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The European Constitutional Model for Data Protection

1. May one argue that there is a European model for data protection? What are the features of this model, if any? May one consider that the protection afforded is of a Constitutional level? Does the existence of a “Constitutional” model impose specific obligations on EU institutions?

To answer these questions, to understand the present and turn our gaze to the future, it is indispensable to be aware of one’s past. Europe took up and revamped the modern concept of privacy far beyond the form that had been developed in the United States. We know the main steps along this road. Informational self-determination was recognised as a fundamental right by the Bundesverfassungsgericht in 1983, after the OECD in 1980 and the Council of Europe in 1981 had adopted two instruments in this area – namely, the Guiding Principles and Convention 108, respectively. In 1995, with European Directive 95/46, it was explicitly affirmed that the approximation of laws “must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection”. In 2000, the Charter of Fundamental Rights of the EU recognised data protection as an autonomous right. This approach resulted into major institutional effects, such as the two communications in which the European Commission provided that its legislative and regulatory instruments should always undergo a prior compatibility assessment with regard to the Charter of Fundamental Rights.

2. The differences between the European and the US model are clear-cut if one considers that Europe chose the approach based on omnibus legislation supported by public supervisory agencies. This is quite different from the US approach, where preference was given to sector-based legislation, public control was ruled out, judicial remedies continue to be the main tools in this area, and self-regulation was left intentionally a considerable manoeuvring space. Indeed, one is probably faced with a paradox here. The European model was developed starting from materials that came from the US legal environment – a complex concept of Constitutional privacy and the availability of independent regulatory authorities. In spite of this recognisable source, the model in question was basically rejected in the USA – even though there has been some pressure in recent times to introduce general data protection legislation along with a pre-emption clause ruling out the State’s jurisdiction in this sector, as well as to set up an independent privacy agency.

The differences between the two systems and the features of the European model can be highlighted even better if one considers the contents of legislation. European supranational and domestic legislation envisages specific limitations with regard to public bodies’ activities; above all, they empower data subjects to remain masters of their own information, based in particular on their prior consent to processing and on their access rights.

It should be pointed out that this approach – whilst previously enshrined only in standard laws – was ultimately taken up by Constitutional instruments, as shown by the explicit reference made to privacy and data protection in the Constitutional charters of Spain, Portugal, Netherlands, Greece, Estonia, Lithuania, Hungary, Poland, Slovenia, Slovakia, and Finland. If one also considers the stance taken in other European countries – from Germany to France, and to Italy – it can be concluded that data protection, as a fundamental right recognised by the Convention of the Council of Europe for the protection of human rights and fundamental freedoms, the Charter of Fundamental Rights, and the “constitutional traditions common to the Member States”, must be regarded as one of the “general principles of Community law” (article 6 of the Amsterdam Treaty).

3. Given this context, special importance should be attached to the innovation brought about by the EU Charter of Fundamental Rights, which mirrors the new situation resulting from the widespread use of information and communication technologies – indeed, our life can be said to

have turned into an exchange of information. We live amidst a continuous flow of information, and this has made data protection increasingly important as well as increasingly the focus of political and institutional attention. This evolution is clearly visible by considering the EU Charter of Fundamental Rights, in particular if one compares it with the provisions made in the 1950 Convention of the Council of Europe. Under Article 8 of the Convention, “everyone has the right to respect for his private and family life, his home and his correspondence”. Conversely, the Charter draws a distinction between the conventional “right to respect for his or her private and family life” (art. 7), which is modelled after the Convention, and “the right to the protection of personal data” (art. 8), which becomes thereby a new, autonomous fundamental right. Moreover, article 8 lays down data processing criteria, expressly envisages access rights, and provides that “compliance with these rules shall be subject to control by an independent authority”.

The distinction between right to respect for one’s private and family life and right to the protection of personal data is more than an empty box. The right to respect for one’s private and family life mirrors, first and foremost, an individualistic component: this power basically consists in preventing others from interfering with one’s private and family life. In other words, it is a static, negative kind of protection. Conversely, data protection sets out rules on the mechanisms to process data and empowers one to take steps – i.e., it is a dynamic kind of protection, which follows a data in all its movements. Additionally, oversight and other powers are not only conferred on the persons concerned (the data subjects), as they are also committed to an independent authority (Article 8.3). Protection is no longer left to data subjects, given that there is a public body that is permanently responsible for it. Thus, it is a redistribution of social and legal powers that is taking shape. It is actually the endpoint of a long evolutionary process experienced by the privacy concept – from its original definition as right to be left alone, up to the right to keep control over one’s information and determine how one’s private sphere is to be built up.

The special importance attached to data protection is also shown by the circumstance that the provisions contained in article 8 are taken up in Part I of the draft Treaty establishing a Constitution for Europe – indeed, this is the only case in which one of the rights referred to in the Charter is expressly mentioned. Furthermore, article 8 should be put in the broader context of the Charter, which refers to the new rights arising out of scientific and technological innovation. Article 3 deals with the “right to the integrity of the person”, i.e. the protection of the physical body; Article 8 deals with data protection, i.e. the electronic body.

