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The right to data protection in the light of personality rights: does it prevent the emergence of data ownership?

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Abstract: This paper is devoted to the analysis of the right to data protection as an integral part of personality rights in the context of property relations. Despite the fact that this right is commonly not considered from the point of view of property rights, the authors tend to believe that such a confrontation is increasingly becoming a fiction: the recognition of this right as an independent fundamental right in EU law does not exclude the possibility of its consideration in the context of property relations, since it is not a classical fundamental right and has a "market basis". In its turn, the case law of the ECtHR reflects the concept of personality rights in the scope of the article 8 of the European Convention on Human Rights (hereinafter – "ECHR") and this concept developed assumes an approach to property rights as an integral part of personality. In this framework, if the right to the protection of personal data is considered in the context of article 8 of the ECHR it may imply ownership of personal data.

Keywords: personal data, personality rights, property, privacy, EU law, ownership.

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1. Introduction

Theoretical debates do not give an unambiguous answer to the question of what "privacy" means and what its real content is. A uniform definition of the term "privacy" is difficult due to its different semantic components in different legal systems. This almost dimensionless category covers an unlimited range of interests, such as personal autonomy, personal integrity, family life, inviolability of the home and so on. As Daniel J. Solove rightly points out: "Privacy (…) is a concept in disarray. Nobody can articulate what it means. Currently, privacy is a sweeping concept, encompassing (among other things) freedom of thought, control over one's body, solitude in one's home, control over personal information, freedom from surveillance, protection of one's reputation, and protection from searches and interrogations" (Solove, 2008).[2] In particular, one of the most problematic issues is the relationship between privacy and the right to personal data protection, which in the context of development of information technologies has become more acute.

There are two points of view on this issue: either the right to protection of personal data is considered as a part of human privacy, or these rights are considered to be different legal categories. In continental Europe, personal data is accepted as a part of the right to personality of the data subject (Samuelson, 2000),[3] and among the different manifestations of the general right to personality, the protection of personal data is related to the individual's right to privacy (Cate, 1997).[4] In the broader theoretical discourse, this issue is considered in the context of the confrontation between property rights and personality rights. Moreover, the proponents of both approaches give rather strong arguments in favor of their position, supported mainly by an analysis of the provisions of the General Data Protection Regulation (hereinafter – "GDPR") (Lynskey, 2013).[5]

The main argument of the adherents of the "personality rights" approach is the reference to the fundamental nature of the Charter of Fundamental Rights and Freedoms of the European Union (hereinafter – "CFR"), which implies the non-alienability of the right to data protection, which is fundamentally

[2] Solove, Daniel J. (2008), Understanding Privacy. Harvard University Press, May 2008, GWU Legal Studies Research Paper No. 420, GWU Law School Public Law Research Paper No. 420, Available at SSRN: https://ssrn.com/abstract=1127888

[3] Samuelson, P. (2000). Privacy as Intellectual Property? Standford law review 52: 1125, 1142

[4] Cate, F. H. (1997). Privacy in the Information age. Brookings Institution Press, Washington: 42

[5] Lynskey, O (2013). From Market-Making Tool to Fundamental Rights: The Role of the Court of Justice in Data Protection's Identity Crisis in European Data Protection Law: Coming of Age. Springer: 59

incompatible with the property rights (Buttarelli, 2016).[6] However, the following questions arise: Are the concepts of property rights and personality rights so incompatible? Is it possible to consider the right to the protection of personal data as an independent fundamental right in EU law and does such a regulation prevent the possibility of recognizing "personal data" as the object of property relations? Does the consideration of the right to the protection of personal data as part of the right to privacy prevent the possibility of recognizing the right of ownership of personal data? We will try to find answers in this research.

