case of an enterprise, up to 4% of its annual worldwide turnover, which for companies such as Facebook and Google, would be a dramatically high figure.[31]

There is another change that is worth mentioning. The legal basis of the Data Protection Directive is the regulation of the internal market, namely article 100a of the Treaty Establishing the European Community, which specified that measures shall be adopted for

[20] Article 10 Convention (1981).
[21] Article 12 Convention (1981).
[22] Article 13 Convention (1981).
[23] Article 25 Directive 95/46/EC.
[24] Article 31 Directive 95/46/EC
[25] Article 20 Directive 95/46/EC.
[26] 3.2. Subsidiarity and proportionality, European Commission Proposal (2012).
[27] Articles 44–50 Regulation.
[28] Articles 51–59 Regulation.
[29] Articles 60-67 Regulation. See further: Lokke Moerel, *Binding Corporate Rules Corporate Self-Regulation of Global Data Transfers* (Oxford: Oxford University Press, 2012).
[30] Articles 68–76 Regulation.
[31] Article 83 Regulation.

the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishing and functioning of the internal market. That is why, as discussed earlier, the Directive has two explicit aims, namely not only the protection of personal data but also the free flow of information. This duality is maintained in the Regulation, but the legal basis is no longer found in the regulation of the internal market, but in the protection of the right to data protection, as specified in Article 16 of the Treaty on the Functioning of the European Union: '1. Everyone has the right to the protection of personal data concerning them. 2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities. The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union.'[32] Consequently, in the EU, data protection is now protected on the highest level; it is seen as a fundamental right and the EU has an explicit mandate to regulate the field of data protection established by the Treaty, which is unique compared to other fundamental rights. And with the upcoming General Data Protection Regulation, the right to data protection is regulated in detail on the highest level possible in the EU. It is important to stress that the whole Regulation must be seen as an implementation of the fundamental right to data protection, as laid down in the Charter and the Treaty. The first consideration to the Regulation holds: 'The protection of natural persons in relation to the processing of personal data is a fundamental right. Article 8(1) of the Charter of Fundamental Rights of the European Union and Article 16(1) of the Treaty on the Functioning of the European Union provide that everyone has the right to the protection of personal data concerning him or her.' But remarkably, the European Court of Justice has also retrospectively interpreted the Data Protection Directive from 1995 as an interpretation of Article 8 of the Charter from 2000.[33] The Court feels that the Data Protection Directive implements the duties laid down in the Charter and Treaty. For example, in the case of Schrems, the Court held that 'Article 25(6) of Directive 95/46 implements the express obligation laid down in Article 8(1) of the Charter to protect personal data and [] is intended to ensure that the high level of that protection continues where personal data is transferred to a third country. The word 'adequate' in Article 25(6) of Directive 95/46 admittedly signifies that a third country cannot be required to ensure a level of protection identical to that guaranteed in the EU legal order. However, [] the term 'adequate level of protection' must be understood as requiring the third country in fact to ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union by virtue of Directive 95/46 read in the light of the Charter. If there were no such requirement, the objective referred to in the previous paragraph of the present judgment would be disregarded. Furthermore, the high level of protection guaranteed by Directive 95/46 read in the light of the Charter could easily be circumvented by transfers of personal data from the European Union to third countries for the purpose of being processed in those countries.'[34]

[32] It should be noted that Article 16 is limited to data processing that falls under Union law, hence this is not the legal basis for all regulation of DP.

[33] See on this topic: Gloria Gonzalez Fuster & Raphael Gellert, 'The fundamental right of data protection in the European Union: in search of an uncharted right', *International Review of Law, Computers & Technology* 26 (2012).

[34] ECJ, Schrems v. Data Protection Commissioner, Case C-362/14, 6 October 2015, para.72-73.

Although this is a quite remarkable choice from a strict legalistic perspective, because the Court retroactively reinterprets the Directive in light of the Charter, it could be argued that in the Schrems case, very fundamental data protection issues were indeed at stake, and that in such cases, the data protection rules must be seen as an implementation of the fundamental right to data protection. However, the Court has adopted the same reasoning in other cases, which, at first sight, seem to regard less fundamental issues, such as having a reference to an old newspaper article deleted from the indexing system of a search engine. Still, in Google Spain, the Court held: 'Article 7 of the Charter guarantees the right to respect for private life, whilst Article 8 of the Charter expressly proclaims the right to the protection of personal data. Article 8(2) and (3) specify that such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law, that everyone has the right of access to data which have been collected concerning him or her and the right to have the data rectified, and that compliance with these rules is to be subject to control by an independent authority. Those requirements are implemented inter alia by Articles 6, 7, 12, 14 and 28 of Directive 95/46.'[35]

Consequently, the Court of Justice seems to make no difference between types of cases. This is reaffirmed by the Coty case, in which the question was whether a bank was under a legal obligation to disclose the identity of one of its clients, who was suspected of infringing on the intellectual property of a perfume producer. This seems a rather ordinary case, but the ECJ again stressed that this case must be interpreted in the light of the fundamental right to data protection: 'The right to protection of personal data [] is part of the fundamental right of every person to the protection of personal data concerning him, as guaranteed by Article 8 of the Charter and by Directive 95/46.'[36] What is important in the Coty case is that the Court of Justice not only stressed that certain provisions of the Data Protection Directive, but that the Directive as a whole must be seen as an implementation of Article 8 of the Charter. Consequently, both the Directive and the Regulation as a whole must be seen as implementing the fundamental right to data protection.

4. What is a fundamental right?

Section 2 showed that, over time, the right to data protection has been disconnected from the right to privacy, especially within the EU. Section 3 showed that the right to data protection has been coined a fundamental right in the Charter and that both the current data protection rules in the Directive and the ones in the upcoming Regulation must be seen as an implementation of Article 8 of the Charter of Fundamental Rights of the European Union. The question this section will try to answer is: what actually are fundamental rights? Are they to be treated as a sub-set of human rights, should they be seen as quasi constitutional rights and the Charter as the constitution of the European Union, or has the EU introduced a new type of rights altogether, with a different status and different meaning? In scholarly literature, a difference is classically made between rights, constitutional rights and human rights.[37] Rights are legal claims people have against others; they primarily dominate horizontal relationships, between private parties such as citizens and businesses. Ordinary rights are

[35] ECJ, Google Spain v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González, 13 May 2014, para. 69.

[36] ECJ, Coty Germany GmbH v. Stadtsparkasse Magdeburg, Case C-580/13, 16 July 2015, para. 30-31.

