Chapter II

The Right to Privacy in the European Context: Insight into Fundamental Issues

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1. Introduction

To write on the right to privacy in the 21st century is to undertake a multidimensional task, one that can be approached from the perspective of both the contemporary citizen and the jurist in several distinct ways. We live at a time when our need for private space is sought more vigorously than the air we breathe, inhabiting a technological world saturated with cameras, gadgets, telephones, TVs and CCTVs; in short, a world where information has become the most important and most expensive feature. Quick information is essential, and the holders of such information tend to be powerful and well equipped. People and places are valued by technological and social media appearance; it is impossible to measure the level of voyeurism we are all enmeshed in. Real values – values of having your private space for yourself, for family and family life, and the right to be a functional human in the dehumanized world of wires and screens – seem to be urgently and fundamentally relevant.

Yet, the reality of modern life requires that the State, the principal guarantor of peace and freedom, provides a functional, safe and secure life for everyone. To do this, States use the same technological tools; screens, cameras, CCTVs, computers and telephones. Thus, from a philosophical – or even meta-philosophical – aspect, the protection of privacy is simultaneously a blessing and a curse. How

Vanja-Ivan Savić (2023) The Right to Privacy in the European Context: Insight into Fundamental Issues. In: Marcin Wielec (ed.) *The Right to Privacy in the Digital Age. Perspectives on Analysis of Certain Central European Countries' Legislation and Practice,* pp. 47–75. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2023.mwrtpida_2

does one resolve such fundamental tensions? The key to the solution lies, like in many other things, in *balancing*. I have learned that balancing became one of the major tools in tranquilizing and confronting rights, especially on the European continent. This chapter will thus focus on the European continent; I will examine selected topics on privacy primarily through the ECHR and the decisions of the court. A secondary method of investigation will be historical and analytical, and will attempt to answer such questions as what privacy really means and what the origins of Privacy Law are. As in many other areas of legal regulation, the State needs to clarify at least three facts: (1) what the highest values of the respective legal order are as per the Constitutional Law and Hierarchy of Norms; (2) what the priorities, through level of protection, are; and (3) whether the 'not to harm principle' has been applied. This essentially ensures that by protecting one right, the rights of others will not be endangered; such results are achieved by balancing. Each State has to decide which are the most important values if the society which make fundaments of its existence. This paper will primarily focus on fundamental values which have to be protected through Privacy Law, as well as some basic aspects of privacy: privacy of family life, privacy of religious organizations, and protection of religious freedoms. An important section will be dedicated to privacy in private life and to data protection (mostly GDPR). All these topics are connected to the core values common to European society as a whole. However, some additional attention will be given to the Central and Eastern European countries and their values.

Obviously, the central clash is between private and family life on the one hand and security on the other. Therefore, the balancing act should be attempted with a clear sight of the values and the public order of a particular State. Moreover, the Margin of Appreciation doctrine should also be taken into account. For instance, religious places of worship have to be excused from surveillance and respected as a sacred space, but at the same time security issues and safety protocols have to be taken into account and properly balanced. At this point it is important to secure and fully respect the application of human rights standards which are essential for the perception of the contemporary European lawyer and citizen.

Recently, another modern privacy issue arose with the onset of the Covid-19 pandemic. In the beginning, no one really thought that a pandemic could also be privacy issue, but it turned out that epidemiological regulation affects private life and religious freedoms much more than anticipated. Private life is potentially endangered through the requirement of masks and vaccinations. The new pandemic brought fort several global challenges. In sum, this paper will act as a contemplative text about privacy in the European context, with specifically chosen topics arising from the legal discourse on privacy.

2. Origins of privacy in Europe (European Union and the Council of Europe)

Although under the Treaty on the Functioning of the European Union (Lisbon Treaty), which entered into force on December 1, 2009, and where the protection of *personal data is recognized as a fundamental right,* most issues related to the right to privacy in the legislation of the European Union are concerned with legal entities and business activities which overflow into various private and non-corporate sectors. This is the case with the GDPR. Although the majority of the analysis in this article will be connected with the activity of the European Court of Human Rights, there is a real necessity to mention two basic pillars important for the development of European legislation[1]:

- Directive 95/46/EC on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data (the "Data Privacy Directive")
- Directive 2002/58/EC Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector (the "E-Privacy Directive")

In the corporate world we live in today, most people, several scholars included, first think of Privacy Law as 'corporate privacy' or the GDPR. However, the history of privacy laws goes much deeper and is linked to individual privacy rights or privacy expectations, for example, the right to have private and undisturbed life. How this

1 EU data privacy laws, EU Treaties and Charters, Legal Information Institute, Cornell University [Online] Available at: https://www.law.cornell.edu/wex/eu_data_privacy_laws (Accessed: 23 February 2022). An excellent summary is provided by the Cornell's LII: "The Data Privacy Directive established the basic legal framework for data privacy protection in the EU, including the default requirement of "opt-in" consent to data sharing and the "adequacy requirement" for data-sharing with non-EU companies. In response to this latter requirement, the U.S. negotiated a "safe harbor" framework for U.S. companies doing business in Europe or with European companies. The Data Privacy Directive also reflects the basic principle that EU privacy protections must be balanced against the four "fundamental freedoms" of the European "internal market": free movement of persons, goods, services, and capital. The E-Privacy Directive supplements the Data Privacy Directive, replacing a 1997 Telecommunications Privacy Directive, and providing a minimum standard for EU member state regulation of commercial solicitation by means of email and telecommunications technologies. It has specific provisions regarding unsolicited communications. Article 13 of the E-Privacy Directive sets forth a basic rule of "opt-in" consent for "unsolicited communications": automated telephone calls, faxes, texts, and email. With respect to unsolicited commercial emails, an exception is created in Article 13(2) for cases where a business has provided a good or service to an individual previously, the individual has provided his/her email, and an unsolicited email is sent to advertise "similar" goods or services. Unsolicited emails sent under this exception must, however, provide the customer with an opportunity to "opt-out" of future emails. Article 13(4) prohibits the sending of commercial emails that disguise or conceal the identity of the sender. See also European Commission Website: Unsolicited Communications – Fighting Spam."

is important? The pure fact remains that this right has its foundation in the Universal Declaration of Human Rights talks by itself. In its Article 12, the UDHR states that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."[2] In a wonderful article two Swiss scholars Oliver Diggelmann and Maria Nicole Cleis argue that the right to privacy was and therefore still is a 'human right', even before it became a 'well-established fundamental right'.[3] This is particularly important to bear in mind when we discuss rights of individuals and/or communities. It is important to go back to the roots of the institution and seek answers to complicated questions which have arisen later on in its development. Privacy concerns are thus much 'older' than we might first think.