Privacy and personal data protection: the EU's approach

The adoption of the CFR took a step towards the separation of the right to privacy and the right to data protection. These rights were established in various articles of the CFR and the right to data protection became an independent fundamental right. It may seem that this division was the result of the use of the technique of "fractional" consideration of the "general" right for the purpose of its protection. The reasoning behind this approach is not entirely clear, although it is noted that: "Article 8 of the EU 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 EU Charter. Article 8 of the EU 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."[7]

Thus, after the adoption of the CFR, the link between the right to personal data protection and the right to privacy has not completely broken and not only at an intuitive level: a number of acts of the EU secondary law[8] continued

[6] Buttarelli, G. (2016) The EU GDPR as a clarion call for a new global digital gold standard, International Data Privacy Law, Volume 6, Issue 2, May 2016, Pages 77–78, https://doi.org/10.1093/idpl/ipw006

[7] Available at: http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf (p. 90)

[8] *See* Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector or Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public

to maintain this connection. In particular, "[o]ften considering questions about the right to be forgotten, we intuitively "slip" into the sphere of privacy. And maybe not just intuitively. Even if article 16 (1) of the TFEU states that "Everyone has the right to the protection of personal data concerning them" and the CFR in its Article 8(1) indicates the emergence an independent right to personal data protection, separate to that of privacy, the Directive 2002/58/EC13 or the Directive 2006/24/EC14 continued to maintain this connection. It is also noticeable in the text of the Directive 95/46/EC (hereinafter – *"DPD"*), where the word "privacy" is repeated many times" (Kocharyan, et. al, 2021).[9]

As one can see the DPD seeks to protect the right to privacy with respect to processing of personal data by laying down rules for lawful data processing and enshrining data quality principles". However, it is possible to assume that the word "in particular" in the text of DPD may be interpreted as an indication of the possibility of protecting not only human privacy, but also other rights. Nevertheless, special emphasis should be placed on the close relationship between these two rights: the right to privacy and the right to personal data protection.

The shift in the position of such a close relationship came after the European Commission proposed a reform of the EU data protection legislation. The GDPR analysis shows this change: the GDPR text does not refer to privacy at all. In addition, article 1(2) of the GDPR emphasizes that it "protects the fundamental rights and freedoms of individuals and, in particular, their right to the protection of personal data", and the reference to article 8(1) of the CFR and article 16(1) of the TFEU in the document more clearly shows that this legal instrument as a whole should be perceived as the implementation of the fundamental right to the protection of data protection.

At the same time, it should be noted that there is no ambiguity in EU law regarding the separate consideration of these rights. As we can see below, the CFR's "tendency" to separate these rights in question is mainly supported in the case-law of the CJEU.

3. Separation of the right to the protection of personal data in the case law of the CJEU

The attitude to the right to the protection of the personal data as a separate right mainly began to form recently with the active assistance of the

communications networks and amending Directive 2002/58/EC

[9] Kocharyan, H.; Vardanyan, L.; Hamuľák, O. and Kerikmäe, T.. "Critical Views on the Right to Be Forgotten After the Entry Into Force of the GDPR: Is it Able to Effectively Ensure Our Privacy?" International and Comparative Law Review, vol.21, no.2, 2021, pp.96-115. https://doi.org/10.2478/iclr-2021-0015

CJEU. In particular, in the case of *Bavarian Lager*, the CJEU argued that, in comparison with the right to privacy, the EU data protection rules create a special and strengthened system of protection.[10] Although if in the case of *Bavarian Lager* the Court did not stop to discuss the division between data protection and privacy and did not refer to article 8 of the CFR, then in the case of *Schecke* the CJEU invoked article 8 of the CFR, although it found that there was a "mixed" right.[11]

However, a true attempt at partial differentiation is made in the case of *Digital Rights Ireland*, where the Court ruled that data stored under the Data Retention Directive (hereinafter – "DRD") disclosed the person's identity, time, location, and frequency of transmission of messages. The storage or, ultimately, access to data by the authorities can directly affect the privacy of individuals and is subject to article 7 of the CFR. In addition, this activity constitutes the processing of personal data and therefore must necessarily fall within the scope of article 8 of the CFR.[12]

