Title: Balancing fundamental rights and freedoms in data regulation in Europe.

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Intention

The intention of this article is to examine and perhaps even challenge the status of fundamental rights and freedoms in the EU, especially to question if all fundamental rights are equal when it comes to recognition and enforcement.

Our very basic values are expressed in fundamental rights. There will always be conflict between different rights and freedoms, as collision is a natural phenomenon in our complex world. However, a triumph of one fundamental right or freedom at the cost of another will always be a deep disappointment to some, and, consequently, the process of defining which right or freedom prevails must be a profound and transparent one.

Ordinarily, in European jurisdictions when such conflicts arise, each fundamental right and freedom should be weighed and balanced, and to the extent possible, the core essence of each right or freedom should be left untouched.[2] Obviously two conflicting parties will have different opinions of what the core value of a particular right or freedom is, and how much can be carved out to make room for conflicting values without touching the core essence of that right or freedom.

Many fundamental rights and freedoms have developed from the blatant lack thereof, and too often it is not until after a public scandal, a clear misjustice leads to its recognition and perhaps to its protection in a form of a written obligation with remedies for its breach. The cry for freedom has been the prelude for many a revolution, but freedom as a concept is one of the most difficult ones to define. Is it freedom to do something, freedom from some constraint, or freedom to choose? On the positive side there has always been a competition as to who had the "real" constitution first, and which country adopted which right first.

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[2] Still, Viveca: *Free movement of Information – the Principle and its Practical Implementations*. Scandinavian Studies in Law, Vol 56, p 331

I. Harmonization or fragmentation: The instruments protecting fundamental rights

In many European countries, fundamental rights and freedoms have received more recognition after the member state has incorporated the European Convention of Human Rights ("ECHR") into their own respective laws. For the global reach, there are United Nations international treaties covering a wide range of fundamental rights and freedoms, including civil, political, economic, culture and social rights and freedoms, and especially rights of vulnerable groups such as migrants, workers, and children. [3]

The system of European Human Rights is founded upon the following instruments: the human rights treaties from Council of Europe (Conseil de l'Europe in French), the human rights dimension of the European Union, and the activities by Organization for Security and Cooperation in Europe (OSCE). The first major treaty that the Council of Europe produced after general status was the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[4] One could argue that the United Nations Universal Declaration of Human Rights is rather a proclamation than a treaty. Whereas the ECHR laid out fundamental rights and freedoms with enforcement bodies, namely, the European Commission of Human Rights and the European Court of Human Rights.[5]

All European states have a separate constitution, amendment, or revision of which requires a specific process, such as a 5/6 majority vote.[6] Each of these reflects the balance between the governmental bodies' functions and rights and freedoms of private citizens. Depending on the history of that government and significant events, such as revolutions or totalitarian regimes, these constitutions emphasize the balance between governments' obligation to protect its citizens and the citizens' right to have protection *against their government* in slightly different ways.

There have been some prominent power conflicts, such as the balance between the freedom of speech (publishing content without censorship) and the protection of individuals reputations, public images, or privacy. In cases across Member States, the press frequently appears to be central in these conflicts, as freedom of the press naturally results in a constant flow of attempts to try the limits of that freedom.

II. EU Charter of Fundamental Rights[7]

The very first Article concerns dignity. "Human dignity is inviolable. It must be respected and protected."[8] The EU Charter of Fundamental Rights ("EU Charter"), which has the same legal value of the Treaties since the Lisbon Treaty, complements, but does not replace, national constitutional systems or the system of fundamental rights protection guaranteed by the European Convention on Human Rights. The EU Charter also covers a vast range of fundamental rights and freedoms,[9] and the terms of the EU Charter are addressed to both the institutions and bodies of the EU, and to the national authorities of the Member States, but only when they

[3] https://www.unfpa.org/resources/core-international-human-rights-instruments
[4] The convention was signed on November 4th, 1950, and came into force on September 3rd, 1953.
[5] Hart, James W. *The European Human Rights System*. 102 Law Library. J. 533 (2010) University of Cincinnati Law Publications.
[6] See Annex.
[7] See FRA's handbook on the Charter of Fundamental Rights on the scope of the Charter and its national application.
[8] EU Charter of Fundamental Rights, https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/how-report-breach-your-rights_en .
[9] https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights_en .

are implementing EU law[10]. The EU Charter is, nearly without exceptions, quoted in the decisions of European courts and constantly referred to in discussions on fundamental rights and freedoms in European Union[11].