[37] There is also a constant discussion about the difference between 'human rights' and the term 'natural rights', a term used by enlightenment philosophers. See among others: Richard Tuck, *Natural rights theories : their origin and development* (Cambridge: Cambridge University Press 1979). John Finnis, *Natural law and natural right* (Oxford: Clarendon Press 1980) David George Ritchie, *Natural rights: a criticism of some political and ethical conceptions* (London 1895)

seen as important, but not as essential to human lives and activities. Rather, they regulate and order people's daily activities and economic transactions. Rights are embedded in laws and are consequently relatively stable, but can nevertheless be changed by a normal majority in a democratic process.[38]

Constitutional rights differ on some of these aspects.[39] Although constitutional rights have gradually also been applied in horizontal relationships, their origin lies in regulating the vertical relationship, between citizen and state. Constitutional rights provide citizens with the freedom from governmental interference, for example in their private life or freedom of expression.[40] The values constitutional rights protect are seen as particularly weighty and essential to human dignity or personal freedom – they concern matters such as privacy and freedom of expression, but also lay down procedural rules that regulate the state and its organs, such as the separation of powers, the authority of the different powers and the democratic voting process. The constitution is literally the constitution of a state, it provides the fundaments on which the nation is based. Although the provisions in the constitution can generally be changed,[41] it is often more difficult to alter those than non-constitutional rights; many countries require a qualified majority to change the constitution and demand that two parliaments in a row, after elections having taken place, must agree on altering the constitution.[42]

Human rights contrast with constitutional rights in that the latter are traditionally bestowed upon the citizens of a state, while human rights are non-dependent on nationality or citizenship. Human rights are innate to being human; one has a human right by virtue of being human.[43] Although there is an overlap between human rights and constitutional rights, for example protecting the right to privacy, freedom of expression and the freedom from discrimination, human rights are traditionally seen as even more weighty. Human rights lay down the essential values without which human life is impossible or unworthy of living. The core of human rights is commonly said to be stable and relatively universal, although there are of course discussions about the exact formulation and catalogue of human rights. Some human rights are absolute, for example the prohibition of torture, some values may in principle not be curtailed, except when the state of emergency is declared, such as the right to a fair trial, and some rights can only be limited when certain conditions have been met, for example, specifying that the infringement is prescribed for by law, aimed at a societal interest and necessary in a democratic society. Human rights can in principle not be altered by the

[38] Pavlos Eleftheriadis, *Legal Rights* (Oxford: Oxford University Press, 2008).

[39] See further: A. W. Heringa & Philipp Kiiver, *Constitutions compared: an introduction to comparative constitutional law* (Cambridge: Portland 2012). Sascha Hardt & A. W. Heringa (eds.), *Sources of constitutional law: constitutions and fundamental legislative provisions from the United States, France, Germany, the Netherlands and the United Kingdom, including the ECHR and EU Charter of Fundamental Rights* (Cambridge: Intersentia 2014). A.V. Dicey, *Lectures on comparative constitutionalism* (Oxford, Oxford University Press 2013).

[40] Some European countries have obviously recognized the right to data protection in their constitution. This contribution does, however, not discuss these national constitutional rights in detail. Rather, it focusses on the status of 'fundamental' right within the EU legislative sphere and the question of whether the right to data protection should be seen as a 'fundamental' right.

[41] An obvious exception is of course the is the ewigkeitsklausel in the German Constitution.

[42] See further: Vicki C. Jackson & Mark Tushnet, *Comparative constitutional law* (St. Paul: Foundation Press 2014). Michel Rosenfeld & András Sajó, *The Oxford handbook of comparative constitutional law* (Oxford: Oxford University Press 2012). Walter F Murphy & Joseph Tanenhaus, *Comparative constitutional law: cases and commentaries* (London: Macmillan 1977).

[43] See further: Michael Freeman, *Human rights : an interdisciplinary approach (*Cambridge: Malden 2011). Christian Tomuschat, *Human rights: between idealism and realism* (Oxford: Oxford University Press 2014). UN, *Human rights : questions and answers* (New York : United Nations 1987).

legislator and are formulated on an international level, having priority over the national legal order. Human rights courts usually operate as courts of last instance.[44]

The EU does not use either the term constitutional right or human right, but has consistently referred to 'fundamental rights'. There has been considerable discussion about the question of how to interpret this term. In general, there are three positions in this debate. First, there are those who view fundamental rights primarily as constitutional rights and subsequently, the Charter as a (quasi-)constitution of the European Union.[45] There are indeed some arguments in favor of this. To start with the most obvious one, the Charter would have been given legal effect by the Treaty establishing a Constitution for Europe, which 18 Member States had signed, but was cancelled after the Dutch and French voters rejected it in their national referenda. Now, legal effect to the Charter has been given by the Lisbon Treaty, which is named differently, but actually resembles the Constitution for Europe to a large extent. Moreover, there are number of provisions in the Charter that arguably, traditional human rights documents would not embody. Examples may be Article 39, the right to vote and to stand as a candidate at elections to the European Parliament, and Article 40, the right to vote and to stand as a candidate at municipal elections. Furthermore, the charter also embodies rights that are not seen as classic (civil and political) human rights, such as the right to a clean environment,[46] the right to working conditions which respect a person's health, safety and dignity[47] and the respect for respect cultural, religious and linguistic diversity.[48] Consequently, so it might be argued, fundamental rights should be seen as quasi-constitutional rights.

On the other hand, there are those who argue that the term fundamental rights should be seen as an equivalent to human rights. From this perspective, it is argued that the Charter actually only contains subjective rights for individuals and duties for the EU to protect the interests of citizens, and not the procedural aspects that are normally part of the constitution. Furthermore, even although the Charter contains more than just the classic (civil and political) human rights, in the human rights realm, the notion of human rights has also broadened over time quite a bit. Besides first generation (civil and political) human rights, second generation (social and economic) human rights are now also commonly accepted, as well as third generation (solidarity based) human rights, such as future generation rights, minority rights and environmental protection. Even under the European Convention on Human Rights, itself only embodying first generation rights, the European Court of Human Rights has decided to grant second and third generation rights protection as well. For example, Article 8 ECHR provides protection to property, education, the right to a name, the right to change sexual identity, the right to protect and to develop one's minority identity and the right to a clean living environment.[49] Finally, in the Charter, the right to data protection is contained in the first chapter, containing the classic rights and freedoms; consequently, even if not all fundamental rights as contained in the Charter must be seen as human rights, this

[44] See further: Andrew Fagan, *Human rights: confronting myths and misunderstandings* (Cheltenham: Edward Elgar 2009). Janusz Symonides (ed.) *Human rights: international protection, monitoring, enforcement* (Paris: UNESCO Pub. 2003) Liz Heffernan (ed.), *Human rights: a European perspective* (Dublin: The Round Hall Press 1994).