Referring to the case of *ÖsterreichischerRundfunk*,[13] the CJEU then determined that to establish the existence of an interference with the fundamental right to privacy, it does not matter whether the information on the private life concerned is sensitive or whether the persons concerned have been inconvenienced in any way.[14] From this it follows that the DPD constitutes an interference with the right to private life. Moreover, the Court also very briefly found an interference with article 8 of the CFR on the sole ground that the DRD provides for the processing of personal data.[15] The Court also noted the importance of personal data protection for the exercise of the right to privacy enshrined in article 7 of the CFR, indicating that privacy protection that requires restrictions on personal data protection are applied only as strictly as necessary.[16] The CJEU noted that the DRD does not contain precise and clear rules for restricting articles 7 and 8 of the CFR and does not meet the requirements of article 8 regarding abuse and illegal access.

Actually, the relationship between articles 7 and 8 of the CFR has not been clarified, and the interpretation of these two rights that the Court approves has not been disclosed. Anyway, in the case of *Digital Rights Ireland*, article 8 of the CFR was partially recognized as an independent right. In our opinion,

[10] Case C-28/08 P Commission/Bavarian Lager:2010:ECR I:6055, p. 60.
[11] Joined Cases C92/09 and C93/09, Schecke, ECLI:EU:C:2010:662, p. 58
[12] Joined Cases C-293/12 and C-594/12, Digital Rights Ireland, ECLI:EU:C:2014:238, pp. 17 and 20.
[13] Joined Cases C-465/00, C-138/01 and C-139/01, ÖsterreichischerRundfunk, ECLI:EU:C:2003:294.
[14] Ibid, p. 33.
[15] Ibid, p. 36.
[16] Joined Cases C293/12 and C594/12, Digital Rights Ireland, ECLI:EU:C:2014:238, p. 54.

the most notable case should be considered one that too clearly emphasizes the wrongness of considering data protection laws as "privacy laws". In particular, as it is specified in the press release 84/2017 on the EU–Canada PNR transfer agreement: "the transfer of PNR data from the EU to Canada, and the rules laid down in the envisaged agreement on the retention of data, its use and its possible subsequent transfer to Canadian, European or foreign public authorities entail an interference with the fundamental right to respect for private life. Similarly, the envisaged agreement entails an interference with the fundamental right to the protection of personal data".[17]

4. The right to protect personal data: is it actually an independent and fundamental right?

The recognition of an independent right to personal data protection as a fundamental right in EU law can be considered contested. In particular, the CJEU's case law, as well as the paragraph 5 of the CFR's Preamble, consider constitutional traditions common to the EU member States as the source of the right in consideration, whereas the constitutional traditions of the EU Member States consider the right to personal data protection in the context of entirely different values. As M. Brkan points out: "It is arguable whether this discrepancy between different constitutional approaches towards the essence should be seen as a simple semantic difference or rather as reflecting a deeper conceptual disagreement on whether the existence of essence in a constitutional order is necessary in the fundamental rights protection landscape. In any event, the constitutional orders of various Member States seem to differ on the questions of whether every fundamental right possesses an untouchable core and whether a separate protection of such a core is necessary or even appropriate" (Brkan, 2019).[18]

The explanations to the CFR specifies that the article 8 of the CFR "*(…) has been based on Article 286 of the Treaty establishing the European Community and Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data as well as on Article 8 of the ECHR and on the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which has*

[17] The Court of Justice of the European Union Press Release No 84/17 Luxembourg, 26 July 2017 Opinion 1/15 // URL: https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-07/cp170084en.pdf

[18] Brkan, M. (2019). The Essence of the Fundamental Rights to Privacy and Data Protection: Finding the Way Through the Maze of the CJEU's Constitutional Reasoning. German Law Journal, 20(6), 864-883. doi:10.1017/glj.2019.66

been ratified by all the Member States".[19] The reference to the provisions of international documents should not imply the existence of an independent right to data protection, but rather its existence as part of the right to privacy. This implies that the entire scope of the right to data protection enshrined in the CFR must be part of the right enshrined in Article 8 of the ECHR, if the "whole–part" rule is followed. However, is it possible to consider this approach as the correct one?

