

Does the Future Hold More Rights or More Proportionality?

The GDPR-Message

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The digital world occupying large swathes of individuals' lives in a trend that shows no signs of abating any time soon, the perennial question in human rights protection has been brought once again, forcefully, to the fore: do we need new human rights to deal with new societal and technological developments? Or are the ones already in place enough, complemented by recourse to the general principles of human rights, specifically to that of proportionality? Making use of the GDPR as a case-study in this regard, this paper elaborates upon the two, foreseeable, answers to this question. The first, within a digital constitutionalism context, suggests the introduction of new rights that will be suitable to protect individuals within the digital world. The second suggests that no new rights are necessary and that recourse should be made to the principle of proportionality instead. The choice by policy-makers between these two options will decide the future for the protection of individual rights in Europe.

Keywords: GDPR, digital constitutionalism, principle of proportionality

I. Introduction

The digital world occupying large swathes of individuals' lives in a trend that shows no signs of abating any time soon (perhaps until the two, the natural and the digital, worlds merge into one), the perennial question in human rights protection has been brought once again, forcefully, to the fore: do we need new human rights to deal with new societal and tech-

nological developments? Or are the ones already in place enough, complemented by recourse to the general principles of human rights, specifically to that of proportionality?

Two, possible, answers are foreseeable. The first, within a so-called digital constitutionalism context, suggests the introduction of new (Internet Bills of) rights that will be suitable to protect individuals within the digital world.¹ The second holds a completely different viewpoint: 'the entire constitutional rights-project could be simplified by replacing the catalogue of rights with a single proposition: The legislature shall comply with the principle of proportionality',² therefore supporting the idea that no new rights are necessary. How are policy-makers to decide between the two? What does the future hold for the protection of individual rights in Europe?

The GDPR could serve as a useful case-study in this regard. The individual right to data protection was the latest addition to the European list of fundamental rights. However, this automatically made the principle of proportionality applicable to it in a twofold manner, both from an individual rights and

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1 See Dennis Redeker, Lex Gill and Urs Gasser, 'Towards digital constitutionalism? Mapping attempts to craft an Internet Bill of Rights' (2018) 80 International Communication Gazette 302-319; Cristina Cocito and Paul De Hert, 'The transformative nature of the EU Declaration on Digital Rights and Principles: replacing the old paradigm (normative equivalency of rights)' (2023) 50 Computer, Security and Law Review, 11 <<https://doi.org/10.1016/j.clsr.2023.105846>>.

2 Grégoire CN Webber, *The negotiable constitution: On the limitation of rights* (Cambridge University Press 2009) 4.

from a GDPR perspective (the principle explicitly recognized since the days of the 1995 EU Data Protection Directive). The GDPR, and EU data protection in general, is therefore uniquely positioned to address the debate between digital constitutionalism and extensive application of the principle of proportionality. At the same time, this debate could prove useful to the GDPR itself: at a point in time when it is accused of ubiquituousness and ever-presence (the underlying claim being that its scope needs to be curtailed in the future), the insights gained through engaging in the discussion above could shed new light as to its role in the protection of individual rights, as well as, to its continued usefulness and relevance.

The above line of reasoning will be applied in the analysis that follows. First, the principle of proportionality and the notion of digital constitutionalism will be briefly discussed within the above context (in sections II and III respectively). Then, attention will be drawn to the GDPR and the EU system of data protection (in section IV) by way of a case-study, with a view to justifying our concluding remarks on each one of the above topics in the final section (section V).

II. The Principle of Proportionality as a Fundamental Rights' Filter

The principle of proportionality is known since antiquity, originating in the writings of Aristotle in the

form of justice in the right ratio. In essence, the principle asks for 'some articulate relationship between means and ends'.³ It is because of its vagueness that this principle has served the law in various contexts: within EU law 'various expressions of proportionality can be identified'.⁴ From a substantive point of view, Article 5(4) TEU sets that 'under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. Accordingly, a three-step assessment needs to accompany any new EU law initiative: whether it is suitable to achieve the desired end; whether it is necessary to achieve the desired end; and whether it imposes a burden on the individual that is excessive in relation to the objective sought to be achieved.⁵

From an EU case-law perspective, proportionality could, arguably, be seen as a cuckoo's egg.⁶ Once introduced, it pushed aside all other methods of judicial reasoning. It made us collectively forget that the 1950 ECHR requires 'necessity in a democratic society' and not 'proportionality'. The leap from the former to the latter was so evident, and the leap from quasi-explicit proportionality to implicit (or invented) proportionality was so attractive, that it affected other legal systems to follow. One of the systems that followed was the EU's system of fundamental rights codified in the CFR.⁷ Proportionality in this legal order is explicitly given a pole position, with 'necessary' in a subordinate role as its subset.⁸ In CJEU-practice proportionality has even reached top status.