It is interesting to note that prior to the Second World War (WWII) European constitutions didn't recognize 'privacy' or 'right to privacy' as a constitutional right – and even then, very few references to 'privacy' have been shown, for example, the correspondence or inviolability of home.[4] General guarantees, as said, were non-existent. The issue is that human rights are the essence of fundamental rights in every liberal State constitution.[5] As the Swiss authors succinctly put it, the usual manner of evolution of rights is such that those that are present significantly at the national level in time become the instrument of conventional law.[6] A definition of the right to privacy does not exist and in that sense belongs to those definitions which have a large impact and define much, but without the definition in itself existing, like the case is with law, or dignity or honesty for instance.[7]

> Privacy is about creating distance between oneself and society, about being left alone (privacy as freedom from society), but it is also about protecting elemental community norms concerning, for example, intimate relationships or public reputation (privacy as dignity). These core ideas compete and partially even contradict each other.[8]

Most scholars do agree that there were two reasons why the right to privacy jumped so high in conventional law; first, the development of electronic or digital media and human development, but the catchment of the institution were undermined when it was created. It has been proven that privacy became present on all levels of legal regulation. However, it has to be remembered that privacy was

2 Universal Declaration on Human Rights [Online] Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights (Accessed: 23 February 2022).
3 Diggelmann and Cleis, 2014, pp. 441–458.
4 Ibid. p. 441.
5 Ibid. p. 442.
6 Ibid.
7 See Warren and Brandeis, 1890, p. 193; Solove, 2002, p. 1087; Griffin, 2007, p. 697.
8 See Diggelmann and Cleis, 2014, p. 442.

conventionally set up in the UDHR in its Art. 12 which became a corner stone and legal standard for all regulation in the area of privacy law.

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.[9]

The document which was produced at that stage was named a Declaration, while there were attempts to make a convention rather than a manifest. At that stage of history (post WWII) it was obviously much easier to get a compromise or agreement on something which is more legally soft or which looks like a moral norm in its essence. Nevertheless, the impact of such a document still remains far greater than just a pure text of good wishes.[10] When we observe the development of privacy law historically, regulations progressed in a few different directions and what was meant to be protected foremost was privacy, private life and family.

In the second phase of the drafting, the wording was that 'everyone is entitled to protection under the law from unreasonable interference with reputation, family, home or correspondence'[11], which was significant since family and home became more focal. There were discussions on if family should have a guarantee to be 'protected from interference' or a guarantee to have 'freedom from interference'[12]. Although there were obvious differences in approaches and wordings, sometimes more than just linguistic differences, all agreed that family and home should be specially protected. Therefore it is not wrong to state that one of the most important aspect of privacy is connected with family life and the privacy of home, which has to be further connected with contemporary issues related to the protection of family, family values and the right to educate children according to specific morals and worldviews. Moreover, there are links with issues of religious freedom. Correspondence also became important as we encounter questions of uninterrupted communication. Surveillance exists in many aspects of private life, and private communication can be interrupted by technical means. This also has implications for organizational religious freedom, which will be discussed later in the text.[13] Communication and correspondence does not mean only classical writings but more importantly includes

9 Universal Declaration on Human Rights [Online] Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights, (Accessed: 25 February 2021).

10 See Diggelmann and Cleis, 2014, pp. 443–444., and also Universal Declaration on Human Rights [Online] Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights, (Accessed: 25 February 2021) referral to: Commission on Human Rights, 2nd Session, Summary Record of the 28th Meeting, 4 December 1947, E/CN.4/SR/28 ('Commission Summary Record 28').

11 Diggelmann and Cleis, 2014, p. 446.

12 Diggelmann and Cleis, 2014, p. 447. Cit: "The discussions in the Committee focused on whether to include family rights or not and on whether the provision should be designed as a guarantee to 'protection from interference' or as a guarantee to 'freedom from inference'. 'Protection' implies more duties for the State than the obligation to respect the freedom from interference."

13 See supra.

all modes of private interaction including the use of the internet and social media. Of course, given how it is set up in Art. 12 of the UDHR, the State has control over privacy ('no one shall be subjected to arbitrary interference'), which makes correctional pre-clause and ensures that interference with privacy is and should be in accordance with law. There are different solutions regarding the scope of state control and the scope and limits of protected values, but this wording secures the most important thing; balancing. Balancing will be the most important mechanism to secure equal legal presence of private life on the one hand and necessary state control on the other. Although the flavor of the text has a clear influence of Anglo-American vocabulary, the clause remains clear and understandable to members of all legal systems.

There are also other documents which cover the right to privacy like the Covenant on Civil and Political Rights, which was set up through Art. 17:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> 2. Everyone has the right to the protection of the law against such interference or attacks.[14]

In this article of the ICCPR, the same rights are protected and this has to be taken into account when discussing the scope of protection through privacy law. This is shaped by the fact that privacy, family, home and correspondence are connected with honor and reputation. It is important to notice that since the ICCPR, as one of the key documents, the intention begun to also protect honor and reputation through the private sphere. Later on, this process will be elevated to protection through criminal law. All in all, privacy has to be tested thorough the reputation and/or honor test.