It is necessary to note that the subject of the Article 8 of the CFR is defined in the GDPR. Thus, the GDPR defines that "personal data" means any information relating to an identified or identifiable natural person ("data subject"); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.[20] In its turn, the CJEU interprets the case law of the ECtHR as meaning that "privacy" includes the protection of personal data defined in this way.[21] At the same time, the ECtHR requires an additional element to include personal information in the sphere of privacy. For example, in the case of *M.M. v United Kingdom* the ECtHR pointed out that information about a criminal conviction or warning becomes part of a person's private life as the event fades into the past.[22] In the cases of *Rotaru v. Romania* and *Segerstedt-Wiberg and Others v. Sweden* ECtHR pointed out that the personal information in question has a long history.[23] However, such elements have not yet been included in the case law of the CJEU. It may be assumed that according to the practice of the ECtHR, there is such personal information that has not yet become part of private life and that is not protected by the right to privacy. However, in EU law, even what is not included in the concept of "private life" and has no fundamental meaning in the practice of the ECtHR, is "fitted" in the scope of the fundamental right. If we proceed from the approach of the CJEU regarding the fact that the GDPR as a whole is the implementation of the right to personal data protection, it turns out that even a minor violation of the data protection rules enshrined in the GDPR should be considered as a violation of the fundamental right enshrined in Article 8 CFR. However, not

[19] Explanations relating to the Charter of the fundamental rights (2007/C 303/02)
[20] See Recital 4(1) of the GDPR
[21] Joined Cases C–92/09 and C–93/09 *Volker und Markus Schecke and Eifert:* 2010:ECR I:11063, p. 52.
[22] ECtHR, *M.M. v. UK* App no. 24029/07 (13 November 2012), p. 188.
[23] ECtHR, *Rotaru v Romania* App no 28341/95, ECHR 2000-V, p. 44, *Segerstedt-Wiberg and Others v Sweden* App no 62332/00, ECHR 2006-VII, p. 72.

all the principles embodied in the GDPR are recognized under the European Convention: only a number of the principles of the right to data protection are guaranteed under Article 8 of the ECHR. As Paul de Hert rightly argues: "Article 8 ECHR is an important point of reference, but it is far from the only one. After all, aspects related to Data Protection can be found in the case law on Article 5, 6, 10 and 13 of the ECHR" (de Hert, 1998).[24]

As it was already noted, there is no clear legal basis for the right to data protection to be recognized as a fundamental right in EU law. It seems to us that the right to data protection, which is separated from the right to privacy, is nothing more than the result of a traditional legal positivist approach: it is fundamental, as it is specified in the CFR. The exclusive reference to fundamentality in the CFR implies that the right to data protection is not alienated from the fundamental principle of the concept of property rights. This, of course, implies that the right to data protection should provide a person with personal and not property interests in relation to his/her personal data and prevent the possibility of waiving this right or regulating it in the context of property relations. However, the GDPR assumes the possibility of transferring personal data from hand to hand. Moreover, the adoption of the GDPR has increased the number of arguments for the "proprietary" nature of the right to personal data, even against the background of the existence of a provision on the fundamental nature of this right in the CFR. As N. Purtova indicates: "(…) the adoption in April 2016 of the General Data Protection Regulation ('GDPR') marked the end of the European data protection reform and is a major development on a legislative level (…) which implied, among others, "that individuals are in control of their personal data and trust the digital environment." As a result, the GDPR contains new rights considered by some to be property-like, e.g. the rights to data portability and to erasure ('the right to be forgotten')" (Purtova, 2017).[25]

Unlike other fundamental rights, the right to data protection protects *inter alia* the compromise between the free flow of information and the protection of personal data. In cases *Schrems* and *Coty* the CJEU holds the view that the DPD (and now the GDPR) as a whole should be considered as an exercise of the fundamental right to data protection (Fuster & Gellert, 2012).[26] The

[24] Paul de Hert, Human Rights and Data Protection. European Case-Law 1995–1997 [Mensenrechten en bescherming van persoonsgegevens.Overzicht en synthese van de Europeserechtspraak 1955–1997] (Jaarboek ICM, 1997 Antwerpen, Maklu, 1998) 91.