[45] Most recently, Hielke Hijmans has referred to the European Union as a Constitutional Guardian of privacy and data protection. Hielke Hijmans, *The European Union as a Constitutional Guardian of Internet Privacy and Data Protection: the Story of Article 16 TFEU* (Amsterdam: University of Amsterdam Dissertation, 2016).

[46] Article 37 Charter.

[47] Article 31 Charter.

[48] Article 21 Charter.

[49] Bart van der Sloot, 'Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of "Big Data"', *Utrecht Journal of International and European Law*, 80 (2015).

does at least hold true for the rights contained in the first chapter. The right to data protection is placed between the right to privacy, also protected under Article 8 ECHR, and the right to marry and found a family, also protected under Article 12 ECHR. Thus, Article 8 of the Charter introduces a new human right, or an equivalent to that, namely the right to data protection.

Finally, there are also those that adopt a middle position. Among others, they point to the Universal Declaration on Human Rights, Article 8, where the term 'fundamental rights' seems to originate from. This provision holds: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.' This provision was inserted by the drafters of the Universal Declaration to enlarge the protective scope of the Declaration, though not by granting additional rights in the document itself, but by specifying that certain essential rights contained in national constitutions should be effectively protected in the national legal system. Thus, this provision must be seen as a habeas corpus type of right.[50] Proponents of the middle position argue that the term 'fundamental rights' as such, independently of whether it is used by the United Nations or by the European Union, should be treated as a hybrid between human and constitutional rights, including the most fundamental of the constitutional rights and giving them a special status in the human rights framework, though not declaring them human rights in their own respect.

Each of these positions has something in its favor.[51] The problem is that the European Union has used this concept, without providing an explicit meaning or interpretation. Gloria González Fuster, who has done the most extensive research on this point, remarks: 'In the EU context, the idiom fundamental rights usually refers to the rights protected by EU law, whereas the expression human rights commonly designates rights recognized in international law. EU law is very attached to the idiom 'fundamental freedoms', which has traditionally alluded in EU law to the basic freedoms of the common market: the free movement of goods, persons, services and capital. EU law has never provided a general definition of fundamental rights. Their current recognition is profoundly indebted to their historical unearthing by the European Court of Justice.'[52] Still, it might be possible to derive an interpretation from the various legal documents within the EU and on the international level and from scholarly literature.

To start with, article 6 of the Treaty on the European Union specifies: '1. The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with

[50] Nehemiah Robinson, *The Universal Declaration of Human Rights: its origin, significance, application, and interpretation* (New York: World Jewish Congress, 1958), p.111-112. Albert Verdoodt, *Naissance et signification de la Déclaration Universelle des droits de L'Homme* (Louvain: Warny, 1964), p. 116-119.

[51] To show the level of ambivalence, Reviewer 1 to this contribution stressed: 'It would have been better to focus explicitly on discussing what could be a 'fundamental right of the EU' (not a fundamental right in abstract), which is precisely something openly 'inbetween' constitutional (national) rights and human (international) rights, just as the EU is something sui generis 'inbetween' the State and international law.' To the contrary, Reviewer 2 stressed 'I don't see the need for this discussion. It is fairly obvious that fundamental rights is (at least in the context of EU law) a synonym for human rights; the whole section could simply be replaced by just quoting the brief but clear answer from the FRA: http://fra.europa.eu/en/about-fundamental-rights/frequently-asked-questions#difference-human-fundamental-rights.'

[52] Gloria Gonzalez Fuster, *The emergence of personal data protection as a fundamental right of the EU* (Springer: Dordrecht, 2014), p. 166.

due regard to the explanations referred to in the Charter, that set out the sources of those provisions. 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.' Primarily the latter paragraph is of relevance here; it suggests that the correct interpretation of the term 'fundamental right' is somewhere between proponents of the second position, holding that fundamental rights are similar to human rights, and the third one, those holding that the term must be interpreted according to the UDHR, in which fundamental rights concern the most fundamental of the constitutional rights, which are brought partially under the protective scope of the human rights framework. Paragraph 3 refers both to human rights as protected under the ECHR and the common constitutional traditions of the Member States, as being fundamental rights. Consequently, it seems that the first interpretation of the term fundamental right, as meaning a constitutional right for EU citizens, is false. Supportive evidence may be found in paragraph 2 of Article 6 of the Treaty, specifying that the EU shall subject itself to the European Convention on Human Rights.

This interpretation seems to be reaffirmed by the fact that many of the EU documents prior to the Charter spoke of human rights or referred to human rights and fundamental freedoms. It seems that human and fundamental rights were used interchangeably. For example, the *Resolution on the Constitution of the European Union* as adopted by the European Parliament, contained article 7 with the title *Human rights guaranteed by the Union.* It specified: 'In areas where Union law applies, the Union and the Member states shall ensure respect for the rights set out in Title VIII. The Union shall respect fundamental rights as guaranteed by the European Convention on the Protection of Human Rights and Fundamental Freedoms, by the other applicable international instruments and as they derive from the constitutional principles share by the Member States.'[53] Title VIII again referred to 'Human Rights protected by the Union', though it did not yet contain the right to data protection.[54] Consequently, it seems that the terms human and fundamental rights were treated as each other's equivalents.

In literature too, the prevalent term used to signify fundamental rights seems 'human rights', both when referring to the provisions contained in the Charter as when referring to the fundamental principles developed by the Court of Justice.[55] To give an example, one author stresses: 'Human rights law in the EU is mainly the achievement of judicial interpretation. The constitutional principle that EU legislation and administrative action should be subjected to human rights requirements, the EU human rights principles, and the subsequent extension of this principle to the activities of the Member States, were the creation of the EU judiciary. The institution of a human rights framework for the EU followed form the judicial realization that the EU constitutional architecture was incomplete and that in order for the law to fulfil the central role designated to it in the process of European integration it needs to adhere to