3 Eric Engle, 'The history of the general principle of proportionality: An overview' (2012) 10 *Dartmouth Law Journal* 1-11.

4 Koen Lenaerts, 'Proportionality as a matrix principle promoting the effectiveness of EU law and the legitimacy of EU action' (2021) ECB Legal Conference 2021 1-19, these various contexts, however, causing Craig to note that "one should be cautious about ascribing the same meaning to the concept whenever the word 'proportionality' is found within different legal systems" Paul Craig and G. De Búrca, *EU law: Text, cases, and materials* (7th edn, Oxford University Press 2020) 585.

5 Craig and De Búrca, *EU law: Text, cases, and materials*.

6 See, E Bjorge and J Zgliniski, 'The principle of proportionality in EU law and its domestic application: ni tout à fait le même, ni tout à fait un autre' in K Ziegler, P Neuvonen and V Moreno-Lax (eds), *Research Handbook on General Principles in EU Law. Constructing Legal Orders in Europe* (Edward Elgar Publisher 2022) 191-208, 193. This journey started with *Internationale Handelsgesellschaft* (1970), judged six years before the ECtHR's *Handyside* (1976). Invited by the Advocate General in this case, the CJEU was invited to affirm the principle of proportionality in a case with fundamental rights-dimensions. The CJEU recognized the existence and role of the principle. Contrary to the suggestion

of the AG, it did however not undertake any effort to anchor the principle in the wordings of the Treaty but decided to base the principle on unwritten law rather than on textual arguments. Amid this creative moment, the CJEU looked at German law, but insisted on a European law solution. This was found! The Court detected the presence of a general principle in European law requiring that limitations must be 'appropriate and necessary' to attain the relevant EU policy objective of the measure. The term proportionality was not used, but the cuckoo's egg was added to the basket, and it was under the full control of the European judges.

7 Compare M-A Eissen, 'Le principe de proportionnalité dans la jurisprudence de la Cour européenne des droits de l'Homme' in L-E Pettiti, E Decaux and P-H Imbert (eds), *La Convention européenne des droits de l'Homme, Commentaire article par article* (2nd edn, Economica 1999) 65- 81; Bjorge and Zgliniski (ibid) 193.

8 This in striking contrast with the 1950 ECHR where 'necessary' is the only term mentioned in the Convention and where 'proportionality' is only an unwritten law-tool introduced by Court to clarify 'necessary'. Hence, proportionality in the Charter has moved up in rank, necessary has been downplayed and deprived of its important connection to 'democratic society'. Necessary thus becomes a technical tool, deprived of its political dimension.

Although Article 52(1) CFR demands to verify not only proportionality, but also essence and legality as autonomous requirements,⁹ in practice the CJEU does not always refer to the CFR, treats CFR-rights only as principles,¹⁰ or does not examine Article 52(1) CFR systematically, and omits checking on the essence requirement.¹¹ In addition, the CFR's 'principle' of proportionality is hardly defined or clarified.¹² The vague set-up of the general limitation clause (that should logically require uttermost precision) has allowed the CJEU to continue doing what it has been doing from the start of its proportionality-journey: making sure the proportionality principle was under its definitional control avoiding annoying consequences of coming out the cuckoo's egg.

Proportionality-based judicial review usually employs a two-stage analysis in order to answer the question of whether a given policy violates rights. The first question is whether the policy under consideration interferes with (limits, restricts) a right. The second is whether the interference is justified, and usually this is the case if it is proportionate. However, the first stage is of little practical relevance be-

cause of the phenomenon that Letsas has called 'rights inflation':¹³ the scope of (prima facie) rights has become so broad in legal practice that it is difficult to find a case where the reviewing court concluded that the policy at stake did not interfere with a right and therefore was not in need of a justification. The consequence of this is that most if not all of the analytical work effectively takes place at the second stage.

It is in the above context, of the proportionality-test dominance and ubiquitousness, that Webber gave center-stage importance to the principle of proportionality. He finds that constitutions in particular intentionally, leading to 'underdetermined rights with all-encompassing guarantees, protecting limitless instances of activity as within the scope and content of rights and subjecting almost all legislation to evaluations of proportionality and balancing'.¹⁴ While this calling for a replacement of any list of fundamental rights by a single (proportionality) proposition may sound extreme, more nuanced approaches have been suggested, albeit under the same mindset. For instance, Möller claims that, although some rights are absolute (for example, the right to freedom from torture), balancing as reasoning is always appropriate.¹⁵ However, the distinction between absolute (and non-absolute) rights and the prohibition of proportionality test only on the former implicitly means that it is permitted on the latter – thus paving (at least, partially) the way to Weber's sweeping proposition above.