[25] Purtova, Nadezhda, Do Property Rights in Personal Data Make Sense after the Big Data Turn?: Individual Control and Transparency (November 13, 2017). N Purtova 'Do property rights in personal data make sense after the Big Data turn? Individual control and transparency', 10(2) Journal of Law and Economic Regulation November 2017, Tilburg Law School Research Paper No. 2017/21, Available at SSRN: https://ssrn.com/abstract=3070228

[26] Gloria Gonzalez Fuster & Raphael Gellert, 'The fundamental right of data protection in the

GDPR includes not only human rights provisions, but also heterogeneous provisions that establish the powers of the national regulators, which are more typical of a market regulator. Thus, the origins of this right are partly seen in the regulation of the market and the promotion of the free flow of information, which means that this right is more an instrument of market regulation than a classical fundamental right.

5. The right to personal data protection in the case law of the ECtHR

In the explanations of the CFT is stated, that Article 7 of the CFR corresponds to Article 8 of the ECHR and should therefore be interpreted in accordance with it. It should be noted that the right to data protection was initially considered by the ECtHR within the framework of various provisions of the Convention, and only in recent practice data protection rules are considered in the context of Article 8 of the ECHR.[27] What is the reason for this direct inclusion of the right to data protection in the right to privacy is difficult to say. A number of researchers of Article 8 of the Convention, such as Paul de Hert and Serge Gutwirth, have even concluded that its scope does not include data protection at all. Thus, it is assumed that privacy and data protection are two different tools for the control of state authorities and cannot be considered together. Privacy restricts the power of state, creating a sphere of individual autonomy and self-determination free from state interference. In this context, privacy is a negative right that allows an individual to prevent the state from interfering in his/her affairs, but not to require the state to take any positive steps (de Hert & Gutwirth, 2003).[28] Data protection does not prohibit such state interference, but directs and controls it, granting the individual positive rights and imposing positive obligations on the state.[29]

At the same time, if we turn to the *travaux préparatoires* of the ECHR, we can notice that article 8 was conceived as a negative right of citizens to be free from arbitrary interference in their private and family life, housing

European Union: in search of an uncharted right', International Review of Law, Computers & Technology 26 (2012); ECJ, Coty Germany GmbH v. Stadtsparkasse Magdeburg, Case C-580/13, 16 July 2015, p. 30-31.

[27] http://www.echr.coe.int/NR/rdonlyres/4FCF8133-AD91-4F7B-86F0-A448429BC2CC/0/FICHES_Protection_des_donn%C3%A9es_EN.pdf

[28] de Hert, P., Gutwirth, Serge (2003). "Making sense of privacy and data protection: a prospective overview in the light of the future of identity, location-based services and virtual residence in the Institute for Prospective technological studies." Security and Privacy for the citizen in the postSeptember 11 digital age: a Prospective overview: 138.

[29] Ibid: 144.

was called "Freedom from wrongful interference".[30] It was not intended as a positive right for the individual and did not imply any positive obligation for the Member State. In this context, Paul De Hert and Serge Gutwirth are right, however the need to adapt the original text of the ECHR to new realities, especially in connection with scientific and technological, biotechnological and information development, forced the ECtHR to change the original intentions of the drafters of the ECHR through the concept of "the Convention is a living instrument" through its judicial activism. The most tangible changes were refuted by article 8 of the ECHR, the expansion of the substantive scope of which occurred *inter alia* by the inclusion of new rights and freedoms in its sphere. Such an extension of the scope of article 8 of the ECHR, especially on the basis of the doctrine of the effective exercise of the right.[31] It was associated with the inclusion of personality rights, which, while granting "positive freedom" to a person, simultaneously impose positive obligations on states.