3. Declaration on human dignity for everyone everywhere

One of the most important documents of the 21st century is the one which was signed in Punta Del Este in Uruguay in December 2018, the Punta Del Este Declaration of Human Dignity for Everyone Everywhere, which reaffirms the UDHR.[15] The Declaration on Human Dignity was made as a reflection on the 70th Anniversary

14 International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Art. 49 [Online] Available at: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (Accessed: 28 February 2022).

15 Punta del Este Declaration on Human Dignity for Everyone Everywhere [Online] Available at: https://www.dignityforeveryone.org/introduction/ (Accessed: 3 March 2022).

of the UDHR. The core value of this Declaration is that it reaffirms positions which existed and had been derived from the UDHR, but set up more on the concept of human dignity which emphasizes the source of the right of others, which is the core of humanity, in all directions, for all. It also stated that human rights involve corresponding duties. This means that the minority has to be treated well and with respect, but also that the minority should respect majority. Dignity as a source of human rights requests that all views should be taken into account, including the rights of groups or societies from diverse worldviews, but with the understanding of the essence of public morals and *ordre public,* as well as the reasons for why one society looks different from another. For example, surveillance might not be acceptable in religious premises, but if the religious community threatens public order and peace, it might be acceptable. It might be useful, from the perspective of security, to record the voice of a particular person, but it might be crossing the line if the recording catches, for instance, members of the whole family. Therefore in both cases the dignity of the person will be examined and balanced with the particular social values of a particular society. This could be called the *public order test* or the test of public order.

Therefore, we have to approach law as a reflection and summary of the beliefs and moral values of a majority of citizens who, by the power of their original and genuine rights, transfer the capacity of making law to representatives that will bound themselves and the nation itself. This is called the democratic principle. Of course, in every decent democracy the majority has to find a way to respect different needs, creeds and attitudes to the maximal possible limit in order not to break the core values of the society in question. This is called the human rights principle. A just society, in my view, is one that tries to achieve the right balance between the two.[16] It is this balancing that secures all rights and values equally (in its nature) and ensures that they are well regarded. This is underlined in the Declaration on Human Dignity:

> Human dignity for everyone everywhere emphasizes the concept in the UDHR that rights include accompanying obligations and responsibilities, not just of states but also of all human beings with respect to the rights of others. Dignity is a status shared by every human being, and the emphasis on everyone and everywhere makes it clear that rights are characterized by reciprocity and involve corresponding duties. Everyone should be concerned not only with his or her own dignity and rights but with the dignity and rights of every human being. Nonetheless, human dignity is not diminished on the ground that persons are not fulfilling their responsibilities to the state and others.[17]

16 See Savić, 2016, p. 679.

17 Punta del Este Declaration on Human Dignity for Everyone Everywhere [Online] Available at: https://www.dignityforeveryone.org/introduction/ (Accessed: 3 March 2022).

> Recognition of human dignity for everyone everywhere is a foundational principle of law and is central to developing and protecting human rights in law and policy. The richness of the concept of dignity resists exhaustive definition, but it encourages the pursuit of optimum mutual vindication where conflicting rights and values are involved. It is critical for moving beyond thinking exclusively in terms of balancing and tradeoffs of rights and interests.[18]

Why is this Declaration so important? In recent years, at least in Europe, public space legal discourse of human rights has largely been shaped in a way that suits the stance and positions of those espousing left and liberal positions on the political spectrum. For such trends, blame must also be assigned to conservative and demagogic Christian parties and policies which have allowed the identification of human rights with new tendencies and cultures that have been developing in the contemporary world. Spiritual laziness allowed the hyper concentration of concept(s) which only underline a few sub-groups of human rights and present them as the core of the human rights movement, or rather present them as 'Human Rights' as such. From this perspective, human rights are only connected with so called progressive movements and one easily forgets that the roots of human rights as we know them today lie in the documents which were written under influences of moral philosophy (and also politics) which included, *inter alia,* Christian and 'conservative' values. The UDHR, the key document of mankind, was influenced, for instance, by Lebanese Charles Habib Malik, a Christian who insisted on the protection of family values, and his work is a reflection of his belief that people have a spiritual dimension and that family is important.[19]

The crucial notion on dignity lies in its relation to human rights. Most scholars[20] agree that human rights are products or derivatives of human dignity. In other words, human dignity is a source of human rights and as such holds a very special position. Human dignity is more than just a legal standard – it is a specific legal foundation that guarantees every human a special, non-infringed position towards all people in their integrity, and a genuine right to have and live their own values. It also grants protection for his or her living space. Therefore understanding human dignity is important to understand space, which belong to every person as free men. This is obviously connected with privacy and privacy law which protects the whole personality of the individual and his private life. *It would be essential to understand*

18 Ibid. at. 7 'Implementing and Realizing Human Rights in Legislation'.

19 Savić, 2019, p. 175.: "It is not so well known that as an Orthodox Christian he wrote one of the most valuable books published in the Middle East after WWII which reflects his ideas at the time when the Universal Declaration of Human Rights was signed. In Christ and Crisis, first published in 1962 (newly reprinted by Acton Institute (Grand Rapids, MI, USA) in 2015), Malik states that the deepest crisis of our age is a spiritual one which, in his view, is clearly recognized and underlined by the Church. He was a devoted Christian and was heavily involved in ecumenical work."

20 See Punta del Este Declaration on Human Dignity for Everyone Everywhere [Online] Available at: https://www.dignityforeveryone.org/introduction/ (Accessed: 3 March 2022).

the concept of dignity in order to balance privacy rights and surveillance and privacy rights and legitimate state control, which has to be: a) justified, b) proportionate and c) protective for public order.

In the three proposed characteristics offered above, we have two elements, one which control private sphere and one concerned which public control. A just society, as it will be elaborated here, will take care about both.