III. The role of EU as the lawmaker and enforcer in the fragmented world

A clear and predictable jurisdiction means a service provider can understand the consequences of their chosen actions. A service provider can also trust that their operations shall receive protection from local authorities in case their contractors or customers do not play by the rules.

The protection and balancing of fundamental rights and freedoms are the work of many different institutions. This means there will be room for various opinions and approaches, however, this increases the challenges for coordination, the lack of which leads to fragmented implementation and creates a risk for equal treatment of citizens in different member states.

The trend seems to be that when cases are brought before the CJEU or the European Court of Human Rights[12], the core issue raised relates to two or more fundamental rights or freedoms and the relation between them. These colliding rights and freedoms are not necessarily (art. 20) fundamental rights and freedoms from any charter, but one of them may be classified as economic freedom such as free movement of people, capital, or goods recognised under European Union Treaties. [13]

IV. The scope of Freedom of Expression

George Orwell has been quoted ad nauseam, but as a defence for further quoting, his books do offer some brilliantly fundamental rights reflecting quotes: "If liberty means anything at all, it means the right to tell people what they do not want to hear". [14] It is no surprise that we, humans, regard this right in a very subjective way. We all, or at least most of us, are very passionate about our own right to free speech. Are we as passionate about the rights of others, who may mercilessly attach our reputation or question our actions? Artists rights to publish works that may be seen as obscene or blasphemous, or offending wide audiences' moral values are often fiercely disputed in public discussion.[15]

When journalists fight to keep their sources, sometimes of people that are guilty of criminal acts, can they have protection by relying on a public interest?[16]

The United Nations declared free speech a universal right in 1948.[17] Its member states have implemented this in a wide variety of ways. Europe has a relatively narrow scale of

[10] https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/when-does-charter-apply_en .

[11] The EU Charter refers to rights and freedoms of very different natures, including the right to equality (art. 20) or privacy (art. 7), the freedom of expression and information (art. 11) and assembly and association (art. 12) as well as the right to security (art. 6), data protection (art. 8), freedom of arts and sciences (art. 13), freedom to conduct a business (art. 16), right to intellectual property (art. 17) or the right to access to services of general economic interest (art. 36) as well as the general prohibition of abuse of rights (art. 54).

[12] https://www.echr.coe.int/Pages/home.aspx?p=home&c .

[13] Allan Rosas, *Balancing Fundamental Rights in EU Law*, The Cambridge yearbook of European legal studies: CYELS, Volume 16, p. 347-360.

[14] George Orwell, 'The Freedom of the Press' ,1944, Times Literary Supplement 15 September 1972.

[15] Anthony Lester, *Five Ideas to Fight for*. Oneworld 2016, pp 99.

[16] See FRA's legal opinion on the removal of online terrorist content on the need to protect journalistic, artistice and other forms of expression, the proposed amendment and its inclusion by LIBE first, and then its inclusion on the final instruement.

[17] Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217 A (III) (1948).

interpretation, in comparison to the USA and Saudi Arabia.[18] In every country there are limitations, but what is considered a 'proportionate' restriction is subject to a very wide scope of varying interpretations. [19] In Europe, the right to freedom of expression is protected by Article 10 of the European Convention of Human Rights and article 11 of the Charter.[20] The court in Strasbourg has jurisdiction on matters concerning this freedom[21].

The crucial point to bear in mind is the necessity to have ongoing discussions on the limitations, collisions, restrictions, and the balance of freedoms and fundamental rights. These are living rights that evolve constantly and are ceaselessly put to test on a daily basis. The biggest mistake would be to maintain the status quo and stand by an illusion that these issues are solved for good, or even for the time being.

Many European Union member states carried out reviews upon the two-year anniversary of the entry into force of the General Data Protection Regulation ("GDPR")[22]. In Finland, the Ministry of Justice published a call for statements to collect feedback and is publishing a summary of contributions and statements.[23] One of the recurring themes in the feedback statements was the conflict between the GDPR and the Laws on Publicity (access to public documents).