[53] <http://www.europarl.europa.eu/charter/docs/pdf/a3_0064_94_en_en.pdf>.
[54] EU Network of Independent experts in fundamental rights, *Report on the Situation of fundamental rights in the European Union and its member States in 2002* (Luxembourg: European Communities, 2003), p. 90-101.
[55] See among others: A. Newhall & A. Rosas (eds.), *The European Union and Human Rights* (Dordrecht: Kluwer, 1995). M. H. Mendelson, 'The European Court of Justice and Human Rights', *Yearbook of European Law*, 125 (1981). Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon', 11 *Human Rights Law Review* 645 (2011). Andrew Williams, *EU Human Rights Policies* (Oxford: Oxford University Press, 2004). Philip Alston (ed), *The EU and Human Rights* (Oxford: Oxford University Press, 1999). Akos G. Toth, 'The European Union and Human Rights: the Way Forward', *Common Market Law Review*, 34 (1997).

the rule of law, in particular, by offering protection to human rights.'[56] Other scholars have used similar terminology, for example stressing that the 'European human rights architecture is not a unique' arrangement, but that it can be compared to other jurisdictions.[57] In any case, it seems that most authors agree that fundamental rights should be granted a higher level of protection than constitutional rights, as they have a special moral status, much like traditional human rights do.[58]

Consequently, both in EU law and in scholarly literature, fundamental rights are often treated as a sub-set of or as equivalent to human rights. This seems also reflected on the international level, where fundamental rights are seen as just another name for human rights. To provide an example, the United Nation's High Commissioner for Human Rights issued a report titled 'The EU and international Human Rights Law'. It explicitly discussed the interpretation of the term 'fundamental right' within the European Union and concluded: 'As a preliminary point it should be understood that while the terminology applied by the EU has been that of **'**fundamental rights', rather than 'human rights', there is in fact no real difference between the two. Different labels, such as 'fundamental freedoms', 'civil liberties', or 'civil rights' have also been applied to the collection of values referred to as 'human rights'. The fact that 'fundamental rights' coincides conceptually and legally with 'human rights' is clear also from the approach of the CJEU, which draws on 'human rights' treaties, as well as the Charter of Fundamental Rights of the European Union, which is made up predominantly of 'human rights' featuring in the Convention for the Protection of Human Rights and Fundamental Freedoms as well as UN human rights treaties. Furthermore, the EU Agency for Fundamental Rights is guided predominantly by UN human rights treaties, as well as the CFR, in setting out the standards against which to compare EU and Member State practices. Neither does it appear that any attempt has been made in doctrine or case law to distinguish between fundamental rights and human rights.'[59]

Consequently, it seems that 'fundamental rights' should be treated as similar to 'human rights', or at least as rights that have a special moral status, and not as quasi constitutional rights. In literature, the common reference to the fundamental rights seems in fact 'human rights'. On international level and in EU documents, fundamental rights and human rights are seen as equivalent and are used as interchangeable terms. Article 6 of the Treaty mentions human rights explicitly as one of the two sources for fundamental rights. Although the other source is the constitutional tradition common to the Member States to the European Union, it seems that this must be interpreted as regarding only those traditions that regard very basic and essential values and when those traditions that are common to all or at least a large part of the Member States. An example might be found in the protection of human dignity, which is explicitly or implicitly protected in many national constitutions and constitutional traditions, but which was not explicitly acknowledged in the European Convention on Human Rights. Article 1 of the Charter of Fundamental Rights of the European Union now explicitly holds: 'Human dignity is inviolable. It must be respected and protected.'

In conclusion, although there are reasonable arguments in favor of treating fundamental rights as quasi-constitutional rights, most arguments seem to point in the direction of seeing fundamental rights as similar to or a derivative of human rights. Finally,

---

[56] Marton Varju, *European Union Human Rights law: the dynamics of interpretation and context* (Northampton: Edward Elgar, 2014), p. 1.
[57] Federico Fabbrini, *Fundamental Rights in Europe: challenges and transformations in comparative perspective* (Oxford: Oxford University Press, 2014), p. 5.
[58] David L. Perrot, 'The logic of Fundamental Rights', in: John W. Bridge et al. (eds.), *Fundamental Rights* (London: Sweet & Maxwell, 1973).
[59] <http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf>.

this is affirmed by The European Union Agency for Fundamental Rights who, answering Frequently Asked Questions on its website, stresses the following: 'What is the difference between human rights and fundamental rights? The term 'fundamental rights' is used in European Union (EU) to express the concept of 'human rights' within a specific EU internal context. Traditionally, the term 'fundamental rights' is used in a constitutional setting whereas the term 'human rights' is used in international law. The two terms refer to similar substance as can be seen when comparing the content in the Charter of Fundamental Rights of the European Union with that of the European Convention on Human Rights and the European Social Charter.'[60]

5. Is data protection a fundamental right?

Section 2 showed that the right to data protection has been gradually disconnected from the right to privacy, specifically in EU legislation. Section 3 demonstrated that data protection has gradually been regulated on a higher regulatory level. Data protection rules will be laid down in a Regulation rather than a Directive, the basis of the Regulation will no longer be the free economic market for personal data, but Article 16 TFEU, mandating the EU to regulate this fundamental right, and finally, the right to data protection has been declared a fundamental right in Article 8 of the Charter, next to and separated from the right to privacy, contained in Article 7 of the Charter. Section 4 argued that although it is impossible to provide a decisive answer on the correct interpretation of the term 'fundamental right', most arguments seem to be directed at treating fundamental rights as equivalent or similar to human rights, providing protection to values that have a special moral status and protecting particularly weighty interests for individuals and society at large. This section will investigate whether data protection is a fundamental right proper, whether it should be treated as a fundamental (human) right. It reflects a normative endeavor, going beyond the mere legal positivist argument that data protection is a fundamental right, because it has been named so by the European Union.

Answering this question, it would have helped if the drafters of the Charter would have indicated why they have termed the right to data protection an independent fundamental right, but little has been said on this point. Similarly, a commentary by several experts indicates merely that 'since Article 7 of the Charter on respect for private and family life covers a particularly wide range of issues, extending from private life and family life to inviolability of the home and secrecy of communications, the compilers of the Charter devoted a specific article to the protection of personal data in order to give it an appropriate treatment. As a consequence, Article 8 of the Charter recognizes the right to the protection of personal data as a new fundamental right, distinct from the right to respect for private and family life, home and communications set out in Article 7 of the Charter. Article 8 of the Charter is inspired by, and is based on, a variety of legal instruments although the protection of personal data is not recognized as a specific right in the framework of existing international instruments on the protection of human rights. To begin with, it derives from Article 8 of the European Convention on Human Rights (ECHR), including the case law of the European Court on Human Rights, on the protection of privacy and private life, although the protection of personal data is not, as such, explicitly mentioned in the ECHR.'[61] Consequently, these comments provided little legal clarity on this point. Still, it is possible to answer the normative question on the basis of the character of the data protection rules and the cases by the European Court of Justice.