4. GDPR

'Regulation (EU) 2016/679 of the European Parliament and of the council of 27 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'[21] or GDPR. The GDPR Directive entered into force on 25th of May 2018.

GDPR is an acronym derived from the first letters of the English name for the 'General Data Protection Regulation, the full title of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals concerning the processing of personal data and the free movement of such data and repealing Directive 95/46/EC'. The title itself gives us five important pieces of information: 1) 'who' passed it – the European Parliament and the Council; 2) 'when' have they passed it – on April 27, 2016; under which 'number' is it marked as Regulation of the European Union – 2016/679; 3) 'what' it deals with, i.e. 'what' is its content – the protection of individuals in connection with the processing of personal data and the free movement of such data; and 4) 'which' legal text does it replace or repeal – Directive 95/46/EC.' The next important feature to note is the very structure of the GDPR text. Viewed as a whole, it comprises two large parts: an extensive introductory part divided into 173 Recitals, and the legal text itself, which comprises 99 Articles divided into 11 chapters, of which Chapters III, IV, VI, and VII are further divided into sub-sections. Furthermore, the introductory part and the legal text itself are interconnected in such a way that each article of the legal text supports one or more of the above Recitals that explain it by giving it breadth, and describing what it aims to achieve and in what way.' [22]

21 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals 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) is published in the Official Journal of the European Union under the code L 119, Volume 59, dated 4 May 2016. This Regulation has been also published in the Official Journal of the European Union in parallel in all European Union languages on the official EUR-Lex website [Online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1530652545116&uri=CELEX:32016R0679 (Accessed: 3 July 2019).

22 Same technical text has been equally written for the Savić and Mladen, 2020, p. 81.

It is obvious that, for the European Union, privacy matters. The most visible example for this is the GDPR which is connected with Art. 8(1) of the Charter of Fundamental Rights of the European Union. Although this regulation is primarily focused on the transfer of data within the European Union, it also covers transfer of data outside the EU[23]. The primary intention of the GDPR was to establish control of data usage by corporate bodies. It is intended that natural persons primarily have or gain control over their own data. As in many other big projects of law, with the passage of time, many specific problems became visible, but the massive system did not have mechanisms for easy maneuvering and treatments of special situations which were not anticipated when the GDPR was first enshrined.

Comprising 11 chapters, the GDPR became the most comprehensive and wide privacy law instrument in the EU, but according to its principles many others followed its example. The principles of the GDPR are set up in Art. 6 and show that privacy control has is limits, as shaped through the chapter on 'Lawfulness of processing'. This could be a useful guide when *balancing between public security and personal privacy and privacy of family life*. Moreover, all this should obviously be examined through the *lenses of public order and public morals*.[24]

For the aforementioned reasons, quite a few obstacles occurred in the process of implementing the GDPR principles. 1) Massive regulations are present everywhere – from internet and social media to every business activity that consumers (or those who were intended to be protected) skip reading and approve. Almost constantly, huge portions of small print are ticked automatically without any proper understanding of the contents. 2) In the beginning it was thought that the GDPR was designed only for business entities and that other entities are not covered by it, such as churches and other religious institutions. It is to be expected when one has such a

23 Art. 3(2): This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to: (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or (b) the monitoring of their behavior as far as their behavior takes place within the Union.

24 Art. 6 of the GDPR: "Processing shall be lawful only if and to the extent that at least one of the following applies:
1. the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
2. processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
3. processing is necessary for compliance with a legal obligation to which the controller is subject;
4. processing is necessary in order to protect the vital interests of the data subject or of another natural person;
5. processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
6. processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child." [Online] Available at: https://gdpr-text.com/hr/read/article-6/ (Accessed: 1 April 2022).

massive document that some aspects always remain uncovered and/or unpredicted. What happened was that the GDPR provisions, initially made for the protection of consumers, turned out to be obstacles which also prevented fair treatment of social entities which did not fall into a business category. This caused major controversies which were not predicted properly.

According to some relevant polls, 2 out of 5 persons are worried or concerned about the possibility that their personal data will be used without their consent or knowledge; moreover, 80% of people interviewed consider violations of financial or banking information troublesome and 62% of voters would consider the company which acquired data (which comes from their activity) directly from customers the major responsible party, and not hackers or other criminal fraudulent actors.[25] All this means that privacy issues are connected with business activity in the first place and that customers (citizens) require some serious privacy care. This also shows that the primary reason for introducing the GPDR was business activity and market logic.

Before the GDPR was introduced to the countries of the European Union, surveys were made in the United States and have shown that 72% of consumers would boycott the company which lost their private data, and that 50% would rather buy from a company that shows that it cares about the protection of private data.[26] The GDPR protects the following data:

- personal data: name and surname, address and ID number
- data printed on the credit cards
- data received through health status: sickness, invalidity etc.
- biometrics
- genetic data (DNA etc.)
- religious and philosophical convictions
- ethnicity
- economic status
- union membership
- sex orientation and sex life
- IP addresses
- Personal e-mail messages
- Cookies
- Pseudonym Data[27]

It is surely important to stress that both consent and opt-out options are present through the whole journey of processing the data of those involved. It wouldn't be wrong to say that consent and withdrawal are flip sides of the same coin. As it is well defined in Art. 7 of the GDPR:

25 Vodič kroz GDPR za početnike (GDPR Guide for Beginners) [Online] Available at: https://gdprinformer.com/hr/vodic-kroz-gdpr (Accessed: 3 April 2022).

26 Ibid.

27 Ibid. Adapted and translated to English from Croatian.

> The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw as to give consent.[28]

A special issue here is ensuring that children are also aware of this right in plain and clear language. Therefore Art. 12 of the GDPR clearly prescribes protection of children through appropriate language and form.[29] There is no doubt that the integral document has to be observed as a whole, but some articles underline what is the key task of the document: to give control of personal data to those who are holding and producing them: citizens. It contains: a) the right to access, which pre-includes the right to reject transfer of data and b) the right to withdraw or, said more appropriately, the right to be forgotten. Therefore it is very important to examine Arts. 15 and 17, which represent the core of the GDPR structure. The aim of this chapter is to stress and underline the pillars of the GDPR and its spirit rather than to analyze each norm of the document.