V. Sanctions and enforcement

Albert Einstein famously stated that "Nothing is more destructive of respect for the government and the law of the land than passing laws that cannot be enforced." This quote has been used in many instances that Albert Einstein probably would have disapproved of. However, a law without adequate and rapid enforcement is toothless.

With fundamental rights, it seems that there may be too many enforcers or none in a Member State. Some Member States have separate constitutional courts, others do not. A lack of such constitutional court does not mean that there are no processes to evaluate an alleged threat to a basic right or to balance and decide which prevails.[24]

It is well established that a fundamental right may be overridden or ceded to the upholding of another. However, as the objective is to ensure that no one of the fundamental rights in contention loses its core value, it is essential to conduct a careful balancing test. The end result should never be an entire loss of one right at the expense of the other, but a scenario where both rights can be respected to the extent possible. A harmonious co-existence instead of a decisive winner and loser, a situation that, unfortunately, often breeds bitterness.

Regarding the enforcement and available remedies for citizens, who claim and/or feel that their fundamental rights have been violated/infringed, the available options are not equal among all

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[18] In United States of America the First Amendment grants almost an absolute protection to free speech, see e.g., *McCullen v Coackley,* 134 S. Ct. 2518 (2014), where the US Supreme Court ruled that the First Amendment was burdened "substantially more speech than necessary" by the law in Massachusetts that knowingly criminalised standing on a public way within 35 feet of an entrance of an abortion clinic, effectively meaning that claims for public safety, order, or promoting free flow of traffic were less valuable than the free speech.

[19] Anthony Lester *Five Ideas to Fight For*. Oneworld publication (2016).

[20] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, Article 10.

[21] European Court of Human Rights https://www.echr.coe.int/Pages/home.aspx?p=home
Regulation (EU) 2016/679 of the European Parliament and of the Council of 27th April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L1 19/1.

[23] OM 2020:7 *Lausuntokokoelma yleisen tietosuoja-asetuksen soveltamiskokemuksista* (A collection of statements on experiences on implementation of GDPR), Ministry of Justice, Finland. https://oikeusministerio.fi/-/yleisen-tietosuoja-asetuksen-toimivuudesta-kerataan-kokemuksia-lausuntokierroksella.

[24] See FRA's surveillance reports (report I and report II) on the issue of overisght bodies for intelligence services and available remedies for individuals.

rights. If one were to compare the supremacy in practice of fundamental rights on the basis of cost, availability, effectivity, and authority resources allocated to the investigation of an alleged breach of such fundamental rights, we seem to have clear winners: data protection and privacy.[25]

To illustrate, let's assume that citizen XAB from Europe has been summoned to police investigations concerning a pamphlet he has published online that contains controversial language about his opponents. The summons mentions that his pamphlet will be investigated under the title of suspected hate speech. This news travels fast and the headmaster of the school his child attends mentions this on the teachers' internal website, calling him a hatemonger and mentioning, alongside his full name, occupation, age, that he was suffering from high blood pressure, and whose father he is. XAB hears from his child that the child is being mocked in school as a result.

XAB has very different routes to defend himself. As to the alleged accusation of hate speech, he must go through the entire system and find there will be a judgment that he can appeal. Only after no further means of appeal are available, and if he argues a lack of fair trial or the loss of his freedom of expression, can the case be taken to the European Court of Human Rights. Even if successful, he will not get his sentence reversed, he will possibly be offered compensation if the ECHR finds that the courts or other authorities in the applicable member state did not respect his fundamental rights. This whole process will take years and depending on the laws and practises in the member state he may have to finance part or all of the process himself. There is an unfortunate example, where a much-anticipated case has been withdrawn because the party involved could not pay the advance for costs in UK.[26]