[60] <http://fra.europa.eu/en/about-fundamental-rights/frequently-asked-questions#difference-human-fundamental-rights>.
[61] http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf, p. 90

On the one hand, it could be pointed out that there are certainly data protection rules and cases that qualify as fundamental. For example, the rules in the Directive and the upcoming Regulation on the processing of sensitive personal data, such as those revealing a person's sexual or political orientation, medical conditions or race, could qualify as fundamental or essential in a democratic society. Moreover, certain cases in the jurisprudence of the European Court of Justice seem to concern very important matters, which indeed should be seen as providing protection to fundamental (human) rights. For example, the Digital Rights Ireland case regarded the legality of the Data Retention Directive, which obliged states to carefully monitor and store data on internet traffic of millions of innocent citizens. The European Court of Justice determined in very clear words 'that Directive 2006/24 does not lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter. It must therefore be held that Directive 2006/24 entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary.'[62] Consistently monitoring the communications of citizens, without any apparent reason and without sufficient checks and balances, was declared illegitimate. Obviously, these types of cases must be treated as protecting very fundamental and essential values connected to individual freedom. A similar argument could be made with respect to the Schrems case. Consequently, it seems that at least some data protection rules and cases must be seen as part of a fundamental right to data protection proper.

On the other hand, however, there are also data protection rules and cases which seem less obvious candidates for fundamental rights protection, because they protect more ordinary interests. For example, the Data Protection Directive contains an obligation for data controllers to inform the data subject, when reasonably possible, of the fact that his data are being processed, by whom and why.[63] If a company processes a person's name and address without abiding by the transparency principle, it is processing personal data and at the same time violating one of the data protection principles. Likewise, taking pictures of others at a party and posting them on the internet without their consent would normally qualify as a breach of the data protection rules. Still, it is highly questionable whether such trivial issues should be seen as falling under the fundamental (human) rights realm and should be treated as similar to a violation of, for instance, the right to discrimination or to a fair trial.[64] Similarly, cases such as Coty seem not to deal with fundamental or essential values at all. Although not having one's identity disclosed by a bank, after being suspected of having engaged in the illegal sale of another person's brand is valuable, it seems to be of a quite different order than the Schrems and the Digital Rights Ireland cases. Consequently, there are at least certain provisions in the data protection instruments and certain cases on data protection principles that intuitively do not qualify as (part of) a fundamental (human) right.[65]

There are also other factors that seem to indicate that data protection seems to protect a value that is quite different from those protected by the traditional human rights. As has

[62] ECJ, Digital Rights Ireland Ltd v Minister for Communications et al., Cases C-293/12 and C-594/12, 8 April 2014, para 65.
[63] Articles 10-11 Directive 95/46/EC.
[64] Note that the triviality of the processing depends on the broad scope of the notion of personal data and not on the principle of transparency or of having a legitimate purpose as such.
[65] One reviewer has suggested that under the right to privacy, Article 8 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights, a number of trivial interests are also provided protection. This is absolutely true. See on this point. Bart van der Sloot, 'The Practical and Theoretical Problems with 'balancing': Delfi, Coty and the redundancy of the human rights framework', *Maastricht Journal of European and Comparative Law*, 3 (2016).

been stressed, under the Directive and the Regulation, data protection rules aim to protect two quite opposite values, namely the interests of individuals to protect their personal data on the one hand and the interests of data controllers to process their data within the internal market of the EU on the other hand. Thus, data protection rules must be seen as already providing a compromise between the rights and interests of different parties. In this sense, the right to data protection seems to differ from most other human rights, because these rights focus primarily on the interests of the individual, even though some of them may be curtailed under certain conditions. Consequently, Article 3 ECHR protects the interest of the individual not to be tortured or subjected to inhumane or degrading treatment and Article 8 ECHR specifies the right of the individual to protection of his private and family life, home and communications. Even although there is a limitation clause in paragraph 2 of that Article, the right itself does not contain a compromise. The right to privacy protects the rights of the individual against governmental interference, while data protection rules already embody a compromise between the rights and interests of data subjects and data controllers.

This point becomes even clearer in the Charter of Fundamental Rights of the European Union. Unlike the European Convention on Human Rights, the Charter does not contain specific limitation clauses per provision, but lays down one limitation clause for all provisions contained in the Charter. Article 52 holds that any 'limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.' Consequently, many of the rights contained in the Charter, especially those in the first chapter, do not themselves contain conditionality's or limitation clauses. For example, Article 6 of the Charter provides 'Everyone has the right to liberty and security of person' and Article 7 specifies 'Everyone has the right to respect for his or her private and family life, home and communications'. In contrast, Article 8 not only provides that the personal data of individuals should be protected, but also specifies when and how personal data can be legitimately processed. Again, not only does a general limitation clause apply to Article 8 of the Charter, the fundamental right to data protection is in itself already a compromise between different legitimate interests. Thus while the right to privacy protects individual interests and can be curtailed under specific conditions, for example if the interests of others or of society at large outweighs the interests of the individual, the right to data protection is in itself already a compromise between different interests, including the interests of businesses and states to process data.

In this sense, data protection seems to differ fundamentally from human rights. The essential presumption underlying the right to data protection is that the processing of data is in itself legitimate and even necessary - that businesses and states, and even citizens, need to process personal data. If there were prohibitions on the processing of personal data as such, then people would not be allowed to photograph a picture with friends and post it on Facebook, companies would not be able to store the names of their clients and their addresses and states would be unable to maintain car, house and dog ownership registers, marriage registers, etc. Consequently, while the presumption with human rights is that in principle, the state does not need to curtail them, the essential presumption about personal data is that it is good and desirable that they are processed. While the state in principle does not need to enter a private person's home, it in principle needs to process personal information about its citizens.

Consequently, there is a fundamental difference in the nature of human rights and data protection rules. Human rights provisions are based on absolute and conditional prohibitions. The state may not torture a person, period; it may not curtail the right to a fair trial, except

when a state of emergency exists; and it may not curtail the right to privacy and freedom of expression, unless this is necessary in a democratic society and prescribed for by law. Data protection rules are in themselves already a compromise between the free flow of information and the protection of personal data. For a large part, data protection rules regard procedural and quality aspects of this process, for example specifying that when personal data are processed, the data controller should ensure that the data are correct and up to date, that they are processed in a secure and confidential manner and that the processing takes place in a transparent fashion.