Art. 15 describes the right of citizens who have given their data to a particular entity. This is essential and a key concept in the GDPR and it comprises a) the right to access in a narrow sense, b) the right to acquire the knowledge of processing of data, c) the right to receive a copy of the data, d) the right to an explanation of how the data was used and for what purposes, e) the right to an explanation of if the data was delivered or transferred and the reasons for the same, and f) the right to know how it acquired the data, if applicable.[30] Those rights which are derived from Article 15

28 GDPR [Online] Available at: https://gdpr-text.com/hr/read/article-7/ (Accessed: 3 April 2022).

29 "The controller shall take appropriate measures to provide any information referred to in Articles 13 and 14 and any communication under Articles 15 to 22 and 34 relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child. The information shall be provided in writing, or by other means, including, where appropriate, by electronic means. When requested by the data subject, the information may be provided orally, provided that the identity of the data subject is proven by other means." [Online] Available at: https://gdpr-text.com/hr/read/article-12/ (Accessed: 3 April 2022).

30 "1. The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information: (a) the purposes of the processing; (b) the categories of personal data concerned (c) the recipients or categories of recipient to whom the personal data have been or will be disclosed, in particular recipients in third countries or international organisations; (d) where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period; (e) the existence of the right to request from the controller rectification or erasure of personal data or restriction of processing of personal data concerning the data subject or to object to such processing; (f) the right to lodge a complaint with a supervisory authority; (g) where the personal data are not collected from the data subject, any available information as to their source; (h) the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject. 2. Where personal data are transferred to a third country or to an international organisation, the data subject shall have the right to be informed of the appropriate safeguards pursuant to Article 46 relating to the transfer. 3.

could be described as 1) substantive (content) and 2) processing rights. Nevertheless, it is clear that the right to be forgotten from Art. 17 is leaning on Art. 15, which states the data subject has the right to request erasure of his data as the most comprehensive and most complete right of the citizen regarding his/her private data. Even if a legitimate interest for collecting data exists, it is subordinated to fundamental rights and freedoms of the individual in case. Between approval and giving consent on one side and right to erasure are various options, variations and gradations which allow the data subject to be *in control* of his/hers personal data. Today this is done technically and automatically, which has proven to be both beneficial and hostile to the data subject. What does this means? The data subject has control over his/her data, and he/she can conduct operations connected to the transfer of personal data, which means that other companies who have legitimate interests to receive personal data can acquire those easily. However, this also includes companies which are in some sort of corporate or business cooperation to exchange data regardless of the data's ownership. This is the classical 'data portability concept'. DPC exists to prevent lockdowns of data in the business world, where it is supposedly beneficial to have data circulating for the benefit of customers, which they, at least technically, can control. Yet, massive exploitation of internet and data transmissions leads to automatic and often unfair exposure of consent documents which consumers automatically accept and forget, but the 'machine world' doesn't. This is one of the major problems of data transmission and of giving consent. One of the greatest works in this area is by law professor Frank Pasquale who described all this in his 'The black box society'[31]. As said before, between the two extremes rights, one giving (the data)

The controller shall provide a copy of the personal data undergoing processing. For any further copies requested by the data subject, the controller may charge a reasonable fee based on administrative costs. Where the data subject makes the request by electronic means, and unless otherwise requested by the data subject, the information shall be provided in a commonly used electronic form. 4. The right to obtain a copy referred to in paragraph 3 shall not adversely affect the rights and freedoms of others" [Online] Available at: https://gdpr-text.com/hr/read/article-12/ (Accessed: 9 April 2022).

31 Pasquale, 2016,: "Every day, corporations are connecting the dots about our personal behavior—silently scrutinizing clues left behind by our work habits and Internet use. The data compiled and portraits created are incredibly detailed, to the point of being invasive. But who connects the dots about what firms are doing with this information? The Black Box Society argues that we all need to be able to do so—and to set limits on how big data affects our lives. Hidden algorithms can make (or ruin) reputations, decide the destiny of entrepreneurs, or even devastate an entire economy. Shrouded in secrecy and complexity, decisions at major Silicon Valley and Wall Street firms were long assumed to be neutral and technical. But leaks, whistleblowers, and legal disputes have shed new light on automated judgment. Self-serving and reckless behavior is surprisingly common, and easy to hide in code protected by legal and real secrecy. Even after billions of dollars of fines have been levied, underfunded regulators may have only scratched the surface of this troubling behavior" [Online] Available at: https://www.hup.harvard.edu/catalog.php?isbn=9780674970847 (Accessed: 9 April 2022). Frank Pasquale exposes how powerful interests abuse secrecy for profit and explains ways to rein them in. Demanding transparency is only the first step. An intelligible society would assure that key decisions of its most important firms are fair, nondiscriminatory, and open to criticism. Silicon Valley and Wall Street need to accept as much accountability as they impose on others. [Online] Available at: https://www.hup.harvard.edu/catalog.php?isbn=9780674970847 (Accessed: 10 April 2022).

and one erasing (the data), there are other rights on the scale. One of those in between is the right to restriction of processing as set up through Article 18.