But for the possible breach of his and his son's privacy, there are a very different array of remedies available, free of charge. XAB can request the headmaster to provide him with copies of all the data collected on him and can request them to be deleted. XAB may also decide to report the whole incident directly to the Data Protection Authority in the member state and ask them to investigate if the school committed a data protection breach by collecting and processing his data without an appropriate legal basis. In addition, XAB may ask to investigate if any other of his rights as a data subject have been violated, including the lack of proper privacy notice and Data Protection Officer (if required) or without implementing the appropriate security measures. All XAB must do is to prepare a writ explaining the facts (in certain member states, this could even take the form of just filling in a form at the website and pushing "submit"[27]), without paying any fee or necessity to have it written by a lawyer but also without being obliged to allege or evidence damage. The data protection authorities must investigate each complaint, make a decision, and enforce[28] it. If the end result of these investigations is that

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[25] See FRA's surveillance reports (report I and report II) on the issue of overisght bodies for intelligence services and available remedies for individuals. See also, FRA's data protection handbook on remedies.

[26] The case was Stunt v Associated Newspapers and was regarded as a new ruling on issue of data protection versus freedom of expression and journalistic purposes. The claimant was ordered to pay security for costs after certain events, sum of £460,000 by 19th March 2019.The security was not paid by due date, and in June Mr. Stunt was declared bankrupt. On 21st June 2019 Nicklin J refused an application by Mr. Stunt for an extension of time to provide security for costs and his High Court claim was struck out. In an article" News: Stunt v Associated Newspapers, Data Protection reference to CJEU withdrawn" https://inforrm.org/2019/10/30/news-stunt-v-associated-newspapers-data-protection-reference-to-cjeu-withdrawn/

[27] "Make a complaint" If you think your data has been misused or that the organisation holding it has not kept it secure, you should contact them and tell them. If you're unhappy with their response or if you need any advice, you should contact the Information Commissioner's Office (ICO)." https://www.gov.uk/data-protection/make-a-complaint

[28] This is similar practise to criminal investigation, where person can make a request for the police to investigate, if a crime has been committed, and the investigation will either find evidence or the lack thereof. E.g., https://www.gov.uk/your-rights-after-crime (UK), or https://www.riku.fi/en/guides-and-instructions/criminal-procedure/reporting-a-crime/ (Finland).

there has been a breach of GDPR, the question of awarding any compensation for damages to the individual is still a subject of a separate court case. However, the school and its headmaster may face applicable sanctions, even an order to stop the illegitimate processing in case other remedies would be too ineffective and, where applicable, correct their actions, and/or economic penalties to be paid to the Data Protection Authority.

Even more frustrating is the process for people who, outside of any investigation, feel their rights have not been respected. Leaving aside judicial proceedings (civil or criminal) that entail obvious difficulties for affected individuals in terms of procedural complexity, length, and economic costs, who should one turn to if they believe their other fundamental rights and freedoms as such have been violated/infringed? There are usually no administrative bodies, similar to the Data Protection Authorities, with enforcement powers regarding other fundamental rights and freedoms. Depending on the Member State in question, there may be an ombudsman or a chancellor of justice, who ensures public bodies abide by the law. Typically, however, these guardians of laws and rights do not have the power to overturn judgements. First, you must appeal (if that is allowed), and only after you have exhausted every legal path available, you may make a formal complaint. Still, the decision impacting you will rarely be overturned. Instead, there may be an administrative or criminal investigation into the breach of the citizen's right by the public organisation, or there may be recommendations or decisions to change the process. Still, the decision impacting you will stay the same. Maybe next time your rights will be respected as a result of changed processes or a penalty imposed on the authority, but this time you suffered. [29]

VI. Instances where Data Protection or Privacy Rights have prevailed over other fundamental rights[30]

(i) In the notable joint cases of *Volker und Markus Schecke and Eifert*[31], the right to the protection of personal data prevailed over the principle of transparency[32]. The court did take into account that the concept of "privacy" is much wider than the protection of personal data, referring to the Article 7 (respect of private life). Even though it could be argued that this case was a very particular one, in its essence, it was about the collision of these two fundamental rights. The Court also rightly noted that the protection of personal data is not an absolute right but must be considered in relation to its function in society. In this case, the Court considered the publication of the names of natural persons against the right to know the identities of those