These provisions are directly related to human dignity, which article 1 of the Charter declares to be inviolable, as well as to the statement made in the Preamble to the Charter – whereby the Union “places the individual at the heart of its activities”. Thus, data protection contributes to the “constitutionalisation of the individual” – which can be regarded as one of the most significant achievements of the Charter.

4. However, it might be argued that the Charter is not yet legally binding. Still, one is to also take account that the Charter is by now explicitly and directly referred to by international and national courts – indeed, the Spanish Constitutional Court relied upon article 8 of the Charter to cope with a data protection issue well before the proclamation of the Charter in Nice, in December 2000.

Apart from the above considerations, which are nevertheless important because they show that courts are giving a new, major contribution to the building up of Europe, one should recall that two Communications by the European Commission (by Prodi/Vitorino in 2001, and by Barroso in 2005) have introduced and regulated the need for assessing compatibility between any regulatory instruments and the Charter. This obligation has been fulfilled – only consider the recitals to be found in several directives, for instance the 2006 one on data retention, which is said to be in compliance with article 8 of the Charter. Therefore, the Charter can be said to have become formally a part of the European legal framework; compliance with the Charter is a precondition for European instruments to be legitimate.

However, the compatibility test with the European Charter of Rights must go hand in hand – in fact, it must come after – a democracy test applied to any new provisions that might place a restriction on data protection rights. Article 6 of the Treaty and Article 52 of the Charter expressly mention the Council of Europe Convention, whose article 8.2. provides that “there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society”. This is especially important because it relates, first and foremost, to the “interest of national security”, which is nowadays most frequently relied upon to justify limitations on data protection. One may unquestionably argue that the twofold test (democracy and compatibility with the Charter) to be applied to any EU instruments in this area mirrors the general concept whereby one may not call for the need to defend democracy if the measures proposed actually turn out to be against, or bring about the distortion of, the principles of any truly democratic system.

5. The foregoing considerations are meant to better spell out the features of the European model and emphasize the Constitutional level of the protection afforded to data – so much so that this protection must be regarded unquestionably as a fundamental right of the individual, indeed as one of the fundamental rights that must be protected with special care. The consequences to be drawn from this analysis are at least two-fold:

- a. in balancing the interests of data protection with other rights, the innovation consisting in the enhanced safeguards afforded to personal information must be taken into account;
- b. in assessing adequacy of the protection afforded by the laws of non-EU countries to which personal data are transferred, the innovation consisting in the evolution of the European constitutional system must be taken into account, as it steps up the protection level to be used as a benchmark in evaluating such adequacy.

6. This analysis of the legislation and the overall evolution of the European legal system clearly points to the orientation European institutions should be following both within the EU and in terms of their relationships with third countries, in particular the US. However, when addressing concrete issues, one is to be also adequately aware in political terms of the difficulties to be coped with and the pressure coming from many quarters in order to downsize data protection – which may lead, in some cases, to the misconstruction of reality. This applies, for instance, to the data retention directive. Whilst the directive purports to be compliant with article 8 of the European Charter of Rights, it actually goes against its very grain.

We live at a time when the issues related to the protection of personal data feature a markedly contradictory approach – indeed, a veritable social, political, and institutional schizophrenia. There is increased awareness of the importance of data protection as regards not only the protection of the private lives of individuals, but their very freedom. Still, it is increasingly difficult to respect this qualification, because internal and international security requirements, market interests, and the re-organisation of the public administration are heading towards the diminution of the relevant safeguards.

What should we expect from future? Will the trend that surfaced up over the past few years continue, or will one get back, albeit with difficulty, to the concept underlying the origins of personal data protection, which opened up a new age for the protection of freedoms with a really forward-looking approach? More generally, there is the urgent need to put a hold on the growing pollution of civil freedoms that is brought about by all the provisions and measures limiting the protection of personal data on the most diverse grounds - and to do so, all the available means should be used and all the opportunities must be exploited. This is indispensable to prevent scientific and technological innovations from facilitating the creation of a society based on surveillance, classification, and social selection and sorting. And it is also necessary in order to afford technological innovations the social legitimisation that can lead to citizens' trust and thereby allows the business community to operate better. However, such legitimisation should not be

committed exclusively to technology, or the widespread view whereby political and social issues can be coped with by committing their solution to technology.

This task is becoming increasingly difficult, and one wonders more and more frequently whether the protection of personal data will really manage to survive with all the expectations and objectives that had accompanied its birth. Still, to quote Spiros Simitis, it remains "a necessary utopia". An utopia that does not direct our gaze towards the remote future, but rather obliges us to consider the reality surrounding us. The protection of personal data has become one of the dimensions of freedom in our contemporary society. Recalling this at all times is no blabbering, because any changes affecting data protection impact on the degree of democracy we all can experience.

Political awareness of the difficulties currently encountered in establishing the democratic value of the European model should not lead one to conclude that defending such model has only to do with defending the Europeans' interests and is not already supported by other countries and different cultural environments. Only think of the attention paid to this issue in the whole Latin America. It should also be recalled that, when the dispute on the transfer of airline passenger data to the US was most hectic, a document by the American Civil Liberties Union concluded as follows: "We should not ask the Europeans to conform themselves to our model; we should accept theirs." On the grounds of these realistic considerations, European MEPs should be strengthened in their belief as to the general value of the European approach to data protection.