If proportionality is the ubiquitous filter for application of any individual right, then no new rights to deal with the digital world is needed. In the very same manner that in the analogue world intentionally underdetermined rights cater for limitless instances of activity, under only marginal exceptions, the same list of rights would surely cover the digital environment as well. On the contrary, introduction of any new, digital-world, right would add to what is already perceived as rights' inflation. An 'Internet Bill of Rights' would appear far from necessary.

III. Digital Constitutionalism and a New Internet Bill of Rights

Emergence of the digital world, and the multi-faceted effect on all aspects of individuals' lives, has made possible the identification of a new phenomenon,

9 Under art 52(1) CFR any limitation must be (a) provided for by law; (b) respect their essence; and (c) comply with the principle of proportionality. Art 52(1) CFR: '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'.

10 B Zalar, 'Basic values, judicial dialogues and the rule of law in the light of the Charter of Fundamental Rights of the European Union: judges playing by the rules of the game' (*ERA Forum*, 2013, vol 14) 323-325.

11 Reference to the essence-requirement, for example, is often made in passim as part of outlining the conditions which limitations of rights must respect under art 52(1), and in practice, proportionality is by far the most important of the limiting conditions provided for in art 52(1). See T. Tridimas and G. Gentile, 'The Essence of Rights: An Unreliable Boundary?' (2019) 20(6) *German Law Journal* 794-816, 806.

12 The text suggests a definition of the principle of proportionality, but a proper look reveals only a suggestion that the principle is vaguely about reasonable or necessary relationships between means and certain legitimate ends ('Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others').

13 George Letsas, *A theory of interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 120; see also, for example, Paul De Hert and Dariusz Kloza, 'Internet (access) as a new fundamental right. Inflating the current rights framework?' (2012) 3 *European Journal of Law and Technology*.

14 Webber, *The negotiable constitution: On the limitation of rights* (n 2).

15 Kai Möller, *The global model of constitutional rights* (Oxford University Press 2012) 140.

that of the so-called 'digital constitutionalism'.¹⁶ In the words of the authors who coined the term, 'we propose 'digital constitutionalism' as a common term to connect a constellation of initiatives that have sought to articulate a set of political rights, governance norms, and limitations on the exercise of power on the Internet'.¹⁷ Although the term is still in the process of being more clearly defined, it has already been found to be 'a new theoretical and practical field based on a dynamic dialectic between how digital technologies affect the evolution of constitutionalism and the reaction of constitutional law against the power emerging from digital technologies implemented by public and private actors'.¹⁸ In practical terms, however, the term has been connected with the release of a new set of individual rights to deal with the digital world, be it in the form of a digital bill of rights¹⁹ or a new internet bill of rights.²⁰

Under this approach new rights need to be introduced in order to protect individuals more efficiently within the digital world. Although the broad wording of analogue-world fundamental rights has warranted their applicability also in the digital environment, their underlying values have also changed.²¹ It is, arguably, in this context that the recent EU Declaration on Digital Rights and Principles has been perceived as a step towards the digital constitutionalism direction, whereby 'EU regulators have been expected to take actions to address digital power imbalances and safeguard the rights and interests of individuals in the online world'.²²

IV. The GDPR Case-Study

The individual right to data protection gained formal recognition in EU law through the Lisbon Treaty in 2008. Although its wording in Article 16 TFEU does not divulge its digital world origins (being applicable on personal data processing in the digital and the analogue world alike), it could be viewed as a right best suited to the digital environment. Manual processing of personal data took place through all of (written) human history without any need for a specific legal instrument to regulate it. It was automated processing that emerged in the 1960s that led to release of the first Data Protection Acts during the 1970s. These in turn led to the 1995 EU Data Protection Directive, which was replaced in 2016 by the

GDPR. The 2008 introduction of an individual right, therefore, validated at the highest possible level a development already under way for over forty years at that time. This, and the specific provisions of the GDPR, led to a number of unique characteristics when it comes to the EU data protection model that are relevant to the above debate and are listed immediately below.