[29] According to Article 46(1) of the Convention, Member States of the Council of Europe undertake to "abide by the final judgments of the Court in any case to which they are parties." The legally binding nature of the Court's judgments and the developed machinery of enforcement supervision is a unique feature of European human rights. The Member States of the Council of Europe have, in principle, three obligations following an adverse ruling from the Court: (1) to make payment of compensation, if awarded; (2) if necessary, to take further individual measures in favour of the applicant, that is to put a stop to the violation found by the Court and to place the applicant, as far as possible, into the situation existing before the breach (restitutio in integrum), (ECHR, Akdivar v. Turkey (Article 50), 1998, para. 47); and (3) to take measures of a general character to ensure non-repetition of similar violations in the future (ECHR, Broniowski v. Poland, 2004, para. 193). Maria Issaeva, Irina Sergeeva and Maria Suchkova, *Internal Journal of Human Rights,* Dec 2011. https://sur.conectas.org/en/enforcement-judgments-european-court-human-rights-russia/.

[30] See on the topic FRA's data protection handbook on the Interaction of data protection with other rights and legitimate interests (p. 52 et seq.). See also FRA's Covid19 Bulletin n 2 on data protection issues (i.e. balnce with the right to health and derogations on public health grounds) and different approaches and regulations by EU Member Stastes, especially as regrds tracing and tracking apps.

[31] Joined cases C-92/09 and C-93/09 Volker und Markus Schecke and Eifert [2010] ECR I-11063

[32] The principle of transparency is not distinctly formulated in the Charter of Human Rights but is an element without which the rights in Article 41 (Right to good administration) or Article 42 (right to access to documents) could not be recognised, as mentioned in Allan Rosas' article p. 354.

persons involved in public decision-making. Was the interest in guaranteeing the transparency of acts of a public institution, when using of public funds more important than the protection of personal data and privacy of natural persons making those acts? In this case, the Court found a "fair balance" was not to disclose the names to the applicants. [33]

(ii) Another landmark case, Case C-28/08 P Commission v Bavarian Lager, where the CJEU ruled on the interplay between the European Union rules on public access to documents and those on the protection of personal data. In this instance, the Court decided the protection of data prevails. The CJEU found that Article 4(1)(b) of Regulation 1049/2001 requires that any undermining of the privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation concerning the protection of personal data[34].

(iii) In the case of Findata, good intentions led to increasing challenges with medical and social research. Finland received some publicity when it declared its new law on the secondary use of certain data [35] ("Act on the Secondary Use of Health and Social Data"). [36] Quoting from the information page from the Ministry's website: "The purpose of the Act is to facilitate the effective and safe processing and access to the personal social and health data for steering, supervision, research, statistics and development in the health and social sector. A second objective is to guarantee an individual's legitimate expectations as well as their rights and freedoms when processing personal data".

This new law created with it an additional data protection authority, Findata [37], alongside the already existing Data Protection Authority - the Office of the Data Protection Ombudsman[38]. The additional and specific DPA Findata not only grants permissions, but they do so subject to substantial fees[39].

This all appears to be a prudent approach to the processing of personal data related to social welfare and health, but was it necessary at all?

The discussion is ongoing, and one of the fiercest critics is the Finnish Medical Association (FMA). In the opinion of this long-established professional association of doctors, the intention was to facilitate research, but the FMA claim/assert that even the safety of patients is now under threat, as the fast collection and sharing of information is prevented. Prior to this new permission requirement, the medical directors of hospitals could contact each other without delay, confirm the necessary permissions from the hospitals and collect relevant information of identified patients themselves, for example in the case of a new infection. This rapid response procedure is no longer possible[40]. Findata has the monopoly to grant permissions, and the decision on permissions may take up to three (3) months. After the permission is granted, even

[33] Ibid, paras 48, 77, 86 and 88.
[34] https://www.ombudsman.europa.eu/en/recommendation/en/48926
[35] Laki sosiaali- ja terveystietojen toissijaisesta käytöstä (552/2019), entered into force May 1, 2019. Proposal in official document HE 159/2017.
[36] https://stm.fi/en/secondary-use-of-health-and-social-data
[37] https://findata.fi/en/
[38] Office of the Data Protection Ombudsman https://tietosuoja.fi/en/home
[39] https://findata.fi/en/pricing/
[40] The medical director for children's infectious diseases at Oulu University Hospital Terhi Tapiainen, as interviewed for the Journal of Finnish Medical Association article.

more time is then required in the actual collection of relevant data and information once the permission is granted.