As said, erasure is guaranteed in Art. 17[32], but serious limitations exist and those will also be relevant when we will explain balancing between private interests and public (greater) good. As noted, this chapter is about *balancing between individual and collective (public) rights.* As stated in Paragraph 3 of the Art. 17:

> Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:
> (a) for exercising the right of freedom of expression and information;
> (b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
> (c) for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3).[33]

This means that public health or public morals and interests will prevail above the interests of data subjects. This is specifically mentioned in Article 20, namely that the right to control portability will not be enforced in cases of public interests or against those rights which the controller has through official (public) rights and duties. *This is another example where balancing between different rights is taking or should take place. It is better not to use the word 'competing' rights since those different rights and interest should find their place within a coherent system of general law.*

When we examine the GDPR and its aims, it is obvious that it was tailored for the protection of the most vulnerable in the chain of business – the customer, and to give more power to the powerless – the citizen. In many cases, as it will be presented, privacy laws which were underlined and additionally enforced by the GDPR faced serious problems of classical bureaucratic influence, something that is common in legal history. Laws tend to encounter areas which were not initially meant to be tackled, and such lacunas can cause serious problems. One such problem is the application

32 "The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies: (d) the personal data have been unlawfully processed; (e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject; (f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1) 2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data." Vodič kroz GDPR za početnike (GDPR Guide for Beginners) [Online] Available at: https://gdprinformer.com/hr/vodic-kroz-gdpr (Accessed: 10 April 2022).

33 Ibid.

of the GDPR on religious communities, where the same regulations are applied to churches another religious entities in the same way that they are planned for and applied to corporate bodies.

This is a complex problem. The GDPR was made for corporate bodies and legal entities which tend to be most influential in using and spreading personal data of physical persons; citizens as clients and customers. However, as it so often happens, regulations which were intended for particular entities caught in its juridical net those who were not even meant or had been planned to be involved. The GDPR has spread its scope over religious communities and sometimes this jeopardizes it fundamental functioning, which varies from State to State. In the European context, it depends on if the State has an international treaty with the Holy See and if similar agreements exist with other religious communities. It is important to stress that religious freedom(s) as have been set up in Art. 9 of the European Convention of Human Rights[34] (ECHR) protect both private and institutional freedom of religion.[35] One can't exist without the other. Particular problems arise when religious community make requests to erase or modify data which is entered in its books and registries. In brief, churches or other religious books or documents are treated as the company books of big corporations. It is obvious that this was not the intention of the lawmaker (or was it?) The consequence of strict application would have serious influence on historical books (church books are important historical materials) and could jeopardize the construction of historical facts, if necessary, and data of public interest. Such books can contain important public data.[36]

> Thus, it is clear that the European Union and its regulations accept the specificity of church/religious entities and the special way of collecting data that they perform and that are located. This does not mean at this point that they will not be affected by the GDPR, but in any case, the preconditions are created for a specific atmosphere in which churches and religious organizations will be treated.[37]

Problem of the GDPR are more delicate than one may think, as it has been demonstrated with the functioning of religious organizations and the institutional freedom of religion. Without specific practices (collecting data on baptisms, etc.) established church or religious organization cannot perform their duties and creeds

34 Art. 9 Freedom of thought, conscience and religion 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. [Online] Available at: https://www.echr.coe.int/documents/convention_eng.pdf (Accessed: 13 April 2022).

35 On the issues of Church Sate Relations in Croatia and Europe see more in Savić, 2018, pp. 239–240.

36 See Savić and Škvorc, 2020, pp. 100–104.

37 Ibid. p. 8.

and therefore the GDPR jeopardize the normal functioning of religious entities. This in turn can provoke potential violations of Article 9 of the Convention. Like in many areas of privacy law, the most beneficial step to resolving the issue would be balancing.

5. Family as the most vulnerable – European legal framework

One of the central issues of privacy law in modern times is the Privacy of Family Life with special attention to the protection of children. Family is and should be the corner stone of European societies and deserves special protection. There are many international documents which protect family life and they are either part of the European legal structure or international covenants and treaties which overlap with the law on European ground. The most vulnerable unit in our society is its foundational unit – the family itself.

The major document of concern here is the *EU Charter on Fundamental Rights* which contains many provisions on the protection of human dignity, and guarantees legal, economic and social protection of the family and prescribes the right to private and family life, home and communications.[38] It is not pure coincidence that private and family life are in the same paragraph. Private life without protection of family life is not possible.

> Article 7 Respect for private and family life
> Everyone has the right to respect for his or her private and family life, home and communications.

In the same place, the Charter prescribes protection of personal data:

> Article 8 'Protection of personal data
> 1. Everyone has the right to the protection of personal data concerning him or her.
> 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
> 3. Compliance with these rules shall be subject to control by an independent authority.[39]

38 Hrabar et al., 2021, p. 29.

39 Cahrter of Fundamental Rights of the European Union [Online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT (Accessed: 29 April 2022).

On another level, the *European Convention on Human Rights* states that everyone has the right to protection of private and family life, and here, again the treaty combines and puts into connection those two terms – private life and family. As a matter of fact, the EU Charter and ECHR have minor differences in their respective texts, but Art. 7 of the EU Charter and Art. 8 of ECHR are twins.

> Article 8 'Right to respect for private and family life
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[40]

As Hrabar explains succinctly, the judicature of the European Court of Human Rights shows that many family law cases are connected with numerous questions which have to be addressed by local courts and other state bodies in order not to have human rights violations.[41] Furthermore, ECHR contains a precise catalogue of human rights and discrimination violations on various grounds and therefore legal theory should find a way to apply the Convention as a 'living instrument' which has to be used in accordance with specific circumstances of the case.[42] Although generally correct, this statement also contains possible traps because it allows interpretations that allow permanent change, which could put into jeopardy public morals. There are some foundational principles which are permanent and universal and unchangeable in its essence and are not prone to interpretations. This is connected with theories of natural law.[43]

Moreover, it is important to stress that the European Court applies the British doctrine of Margin of Appreciation, which allows the court to somehow treat differently similar cases from different countries. It means that the court will take into account various sociological, historical and ontological perspectives when discussing cases from various countries. This will allow it to preserve values of particular countries. It will be found that cases from Central and Southeastern Europe bear different substance than for instance those from the North or partially from the West of Europe: family law is deeply rooted in values and traditions of particular countries, but this should exclude new movements and different opinions. Again, the key is balancing.