This difference is also emphasized by the fact that human rights traditionally only protect a very limited set of values that are regarded as essential to personal freedom. The jurisprudence of the European Court of Human Rights, for example, is based on concepts such as *ratione personae, ratione materiae* and the *de minimis rule*,[66] from which it follows that only those interests are provided protection under the scope of the Convention that have a severe impact on the life of the claimant and his personal interests. Consequently, the processing of personal data will not be protected under the scope of Article 8 ECHR if it concerns the processing of trivial data, such as a name and address or when the data processing activity must be considered as an ordinary, daily activity.[67] Consequently, there is a threshold for cases to fall under the protective scope of the human rights realm. Data protection instruments, however, do not only revolve around protecting a minimum set of essential personal values; rather, the scope of 'personal data' has been extended quite significantly over time. It is often said that almost any data may potentially be qualified as personal data. Importantly, the question of whether something falls under the protective scope of data protection instruments is dependent on the question whether 'personal data' are 'processed'. 'Processing' concerns almost everything one can do with data, even deleting or blocking information. Moreover, the question of whether information qualifies as 'personal data' is not dependent in any way on the individual interests at stake or on how essential these interests are, but merely on the fact of whether the data can be used to identify a person. Thus, even a name and an address qualify as personal data. In conclusion, there is no threshold for the application of data protection rules, as is common with human rights instruments – both essential and non-essential interests are provided protection.

Taking account of the fact that all interests of the data subject fall under the realm of data protection instruments and that these rules primarily aim at safeguarding the fairness and carefulness of the data processing activities, rather than curtailing or prohibiting them, and keeping in the back of one's mind that the origins of data protection legislation within the EU may be found partially in market regulation and the facilitation of the free flow of information, it might be wondered whether the right to data protection should not rather be seen as a consumer right instead of a fundamental human right. There are certain arguments that support this thought. For example, the right to data protection will be regulated in extensive detail through more than 90 articles in a Regulation, having direct effect. In this sense, data protection seems again to differ from classic human rights, such as the right to privacy and freedom of expression. Regulating human rights, such as the freedom of expression in such detail on EU level would be unthinkable, because countries would claim the right to interpret such rights according to their national traditions in their legislative frameworks.[68] The classic goal of human rights is not to harmonize national legislations, but

[66] Article 35 para 3 (b) ECHR. http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf

[67] See also: ECmHR, Trouche v France, application no. 19867/92, 1 September 1993. ECmHR, Glass v The United Kingdom, application no. 28485/95, 16 October 1996). ECtHR, Murray v The United Kingdom, application no. 14310/88, 10 December 1991.

[68] Even some more economic oriented rights contained in the Charter, such as the right to intellectual property, are regulated on the level of a Directive instead of a Regulation.

to provide an absolute minimum level of protection. An EU-wide harmonization of data protection rules through a Regulation containing some 100 provisions feeds the thought that data protection rules are actually more akin to market regulation instruments than to human rights documents.

This argument is also supported by the fact that Article 8 of the Charter, and only Article 8 of the Charter, makes explicit mention of a (market) regulator. Paragraph 3 of Article 8 specifies: 'Compliance with these rules shall be subject to control by an independent authority.' Moreover, the capacities and powers of the national regulators are broadened by the General Data Protection Regulation quite extensively. These powers regard educational aspects as well an ombudsman function, but many functions are also contained that are traditionally part of the tool-box of a market regulator. The tasks of DPAs, according to the Regulation, include, among others, the duty to monitor and enforce the application of the provisions, to promote public awareness and understanding of the risks, rules, safeguards and rights, advise the national parliament, the government, and other institutions and bodies on legislative and administrative measures relating to data protection, promote the awareness of controllers of their obligations, provide information to any data subject concerning the exercise of its rights, deal with complaints lodged and investigate the subject matter of the complaint, conduct investigations on the application of the Regulation, monitor the development of information and communication technologies and commercial practices, adopt standard contractual clauses, establish and maintain a list in relation to the requirement for data protection impact assessment, encourage the drawing up of codes of conduct and give an opinion on and approve such codes, encourage the establishment of data protection certification mechanisms and of data protection seals and marks and approve the criteria of certification, carry out a periodic review of certifications, draft and publish the criteria for accreditation of a body for monitoring codes of conduct and of a certification body, conduct the accreditation of a body for monitoring codes of conduct and of a certification body, authorize contractual clauses and provisions, approve binding corporate rules, keep internal records of breaches and of measures taken, in particular warnings issued and sanctions imposed, etcetera, etcetera.[69]

The very long and broad list of task by the DPAs gives the impression that data protection goes far beyond the mere protection of human rights. This is reaffirmed by the list of powers contained in the Regulation, specifying the powers of DPAs relating to authorization and advise, investigation and correction. To give an example, the investigatory powers entail, among others, the right of a DPA to order the controller to provide any information it requires for the performance of its tasks, to carry out investigations in the form of data protection audits, to carry out a review on certifications issued, to notify the controller of an alleged infringement of the Regulation, to obtain access to all personal data and to all information necessary for the performance of its tasks and to obtain access to any premises of the controller and the processor. To provide another example, according to the Regulation, each supervisory authority also has corrective powers such as to issue warnings to a controller when processing operations are likely to infringe the Regulation, to issue reprimands to a controller where processing operations have infringed provisions of the Regulation, to order the controller to comply with the data subject's requests to exercise his rights, to order the controller to bring processing operations into compliance with the Regulation, to order the controller to communicate a personal data breach to the data subject, to impose a temporary or definitive limitation including a ban on processing, to order the rectification, restriction or erasure of data, to withdraw a certification and to order the

[69] Article 57 Regulation.

suspension of data flows to a recipient in a third country or to an international organization.[70] Finally, and perhaps most importantly, the fines and penalties of 20 million euro or 4% of the worldwide revenue of a company DPAs can impose on data controllers fits the picture of a market regulator rather than a human rights authority.

Consequently, although some data protection rules and some data protection cases seem to fit the idea of fundamental human rights, most data protection rules and cases do not. Again, there are generally three approaches to the question of whether the right to data protection is a fundamental right. First, one could argue that even although data protection does not fit the classic scope of fundamental (human) rights, a more modern interpretation should be adopted, that is broadened and widened and under which data protection would be accepted as a fundamental right. Second, one could try and distinguish between different aspects of data protection rules and data processing activities; certain rules and cases would then be treated under the fundamental right to data protection and others could be treated as part of market regulation oriented rules and as the protection of consumer rights. Third and finally, one could argue that data protection rules, as a whole, should not be treated as part of a fundamental right. The third option obviously goes against the ideas of the drafters of the Charter; the second option goes against the rulings of the Court of Justice, as it treats the Data Protection Directive as an implementation of the fundamental right to data protection, and against the EU legislator, because the Regulation must be seen as an implementation of Article 8 of the Charter.