The alternative options appear even worse: the planned research is not conducted at all, or the research is done too late, or it will be boldly executed illegally aka "underground". None of these contribute to the original idea of facilitating the processing of personal health and social data in connection with scientific research. In addition, since the applicants must define the quantity, quality, and the source of data for the permission, this means in practice that research is not done in the meaning of the word. It is just confirming the expected results, as the researchers cannot freely roam around databases[41].

However, the most questionable feature is the high costs charged by Findata. Some researchers have disclosed in interviews that they have had to abandon their original research plans, as Findata services would have cost most of their budget, or such a large percentage that the actual research could no longer have been conducted to a reasonable degree.

A brief look at the preparatory legislative proposals and their arguments reveals that at no point was it discussed whether the GDPR would have meant that the earlier process to require separate permission requests from data sources was too burdensome and that now GDPR provides a clear and adequate legal basis, the previous process could have been heavily modified instead of building a new process on top of the old practises. In the opinion of the author, it should have been examined whether the GDPR in fact provided the tools and legal basis for research data, enabling faster sharing of data under its clauses allowing secondary use for inter alia scientific research.

There are demands to heavily amend the Act on the Secondary Use of Social and Health Data, on several aspects. In addition to the questionable pricing mechanism for (perhaps unnecessary) pseudonymization and permissions, it is unclear if the parallel data protection authority Findata is independent and resourced in a way that GDPR requires in its statutes on supervisory authorities.

In summary, unfortunately, it seems that extremely strict interpretation of personal data protection has led to a scenario where vital medical research is seriously endangered in the name of the protection of sensitive personal data[42].

VII. Instances where the outcome was more balanced between colliding fundamental rights[43]

(i) In the joint cases Digital Rights Ireland and Seitlinger and others, the debate centered around the concept of privacy and liberty vs the security of a person. The right to privacy is useless if general security is lost in the process. For example, the

[41] *Toisiolaki torppasi tutkimusta*, in English the article is titled "The secondary research act blocked research", published in the Journal of Finnish Medical Association, 27.11.2020, https://www.laakarilehti.fi/ajassa/ajankohtaista/toisiolaki-torppasi-tutkimusta/

[42] See also the statement from Medtech Europe https://www.medtecheurope.org/resource-library/unlocking-the-full-benefits-of-health-data-recommendations-from-medtech-europe/

[43] See also case Tele2 Sverige, on balancing rights between retention and processing of personal data and the protection of privacy in the electronic communications sector, and in this case "the Charter was seen precluding national legislation which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication." https://fra.europa.eu/en/caselaw-reference/cjeu-joined-cases-c-20315-and-c-69815-judgment
The court documents, see https://curia.europa.eu/juris/document/document.jsf?docid=186492&doclang=EN

fact that the fight against general threats to public safety, such as the fight against terrorism, is an objective of general interest and one of the main objectives of the state to protect its citizens against threats to their safety and security certainly prevails over need to protect the privacy of those involved either as suspects or as citizens whose vital interests are at stake. [44]

(ii) Case Buivids[45] Mr. Buivids had an ongoing dispute in connection with administrative proceedings, he made a video recording at the Latvian police station and published it online. The Latvian Data Protection Authority concluded that this was against data protection rules and ordered the video to be deleted from websites. Buivids made a counter-argument claiming that he was merely showing evidence of "unlawful conduct on the part of the police". Further, he argued that he did not need to take it down because the recording was under the personal and household use exemption, or at least by the journalistic works exemption. The CJEU determined that the recording could not fall within the personal and household use exemption because, when published on YouTube, the video could be seen by an unlimited audience. However, the CJEU did consider that due to the unique circumstances of this case, the journalistic exemption may apply.

The CJEU was requested by the Latvian Supreme Court to deliver a preliminary ruling on the question of whether Mr. Buivids, who had posted a video on the internet, without the consent of persons (police) appearing in the video, could rely on the exemption allowing the processing of personal data "solely for journalistic purposes". Since Mr. Buivids was not a professional journalist, but a private citizen, the question was of particular interest.