40 European Convention on Human Rights (ECHR), Art. 8 [Online] Available at: https://www.echr.coe.int/documents/convention_eng.pdf (Accessed: 29 April 2022).
41 Hrabar et al., 2021, p. 12.
42 Ibid. p. 13; According to: Hugh, 2010, p. 78.
43 Savić, 2021, p. 18. Also see Hrabar and Dubravka, 2018, p. 52.

At this juncture, it is important to stress that privacy law in family life is also implanted into the domestic internal law of particular member states of the ECHR. For instance, Croatian Criminal Law, through the Croatian Criminal Code, specially protects privacy of the child and prescribes prison penalties up to two years.[44] This is the case with many other jurisdictions.

6. Doctrinal approach to the issues of privacy in family law

There are numerous debates about the extent of state intervention into the private life of families, especially in relation with the right of parents to educate their children according to their philosophical and religious convictions. There are various aspects of privacy law interfering with family life: a) the right of the parents to educate and raise their children, b) the right of the family to be protected from outside influences, c) the obligation of parents to take the best care possible of their children's needs and interests, d) the obligation of the State to provide a proper and decent legal, and then social, framework for family life, e) the obligation of the State to supervise the educational system for the best interests of children and f) the obligation of the State to intervene into the life of families in case of violence, crime, and especially if children need special protection.

As we can see from the list of interactions between state, family and privacy, most components show that family is a private affair, wherein rights of the family itself and of parents in particular with regard to their children outnumber the rights of the State towards the family. State rights are in their nature obligations, often concerned with child protection. The state has an obligation to interfere when crime or violence is involved and when children need protection.

According to Neethling,

> privacy is personal living condition which is characterized by the person's right to decide by himself/herself or to control the scope of her privacy which can be

44 Art. 178 Croatian Criminal Code [Online] Available at: https://zakonipropisi.com/hr/zakon/kazneni-zakon/178-clanak-povreda-privatnosti-djeteta (Accessed: 30 April 2022).
"(1)Tko iznese ili pronese nešto iz osobnog ili obiteljskog života djeteta, protivno propisima objavi djetetovu fotografiju ili otkrije identitet djeteta, što je kod djeteta izazvalo uznemirenost, porugu vršnjaka ili drugih osoba ili je na drugi način ugrozilo dobrobit djeteta,
kaznit će se kaznom zatvora do jedne godine.
(2)Tko djelo iz stavka 1. ovoga članka počini putem tiska, radija, televizije, računalnog sustava ili mreže, na javnom skupu ili na drugi način zbog čega je ono postalo pristupačno većem broju osoba,
kaznit će se kaznom zatvora do dvije godine.
(3)Tko djelo iz stavka 1. i 2. ovoga članka počini kao službena osoba ili u obavljanju profesionalne djelatnosti,
kaznit će se kaznom zatvora do tri godine."

intruded by the breaking into the personal sphere of individual or by disclosing or publishing private facts.[45]

There are more and more scholars of civil law who have started to recognize that a large amount of civil law protections falls within the scope of the protection of the right of personality. It is interesting that both continents espousing so-called Western thought, North America and Europe, had similar developments in terms of regulating personal rights. For instance, rights which protect private life; first economic rights were developed and regulated, and only after existential issues were settled, states both on the American continent as well as States in Europe came to build the legal framework for the protection of personal rights.[46]

Radolović is absolutely right when he states that the development of personal rights was less 'visible' than property or financial rights; it is a product of the development of the human race and the development of law in general.[47] It is interesting that none of the totalitarian regimes recognize personal rights[48] from which privacy law is also derived. This is somehow obvious – totalitarian regimes do not accept free will of the person and State intervention is more a norm and less of an exception. This was the case with the totalitarian regimes of Nazism, Fascism and Communism, which had swamped European lands for decades. Authoritarian regimes do not respect individual freedoms. Since freedom for the family's privacy can only be derived from individual freedom, in those systems neither existed. The veil of collective security, or to put it as a more sharpened expression, collective surveillance, which is always in the hands of the group(s) who dictate, is just another expression for suppression. On the other hand, democratic regimes are based on the principle of personal rights, which is the basis for the protection of privacy law and the privacy of families in particular.

Table 1

REGIME	**MAJOR VALUE**	**MAJOR ACTION (ACTIVITY)**
Totalitarian regime	Collective Security	Control
Democratic regime	Individual Liberty	Privacy
Balanced regime (democratic)	Public order	Protection

45 Neethling, 2005, p. 210.

46 Radolović, 2006, p. 1. This is interesting analysis of professor Radolović, who explains that the first values which were protected were those of material and financial substance, connected to property like money, capitals, real estate, interests, security issues etc. It seems, however, that now there is some shift happening and that more and more space is dedicated to personal rights and their connection to property rights within the one general system of civil law. Security and safety of private life enter more into focus and discussion of the security of the State activates only if private life threatens society or its principal values and if the *veil of private life* protection hides unwanted behavior towards children, p. 130.

47 Radolović, 2006, p. 131.

48 Ibid.

Table 1 shows three possible systems which have existed both historically and/or presently. Totalitarian regimes claim collective security, but this is usually only an excuse for a control mechanism. In this system, collective security is a justification for law-making in order to gain control. In democratic regimes, the main social value is individual liberty and the law which covers it is shaped to secure privacy as a goal. And the third regime shows a balance between extreme requests of collective security and absolute individual liberty, in a system where public order is a value protected by law and where the main goal is to secure the real protection of both private and family life, but secure the protection of the values of a particular culture and public order as well. Having that in mind alongside the judicature of the European Court of Human Rights, we can claim with great certainty that the level of protection would fall under the application of the Margin of Appreciation doctrine through which the Strasbourg court takes into account particularities of each country as quaestio casii with potentially different solutions. It does not mean that a balanced regime is not democratic; on the contrary, balanced regimes are democratic and safe for everyone – they comprise both security and individual liberty as values that have to be protected in order to maintain public order. They contain the modification of the totalitarian regime's most prominent characteristic, security, and the democratic regime's most prominent characteristic, individual liberty. Just to avoid confusion, there might be traces of protection of individual liberty in totalitarian regimes and even some elements of individual liberty practices, but that regime is unacceptable because it is focused only on the needs of the collective body (State), usually meaning political elites with doubtful legitimacy and/or legality. Democratic regimes have various gradations for the protection of public order and public morals, but usually they focus on personal rights rather than the norms of society (or norms and values of society are only transmitted to the values of individuals). Balanced regime protects both, but as said, elements of a balanced regime could exist in other legal (State) systems.