The first options seems least plausible of all. This would mean that every processing activity concerning or involving personal data, however trivial and insignificant, would qualify as an issue that would fall under the concept of 'fundamental right'. Processing a name and an address of a person would then fall under the protective realm of the Charter of fundamental rights. While human rights are intended to protect the most essential values of human life and liberal democracies, this would mean that very insignificant interests would be protected on the same level as the right to privacy and the prohibition of discrimination. Not only would this be problematic because the term fundamental right would be become a hollow concept, it could mean that in time, other fundamental rights lose their special status. If small interests of consumers are protected under the fundamental rights realm, necessarily, limitations and infringements on their interests become increasingly common. Having a fundamental right would then have no or very little added value over having a normal right and limiting those rights would be normalized. Consequently, it seems highly undesirable to protect every aspect of data protection under the scope of fundamental rights.

The second option seems plausible and perhaps most desirable, but difficult to implement. The core question is where the line should be drawn between rules and cases that do address the fundamental right's aspect of data protection and those that don't. Arguably, the distinction could be found in the rules contained in Article 8 of the Charter. These rules would then be treated as essential and fundamental, and the others rules contained in the Data Protection Directive or the upcoming Regulation, but not reflected in the Charter, would not be seen as (implementing) a fundamental right. However, there are two general problems with even this distinction. First, the concept of 'personal data' is used in the first paragraph of Article 8, specifying simply that everyone has the right to the protection of personal data concerning him or her. Consequently, the problem that every interest, however ordinary and insignificant, would in principle fall under the protective scope of the fundamental rights realm, and that the added value of having a fundamental over a normal right would therewith diminish significantly, remains. To solve this problem, a difference would need to be made between types of personal data, only providing protection under the Charter to the processing

[70] Article 58 Regulation.

of sensitive personal data or data that have a direct and significant impact on a person's interests. However, this would mean that the concept of personal data as such would need to be changed in essence, not being based merely on the objective question of whether a person can be identified or individualized through the data, but also whether and if so, to what extent personal interests are involved with the processing of personal data. Moreover, and perhaps more importantly, the protection of private and sensitive data directly connected to significant individual interests is already provided protection under the human rights realm, namely under the right to privacy.

The second problem is that even with the limited number of material rules listed in paragraphs 2 and 3, it is questionable whether these are truly the most significant aspects of data protection regulation. For example, paragraph 3 requires the control over the data protection rules by an independent supervisory authority. Having a supervisory authority overlooking the compliance with the rules seems a procedural and institutional aspect, rather than a material interest to be protected under a fundamental human rights framework. This point is even more obvious with regard to the second paragraph of Article 8 of the Charter specifying that personal data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. But suppose that a company processed a person's name without a legitimate ground, would this constitute a fundamental rights violation? The same seems to apply to the right to access and rectification, also embodied in the second paragraph of Article 8 of the Charter. The question of whether such issues fall under a fundamental rights framework proper seems to depend on which types of interests are at stake, not on the question of whether these rules are upheld as such.

The third option is to argue that data protection really isn't a fundamental right. It seems that this is the most logical answer to the question of whether data protection is a fundamental right proper. As argued, the scope of 'personal data' does not fit the classical scope of human rights; the type of rules facilitating data processing rather than curtailing or prohibiting, seems to diverge from the typical purpose of human rights instruments; and the role of the Data Protection Authorities and the detailed regulation of almost every aspect of data processing activities in a EU-wide Regulation seem more akin to the idea of market regulation than to the protection of human rights. But, it might be asked, what about the data protection rules and cases that do seem to protect fundamental aspects, such as the Digital Rights Ireland case and the rules on processing sensitive data. As has been stressed, processing sensitive personal data and other data that have a significant impact on the interest of the individual are currently already protected under the human rights framework, namely under the right to privacy. The same might be said about mass surveillance, data retention and large scale wire-tapping; they usually constitute an infringement of both the communicational secrecy and the right to private life of citizen's. Hence, omitting the right to data protection from the fundamental rights framework would not leave these interests unprotected.

6. Conclusion

Section 2 showed that the right to data protection has been gradually disconnected from the right to privacy, primarily in EU legislation. Section 3 demonstrated that data protection has gradually been regulated on a higher regulatory level. Soon, data protection rules will be laid down in a Regulation rather than a Directive, the basis of the Regulation will no longer be the free economic market for personal data, but Article 16 TFEU, mandating the EU to regulate this fundamental right, and finally, the right to data protection has been declared a fundamental right in Article 8 of the Charter, next to and separated from

the right to privacy, contained in Article 7 of the Charter. Section 4 argued that although it is impossible to provide a decisive answer to the correct interpretation of the term 'fundamental right', most arguments seem to be in favor of treating fundamental rights as equivalent or similar to human rights, providing protection to values that have a special moral status and protecting particularly weighty interests for individuals and society at large. Section 5 investigated whether data protection is a fundamental right proper, whether it should be treated as a fundamental (human) right.

The conclusion of section 5 was that it is not. There are certain aspects that can be seen as fundamental and arguably should be protected under a fundamental human rights framework, but these are aspects that are already protected under the human and fundamental rights realm, namely by the right to privacy. Most aspects of data protection do not seem to fit the underlying idea of human or fundamental rights, even the aspects contained in the Article 8 of the Charter. For example, the scope of the concept 'personal data' is not based on the question of whether significant personal interests are at stake, but simply on the objective criterion of whether someone can be identified or individualized on the basis of the data. Thus, even processing a name or an address would qualify as falling under a fundamental right. The character of data protection rules is to facilitate the data processing activities and to ensure that they are conducted in a fair and adequate manner, while the principle objective of human rights is to stop or curtail the infringements on human rights. Finally, it seems that the Data Protection Directive and the upcoming General Data Protection Regulation are more akin to market regulation than to traditional human rights instruments, which also holds true for the position of Data Protection Authorities.