"As Article 9 of the former Directive 95/46 is similar (but not identical) to Article 85 of the General Data Protection Regulation 2016/679 which is in force since 25 May 2018 (GDPR), the interpretation by the CJEU of the journalistic exemption under the former Directive 95/46 is also of relevance for the application of the processing of personal data for journalistic purposes under the actual GDPR. Article 85(1) GDPR requires the member states to reconcile by law the right to the protection of personal data with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression."[46]

According to the CJEU, it was of crucial importance that the exemptions or derogations were only applied where they were necessary in order to reconcile the two fundamental rights concerned, namely the right to privacy and the right to freedom of expression. The CJEU referred to the case law of the European Court of Human Rights (ECtHR) mentioning relevant criteria, including: the contribution to a debate of public interest; the degree of notoriety of the person affected; the subject of the news report; the content, form and consequences of the publication; and the manner and circumstances in which the information was obtained. Most importantly, it could not be ruled out that the recording and publication of the video (without the persons concerned being informed of the recording and its purposes), did interfere with the fundamental right to privacy of the police officers featured in the video. The CJEU concluded that the making

[44] Allan Rosas, *Balancing Fundamental Rights in EU Law*, The Cambridge yearbook of European legal studies: CYELS, Volume 16, p. 347-360

[45] *Judgment by the Court of Justice of the European Union, Second Chamber, case of Sergejs Buivids v. Datu valsts inspekcija, Case C-345/17, 14 February 2019*

[46] Dirk Voorhoof, *Court of Justice of the European Union: Sergejs Buivids v. Datu valsts inspekcija*, article summary at https://biblio.ugent.be/publication/8614052

and uploading of the video could constitute a processing of personal data solely for journalistic purposes. Further conditions for this were that it should be clear that the sole object of the recording and the publication of the video was the disclosure of information, opinions, or ideas to the public. This was the guidance, but in the end the Latvian court must determine, if this was the actual case. [47]

VIII. Conclusions

The outcome from judgements has not always been predictable and we have brought up cases with different outcomes when it comes to balancing fundamental rights that are colliding. We have tried to analyse how the European Court of Justice or the ECHR have conducted the balancing exercise by addressing the underlying conflicts and arguments for and against values of different fundamental rights in the same case. Not all cases reach the CJEU, nor get any publicity. Nonetheless, they all form part of a jurisdiction's case law, which may be referred to in future cases and impact the interpretation and legal tradition.

There seem to be inconsistency and discrepancy in both pecking order and values when it comes to conflicts of fundamental rights in member states. It is essential that citizens of the EU enjoy the same rights and freedoms and certainty that their choices and actions will lead to predictable protection or lack thereof. If governments want their citizens to participate widely in discussions around essential topics such as freedom of speech, data protection, access to information, social benefits in changing societies, they must be able to give clear rules to their citizens on the limits of such participation. The best way to discourage citizen participation is to punish someone when they express their opinion. All people are not born with the gift of prose, tact of taking into account all possible groups that may be insulted by their opinions, or the accidental (if not intentional) expression of them. It is important to have clear and predictable remedies against people or interest groups, who indeed try to exploit these rights merely to create chaos for their own purposes. To distinguish these two extremely opposite approaches is not an easy task for such a bureaucratic machine as a government. But it is essential that the challenges do not prevent us from trying. There is no perfection, but we can at least move towards it by constantly challenging our analyses and methods; and hearing opposite opinions.

Researchers and stakeholders have been aware, how serious the tension between privacy or the protection of personal data and freedom of expression and information has become. [48] In short, constant dialogue between all parties is essential. The results of these dialogues should be distributed and informed via clear and precise language, available for all.

IX. Essential topics for further discussions

Most conflicts lead to endless disputes. The desired outcome for all would be: fruitful dialogue, understanding the argumentation from the parties that oppose your views, and developments that would benefit all parties. It is essential that there is widespread discussion without prejudices to the constant evolving nature of fundamental rights, the balance of powers and meaningful, effective remedies available for citizens.