Within the framework of Article 8 on the right to personal data protection, the Court has developed a number of significant approaches. For example, it has recognized that an individual has the right to access personal information, that the mere storage of personal data initiates the application of Article 8 of the ECHR, personal data can only be collected for specific and legitimate purposes, and has accepted a positive obligation of States to establish adequate data protection rules.[32] Moreover, the Court also saw such a positive obligation in the sphere of private relations. In particular, in the case of *X and Y v. the Netherlands*, the Court stated that "The Court recalls that although the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (see the Airey judgment of 9 October 1979, Series A no. 32, p. 17, para. 32) These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."[33] Besides, in the case of *I. v. Finland*, the Court held that: "The mere fact that the domestic

[30] Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights.Vol. I: Preparatory Commission of the Council of Europe, Committee of Ministers, Consultative Assembly, 11 May-8 September 1949. (Pp. xxxiii, 327.) Vol. II: Consultative Assembly, Second Session of the Committee of Ministers, Standing Committee of the Assembly, 10 August-18 November 1949. (Pp. xiii, 311.) (The Hague: Martinus Nijhoff, 1975.

[31] ECtHR 07 July 1979, Gaskin v. UK. Application no. 10454/83.

[32] ECtHR 5 October 2010, Köpke v. Germany. Application no. 420/07

[33] ECtHR 26 March 1985, X. and Y. v. The Netherlands, Application no. 8978/80. p. 23

legislation provided the applicant with an opportunity to claim compensation for damages caused by an alleged unlawful disclosure of personal data was not sufficient to protect her private life. What is required in this connection is practical and effective protection to exclude any possibility of unauthorized access occurring in the first place".[34] So, the State receives an affirmative obligation to create an effective data protection system, so that both state and other entities do not violate the privacy protected by Article 8 of the ECHR.

The judicial practice obliges the state not to allow a violation of Article 8 in a way that reflects the standards of the ECtHR. For example, in the case of *K. U. v. Finland* the ECtHR has given guidelines on the content of States' data protection obligations regarding online anonymity.[35] The Court here again referred to the existence of positive obligations under Article 8. However, it pointed out that the discretionary competence of the state in choosing the means to fulfil positive obligations is limited by the provisions of the ECHR.[36] The Court concluded that the state's failure to enforce confidentiality obligations that promote the anonymity of Internet users, rather than the well-being of children, hindered the prosecution of one of the offenders.[37] Thus, the case law of the ECHR under Article 8 presupposes the creation by the state of a system of data protection that presupposes the positive obligations of the State.

The analysis of the case law shows a change in the original fundamental doctrine underlying the right to privacy from "negative" to "positive", and along with the negative obligations in this area, the case law of the ECtHR imposes positive obligations on states in the field of protection of privacy, and therefore on the sphere of protection of the right to personal data. Moreover, it shows that the scope of article 8 of the ECHR is also beginning to extend to the public sphere and does not protect only classified information. The ECtHR-established right to privacy also protects the full disclosure and development of a personality in the public sphere:[38] "to a certain degree, the right to establish and develop relationships with other human beings especially in the emotional field, for the development and fulfilment of one's own personality." (Gomien & Zwaak, 1996).[39] This change

[34] ECHR 17 July 2008, I v. Finland. Application no. 20511/03, p. 54
[35] ECtHR 2 December 2008, K.U. v. Finland, Application no. 2872/02
[36] Ibid., p. 44
[37] Ibid., p. 49
[38] ECtHR, 09 January 2013. *Oleksandr Volkov v. Ukraine.* Application no 21722/11 p. 166
[39] Commission Report X. v. Iceland (Application No. 6825/74) of 18 May 1976 in Decisions and Reports, Vol 5. p 87; Donna Gomien, D. H., Leo Zwaak (1996). Law and practice of the European Convention on Human Rights and the European Social Charter. Strasbourg, Council of Europe Publishing. 231; Oosterwijck v. Belgium, Comm. Report 1.3.79, para.51 p. 36.