First, the right to data protection is a fundamental right implemented through secondary law, that is expressly required for in its wording. The second paragraph of Article 16 TFEU expressly mandates a law 'laying down the rules relating to the protection of individuals with regard to the processing of personal data'. The first paragraph of the same article, where the general formulation of the right to data protection is included, is not left alone. This comes in stark contrast with underdetermined, as seen above, formulations of other fundamental rights, that are specifically worded in this manner in order to withstand the test of time. These rights are certainly not accompanied by constitutionally-acknowledged secondary law, as is the case with data protection and the GDPR. Although the EU data protection model could also be the result of path dependency (the 1995 Data Protection Directive being already in effect for several years prior to the relevant right being formally acknowledged), the fact remains that the combined effect of Article 16 TFEU and the GDPR created a new fundamental rights law-making paradigm.

16 See Giovanni De Gregorio, 'The rise of digital constitutionalism in the European Union' (2021) 19. *International Journal of Constitutional Law* 41-70; Edoardo Celeste, 'Digital constitutionalism: A new systematic theorisation' (2019) 33 *International Review of Law, Computers & Technology* 76-99.

17 Redeker, Gill and Gasser, 'Towards digital constitutionalism? Mapping attempts to craft an Internet Bill of Rights' (n 1) 2.

18 See De Gregorio, 'The rise of digital constitutionalism in the European Union' (n 16) 58.

19 Giovanni De Gregorio, *The Declaration on European Digital Rights and Principles: A first analysis from digital constitutionalism* (2022).

20 Redeker, Gill and Gasser, 'Towards digital constitutionalism? Mapping attempts to craft an Internet Bill of Rights' (n 1); Giovanna De Minico, 'Towards an Internet Bill of Rights' (2015) 37 *Loyola of Los Angeles International and Comparative Law Review* 1-30.

21 Bart Custers, 'New digital rights: Imagining additional fundamental rights for the digital era' (2022) 44 *Computer Law & Security Review* 1-13, 4.

22 Cristina Cocito and Paul De Hert, 'The transformative nature of the EU Declaration on Digital Rights and Principles: Replacing the old paradigm (normative equivalency of rights)' (2023) 50 *Computer Law & Security Review* 1-11, 2.

Second, the right to data protection may be viewed as a procedural right. Other fundamental rights basically invite a simple question: is interference with the right lawful, or not? However, this is not the case with the right to data protection. Because of its intrinsic connection with the GDPR, it basically invites a multitude of questions: is the processing lawful? Legitimate? Are the rights to information, access etc respected? Are the appropriate security and other measures in place? In addition, because most of the GDPR principles push for transparency of processing and also for more accountability and participation, all three of which being standard values of procedural justice, it seems justified to claim that data protection too is dominantly about procedural right(s).²³

Third, the principle of proportionality applies to EU data protection in a twofold manner. The right to data protection being acknowledged in Article 16 TFEU, the general EU law principles (among which, proportionality) apply to it as well, same as to any other EU fundamental right. Notwithstanding this, however, the GDPR itself offers many opportunities for applicability of the principle of proportionality within its actual wording.²⁴ While it remains to be seen whether this is intended to be a *lex specialis/lex generalis* relationship (the GDPR's processing being case-specific), the fact remains that proportionality is by now a cornerstone of the EU data protection model, warranting both flexibility when dealing with routine processing and future-proof applicability whenever newly emerged digital technologies are thrown at it.

Finally, fourth, EU data protection applies a specific monitoring model (establishment of specialised, independent state agencies, the DPAs), that is also acknowledged in its constitutional text. Paragraph 2 of Article 16 TFEU asks that 'Compliance with these

rules shall be subject to the control of independent authorities.' This, again, could be explained through path dependency: by the time the Lisbon Treaty was ratified DPAs were firmly established for more than forty years in all Member States (and for more than five years at EU level as well, the EDPS being introduced in 2001). This however does not necessarily mean that DPAs should have been acknowledged in the constitutional text as well. Their inclusion complements the new EU fundamental rights law-making paradigm seen above.

In view of the above, could the GDPR be the precursor of things to come? Do we need new rights that, although firmly footed in the analogue world, are mostly aimed at the digital environment? Is the mix of a fundamental right with detailed secondary legislation a suitable solution for digital-age problems? Is the GDPR's blended approach, whereby more procedures follow introduction of a substantive right, optimised for the digital environment? Is the GDPR monitoring model optimised for the highly specialized needs of the digital world? Some of the parties concerned remained skeptical, if not unimpressed. The GDPR has been accused of being 'the law of everything'.²⁵ In the same vein, CJEU's General Advocate Bobek in an Opinion delivered in 2021 noted that 'Humans are social creatures. Most of our interactions involve the sharing of some sort of information, often at times with other humans. Should any and virtually every exchange of such information be subject to the GDPR?',²⁶ before asking for the GDPR's scope to be 'revisited one day' in the future.²⁷