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[47] Dirk Voofhoof, Human Rights Centre, Ghent University and Legal Human Academy, article available at https://merlin.obs.coe.int/article/8525

[48] David Erdos, *European Data Protection and Freedom of Expression after Buivids: And Increasingly Significant Tension*, European Law Blog, 21 February 2019.

The courts have evidently the crucial role as the last instance to rule on collisions of fundamental human rights and provide reasoning in their judgements on conducting the required balance. However, as said, they are the last instance, often after years of uncertainty and when all other means are exhausted. One could argue that time is money also in this context. The very basis of legal systems is to offer explicit understanding to both private individuals and organisations of available protections as well as to be able to understand the consequences of one's decisions, actions, and omissions.

Quoting judge Allan Rosas on any challenges for judges in the European Court of Justice, or European Court of Human Rights faced with the task of balancing between fundamental rights and freedoms and other rights protected by laws, he writes that "it is extremely difficult, if not impossible, to lay down any clear rules in this regard".[49]

In this regard, the above-mentioned judge lists certain considerations and questions that may serve as guidelines for future discussions and decision making:

1. Could one of the fundamental rights concerned be seen as non-derivable or absolute right (e.g., prohibition of torture)?
2. Does the wording and context of a fundamental right provide for deviation "in accordance with national laws and practises" suggesting wider room for member states?
3. Could we locate EU secondary law which can be seen as an implementation of a fundamental right, and is there more specific or more far-reaching legislation to a certain fundamental right compared to another?
4. Where an EU fundamental right corresponds to a right that is guaranteed by ECHR, here Article 52(3) provides that the EU fundamental rights must be given the same meaning and scope as the corresponding right under the ECHR. Perhaps this can be seen as giving ECHR right more weight than to another right that is not found in ECHR?

Naturally, none of these can replace the analysis of the facts of the case or its legal and factual context. In the end, we must examine our values, which fundamental right or freedom is never to be compromised, and if it must be compromised, what is the price of that compromise for us.

[49] Allan Rosas, *Balancing Fundamental Rights in EU Law*, The Cambridge yearbook of European legal studies: CYELS, Volume 16, p. 355-356.

Annex: EU Member State Constitutional Courts[50]

Member State	Constitutional Court	Alternative System
Austria	The Constitutional Court of Austria	
Belgium	The Constitutional Court of Belgium	
Bulgaria	The Constitutional Court of Bulgaria	
Croatia	The Constitutional Court of Croatia	
Cyprus		The Supreme Court of Cyprus Centralised review through the system of mandatory appeals and constitutional references.
Czechia	The Constitutional Court of the Czech Republic	
Denmark		The Supreme Court of Denmark
Estonia		The Supreme Court of Estonia No separate institution called the "constitutional court," constitutional review is exercised by a specialized chamber within the Supreme Court.
Finland		No constitutional court exists in Finland, but the courts and other authorities are under an obligation to interpret legislation in such a way as to adhere to the Constitution and to respect human rights.
France	The Constitutional Council of France	
Germany	The Federal Constitutional Court of Germany	
Greece		The Supreme Special Court Regarded as the supreme "constitutional" and "electoral" court of Greece.
Hungary	The Constitutional Court of Hungary	
Ireland		The Supreme Court of Ireland
Italy	The Constitutional Court of Italy	
Latvia	The Constitutional Court of Latvia	
Lithuania	The Constitutional Court of Lithuania	
Luxembourg	The Constitutional Court of Luxembourg	
Malta		The Constitutional Court of Malta Although there is a nominal constitutional court, it is not separate and forms part of the Maltese judiciary."
Netherlands		The Supreme Court of the Netherlands
Poland	The Constitutional Tribunal of Poland	
Portugal	The Constitutional Tribunal of Portugal	Ordinary courts can find a statute unconstitutional, but such decision will be subject to mandatory appeal.
Romania	The Constitutional Court of Romania	
Slovakia	The Constitutional Court of Slovakia	
Slovenia	The Constitutional Court of Romania	
Spain	The Constitutional Tribunal of Spain	
Sweden		While Sweden does not have a Constitutional Court, all courts can review the compatibility of laws with the Constitution or with superior statues.

[50] Source: https://www.confeuconstco.org/en/common/home.html