is a transformation of article 8 into the personality right. As R. Beddard wrote although the European Convention "does not talk of the right of personality (…) particularly within Articles 8 to 11 are found the rights which go towards the fulfilment of personal hopes, aspirations, and ideals." (Beddard, 1994)[40]

Besides, it is necessary to note that the protection of privacy in German law is considered in the context of a person's ability to develop their own personality and create their own personality. In other words, the property right is an integral part of the personality rights in German law. Thus, according to German law, property is fundamental to the extent that it is necessary for the individual self-development. In particular, in the case of *Hamburg Flood Control*,[41] the German Constitutional Court stated, that: "The function of Article 14 is not primarily to prevent the taking of property without compensation (…) but rather to secure existing property in the hands of its owner."[42] "To hold that property is an elementary constitutional right that must be seen in the close context of protection of personal liberty. Within the general system of constitutional rights, its function is to secure its holder a sphere of liberty in the economic field and thereby enable him to lead a self-governing life.[43] "The property guarantee under Article 14(1)(2) must be seen in relationship to the personhood of the owner - that is, to the realm of freedom within which persons engage in self-defining, responsible activity". So, the role of property is self-government; the main purpose of property is personal. The purpose of property rights is to provide the necessary degree of control of self-determination as a necessary means to promote self-development. This idea coincides with the ideas of Hegel, who in his theory of property and the self understands liberty in both positive and negative sense. (Laitinen, 2017)[44] This shows that the idea of property rights in German law is a more important value and shares the tradition of self-development with the concept of freedom. The point of property protection is not to provide a safe sphere for the individual from the actions of the state: the meaning of property protection is to give a person the opportunity of self-realization.

To sum up, the development of such an approach is not a pure idea and is only the result of the "judicial activism" of the ECtHR. In its essence, it embodies the approach developed in German law, in particular the approach in the interpretation of Art. 2 (1) of the German Basic Law. The adoption of

[40] Beddard, R. (1994). Human Rights and Europe, Cambridge University Press. p. 95

[41] *BVerfGE 24, 367 (1968).*

[42] *BVerfGE 24, 389.*

[43] *BVerfGE 24, 389.*

[44] *See* Laitinen, A. "Hegel and Respect for Persons". The Roots of Respect: A Historic-Philosophical Itinerary, edited by Giovanni Giorgini and Elena Irrera, Berlin, Boston: De Gruyter, 2017, pp. 171-186. https://doi.org/10.1515/9783110526288-009

this approach in the case practice of the ECtHR has a profound impact on the legal regulation of the right to the protection of personal data in the EU and sets the direction for the development of law in this area.

6. Conclusions

The regulation of the right to personal data protection in the EU law is somewhat contradictory. The EU law does not provide an unambiguous answer to whether the right to data protection is a separate right or not, although there is a tendency in the CJEU to separate these rights.

It is generally accepted that the European human rights system is aimed at protecting personality rights, which is considered to be opposed to property rights. Nevertheless, this opposition practically merely disappears in the approach of the modern case law of the ECtHR: the bias towards the adoption of the concept of personality rights within the framework of Article 8 also implies a different approach to property right as an integral part of these rights.

The recognition of the right to the protection of personal data by part of Article 8 of the ECHR, presupposes the consolidation of the right of ownership of those personal data, at least those of them, through which a person self-actualizes. If the right to the protection of personal data is considered in the context of article 8 of the ECHR in the part related to ensuring self-development, such a right must imply ownership of personal data, because in this case they cannot be considered as *res nullius*, as in the EU law. This means that the more deeply the doctrine of personality rights is embodied, the more the possibility of applying property relations to personal data increases. Moreover, the recognition of the right to data protection as a separate fundamental right in EU law cannot prevent this trend, since in EU law the right to personal protection is not aimed at protecting the individual.

The right to the protection of personal data as an independent fundamental right in the EU law does not prevent the possibility of recognizing "personal data" as the subject of property relations. Neither does the consideration of the right to the protection of personal data as part of the right to privacy under Article 8 of the ECHR.

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