V. Some Concluding Remarks

The debate between digital constitutionalism (ie the need to introduce new, digital world-specific rights) and an extensive recourse to the principle of proportionality (ie the need to do no such thing) is admittedly not new. Its latest iteration, that was also relevant in the field of digital technologies, came through the discussion of the 'law of the horse'. Famously, this was the reaction by Easterbrook when asked to discuss 'property in cyberspace': because the online environment is still in flux (as much in 1996 as is the case also today), the legal response should not be the development of new rules but the creation of a sound legal system in the analogue world, which would then be applicable onto the digital world as well. Or, in

23 See Paul De Hert and Serge Gutwirth, 'Privacy, data protection and law enforcement. Opacity of the individual and transparency of power' in Erik Claes, Antony Duff and Serge Gutwirth (eds), *Privacy and the criminal law* (Intersentia 2006).

24 See Dariusz Kloza and Laura Drechsler, 'Proportionality has come to the GDPR' (*European Law Blog*, 9 December 2020) <<https://europeanlawblog.eu/2020/12/09/proportionality-has-come-to-the-gdpr/>> accessed 4 December 2023.

25 Nadezhda Purtova, 'The law of everything. Broad concept of personal data and future of EU data protection law' (2018) 10 *Law, Innovation and Technology* 40-81.

26 Case C-245/20 X, Z v *Autoriteit Persoonsgegevens* [2021] ECLI:EU:C:2021:822, Opinion of Advocate General Bobek, para 55.

27 *Ibid.*, para 65.

other words, 'teaching 100 percent of the cases on people kicked by horses will not convey the law of torts very well'.²⁸ Ever since framed along these lines, the 'law of the horse' discussion never actually left the field of digital technologies.²⁹

Having said the above, in our view allowing a single principle (that of proportionality) to replace the list of all fundamental rights is stretching things too far. Proportionality or the identification of a list of absolute rights (if this task was ever possible) are all about categorical balancing, reflecting the societal circumstances upon which each constitution is built. While it makes sense to have some absolutes in constitutions (boundaries having their purposes), balancing with proportionality can only work if the bigger societal picture has been defined. Drawing boundaries to exclude these behaviors that are undesirable or unacceptable helps considerably.

Similarly, while there can certainly be talk of 'rights' inflation' (acknowledging at the same time that this would have been a movable threshold since the first list of human rights was devised), not all of it is bad. Constitutionalism is renewing itself. For example, are the three branches enough? Important criticism has been expressed in this regard already.³⁰ From this point of view, the constitutional acknowledgement of the DPAs may be a welcome development. They could form a species of a fourth branch, perhaps assisting the other branches to preserve the constitution. In addition, constitutionalism is not only about identifying roles for the three branches or state agencies and dividing the private sphere from the public one, but it is (and should be more) focused also on questions of how: how can the three branches or other public actors exercise the powers given to them by constitutions? From this point of view pro-

cedural rights like data protection make a lot of sense, with their nuanced, detailed and scalable approach. It can therefore be that the future belongs more to procedural, and drawn in detail, rights instead of the known norm of intentionally underdetermined and open-ended ones.

Taking the above into account, we believe that the GDPR is, after all, a precursor of things to come. It was the catalyst both as regards expanding the list of fundamental rights to include new rights aimed predominantly at the digital world, and as regards the formulation of any new such rights. The combination of Article 16 TFEU and the GDPR is a powerful one that cannot be overlooked in the future, whenever the discussion turns to regulating the digital world. The GDPR's unique, blended approach of rights-specific procedures combined with new substantive law strikes the correct balance between proportionality and over-specificity. From this point of view, its continued relevance and usefulness seem uncontested. The only real danger for the GDPR, we believe, is for it to fall victim to its own success: having paved the way for other digital-specific fundamental rights,³¹ it may have to ultimately fight for its scope within still contestable fields of activity in the digital environment.

28 Frank H Easterbrook, 'Cyberspace and the Law of the Horse' (1996) *The University of Chicago Legal Forum* 208.

29 See Ronald Leenes, 'Of horses and other animals of cyberspace' (2019) *Technology and Regulation* 1-9.

30 See, for example, Christoph Möllers, *The three branches: a comparative model of separation of powers* (Oxford University Press 2013), particularly ch 5 (Outlook).

31 See Vagelis Papakonstantinou, 'Cybersecurity as praxis and as a state: The EU law path towards acknowledgement of a new right to cybersecurity?' (2022) 44 *Computer Law & Security Review* 1-14, 13.