Consequently, it seems that it would be wise for courts and national legislators not to replicate the terminology of the European Union, but instead treat data protection as an ordinary consumer right. Admittedly, it is possible to come to a different conclusion, namely when an alternative interpretation of the concept and meaning of 'fundamental rights' is adopted. Those who want to defend such a position would, however, need answer four difficult questions. First, if fundamental rights are not similar to human rights, what status do they have? Second, and related to that, what would be the added value of having a fundamental right over a normal right? Third, which aspects of data protection are a part of the fundamental right to data protection and which ones not, and why? Fourth, which values would be protected by a fundamental right to data protection that are not already protected under the fundamental right to privacy? As long as these question are not answered in a satisfactory manner, it seems best to treat data protection as a consumer right, rather than a fundamental right.

7. Bibliography

Alston, Philip (ed). 1999. *The EU and Human Rights*. Oxford: Oxford University Press.

Burkert, Herbert. 1983. *Freedom of Information and Data Protection*. Bonn: Gesellschaft für Mathematik und Datenverarbeitung.

Costa, Luiz & Yves Poullet. 2012. Privacy and the regulation of 2012. *Computer Law & Security Review*, 28 (2012).

Dammann, Ulrich, Otto Mallmann & Spiros Simitis (eds). 1977. *Data Protection Legislation: An International Documentation: Engl.–German: eine internationale Dokumentation = Die Gesetzgebung zum Datenschutz*. Frankfurt am Main: Metzner.

Dicey, A.V. *Lectures on comparative constitutionalism* (Oxford, Oxford University Press 2013).

Douglas-Scott, Sionaidh. 2011. The European Union and Human Rights after the Treaty of Lisbon', 11 *Human Rights Law Review* 645 (2011).

Eleftheriadis, Pavlos. 2008. *Legal Rights.* Oxford: Oxford University Pres.

EU Network of Independent experts in fundamental rights. 2003. *Report on the Situation of fundamental rights in the European Union and its member States in 2002*. Luxembourg: European Communities.

Fabbrini, Federico. 2014. *Fundamental Rights in Europe: challenges and transformations in comparative perspective*. Oxford: Oxford University Press.

Fagan, Andrew. *Human rights: confronting myths and misunderstandings* (Cheltenham: Edward Elgar 2009).

Finnis, John. *Natural law and natural right* (Oxford: Clarendon Press 1980)

Freeman, Michael. *Human rights : an interdisciplinary approach (*Cambridge: Malden 2011).

Gonzalez Fuster, Gloria. 2014. *The emergence of personal data protection as a fundamental right of the EU.* Springer: Dordrecht.

Gonzalez Fuster, Gloria & Raphael Gellert. 2012. The fundamental right of data protection in the European Union: in search of an uncharted right. *International Review of Law, Computers & Technology* 26 (2012).

Gellert, Raphael & Serge Gutwirth. 2013. The legal construction of privacy and data protection. *Computer Law & Security Review* 29 (2013).

Hardt, Sascha & A. W. Heringa (eds.), *Sources of constitutional law: constitutions and fundamental legislative provisions from the United States, France, Germany, the Netherlands and the United Kingdom, including the ECHR and EU Charter of Fundamental Rights* (Cambridge: Intersentia 2014).

Heffernan, Liz. (ed.), *Human rights: a European perspective* (Dublin: The Round Hall Press 1994).

Heringa, A. W. & Philipp Kiiver, *Constitutions compared: an introduction to comparative constitutional law* (Cambridge: Portland 2012).

Hijmans, Hielke. 2016. *The European Union as a Constitutional Guardian of Internet Privacy and Data Protection: the Story of Article 16 TFEU.* Amsterdam: University of Amsterdam Dissertation.

Hondius, Frits W. 1975. *Emerging Data Protection in Europe.* Amsterdam: North-Holland.

Jackson, Vicki C. & Mark Tushnet, *Comparative constitutional law* (St. Paul: Foundation Press 2014).

Kokott, Juliane & Christoph Sobotta. 2013. The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR. *International Data Privacy Law* 3 (2013).

Lynskey, Orla. 2014. Deconstructing data protection: the 'added-value' of a right to data protection in the EU legal order. *International and Comparative Law Quarterly* 3 (2014).

Mendelson, M. H. 1981. The European Court of Justice and Human Rights. *Yearbook of European Law*, 125 (1981).

Moerel, Lokke. 2012. Binding Corporate Rules Corporate Self-Regulation of Global Data Transfers. Oxford, Oxford University Press.

Murphy, Walter F. & Joseph Tanenhaus, *Comparative constitutional law: cases and commentaries* (London: Macmillan 1977).

Newhall, A. & A. Rosas (eds.). 1995. *The European Union and Human Rights*. Dordrecht: Kluwer.

Perrot, David L. 1973. 'The logic of Fundamental Rights', in: John W. Bridge et al. (eds.). *Fundamental Rights*. London: Sweet & Maxwell.

Ritchie, David George. *Natural rights: a criticism of some political and ethical conceptions* (London 1895)

Robinson, Nehemiah. 1958. *The Universal Declaration of Human Rights: its origin, significance, application, and interpretation.* New York: World Jewish Congress.

Rosenfeld, Michel & András Sajó, *The Oxford handbook of comparative constitutional law* (Oxford: Oxford University Press 2012).

Sloot, Bart van der. Do data protection rules protect the individual and should they? An assessment of the proposed General Data Protection Regulation, *International Data Privacy Law*, 4 (2014).

Sloot, Bart van der. 2015. Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of "Big Data". *Utrecht Journal of International and European Law*, 80 (2015).

Sloot, Bart van der. 'The Practical and Theoretical Problems with 'balancing': Delfi, Coty and the redundancy of the human rights framework', *Maastricht Journal of European and Comparative Law*, 3 (2016).

Symonides, Janusz. (ed.) *Human rights: international protection, monitoring, enforcement* (Paris: UNESCO Pub. 2003)

Toth, Akos G. 1997. The European Union and Human Rights: the Way Forward. *Common Market Law Review*, 34 (1997).

Tomuschat, Christian. *Human rights: between idealism and realism* (Oxford: Oxford University Press 2014).

Tuck, Richard. *Natural rights theories : their origin and development* (Cambridge: Cambridge University Press 1979).

UN, *Human rights: questions and answers* (New York : United Nations 1987).

Varju, Marton. 2014. *European Union Human Rights law: the dynamics of interpretation and context.* Northampton: Edward Elgar.

Verdoodt, Albert. 1964. *Naissance et signification de la Déclaration Universelle des droits de L'Homme.* Louvain: Warny.

Westin, Allan F. & Michael A. Baker. 1972. *Databanks in a Free Society: Computers, Record-keeping and Privacy.* New York: The New York Times Book.

Williams, Andrew. 2004. *EU Human Rights Policies.* Oxford: Oxford University Press.