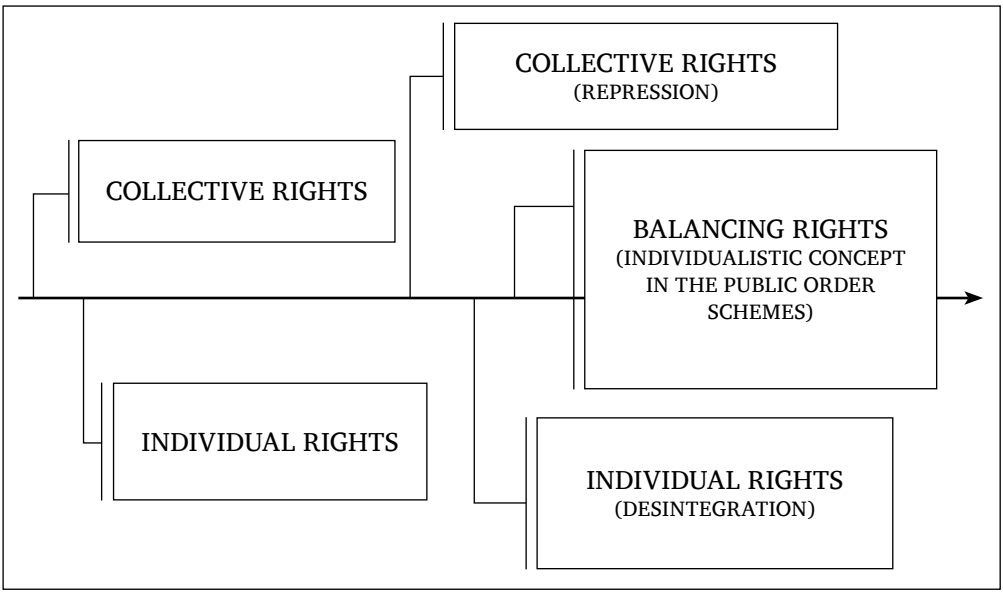
In a particular sense, personal rights are also part of the person's property but those properties are not *stricto sensu* materialized.[49] Radolović succinctly states that the major difference between personal rights and property rights is that personal rights are bound with the verb 'to be', and property rights with the verb 'to have'; different verbs and different primary positions. Then again, only those personal rights which could be transferred into property rights in the term that can be materialized will be objects of private law.[50] In that sense, violation of privacy of particular person in respect of publishing his/hers personal details (and his/hers family life details) will be the subject of private law and thus grounds for legal action.[51]

In his quoted article, Radolović makes necessary connections between religion and personality rights which are linked to the development of privacy law. In the construction of privacy law and the right to privacy, references to religion and religious laws are

49 See Ibid. pp. 133 et seq.
50 Radolović, 2006, p. 134. In his footnote 4., according to: Perlingieri, 1972, p. 15.
51 Ibid. pp. 135; 140.

inevitable.[52] Such statements are connected with discussions on human dignity, which were elaborated in the Declaration on Human Dignity for Everyone Everywhere signed in December 2018 in Punta del Este in Uruguay. With the development of the human race, personality rights were more or less developed, but specially so in the period of humanism and Renaissance and later in the age of the so called 'era of the great ideas', wherein numerous codifications took place on the European continent.[53] It is right to claim that the 20th century was a step backward to begin with, in the context of personal rights of citizens[54] – totalitarian regimes brought forth numerous movements that supressed the private sphere. In the history of the development of individual rights, there were slopes in which collectivity had a primary influence on societal norms, while modernity brought with it more individualistic concepts of social behaviour. Such shifts have changed again and it is clear that a purely individualistic approach to human behaviour lacks the ability to build collective cohesion in society, which is built on particular norms and values. One is sure that historically we face permanent changes of those two distant concepts.[55] Collective rights throughout history, as written here and in many other places, are the key for today's democratic societies, which should practice balancing, or as Aristotle would say, seek for *mesotes*, or the 'golden middle' between collective rights which are bound to today's public order schemes and individual rights which are connected to dignity claims and subsequently privacy rights.

Figure 1 Timeline of the historical movement of collective and individual rights



52 Ibid. pp. 136–137.
53 Radolović, 2006, p. 137.
54 Ibid.
55 Savić, 2013, pp. 1–11.

7. On natural law, privacy and family

Family is the core of society. It remains as such even now. Therefore it requires special protection. Despite the fact that the notions on family and family life change from those on the liberal end of the spectrum, in the Central and Eastern Europe particularly, where classical concepts of family exist, family ties are still strong (e.g. children live close to parents; many generations live together, children visit parents and relatives often, (grand) parents help their children with their children etc.).

This is contained in the teachings of natural law jurisprudence, which posits the values of family life as values which arise from divine law (examples of family life from the New and Old Testament, but also at other primary canonical sources of other religions, and/or natural order of things). As Radolović stated, the school of natural law have made an important impact on the law of personality as well as privacy law by pointing at the important gap which cannot be described by positive laws and is rooted in dignity and claims that each person has their essential rights as shaped by human rights law.[56] Therefore and in accordance with natural law, all personal laws as well as privacy law should be protected for its values which are in the first place of non-materialistic fibre. That violation of privacy law, in the legal action, ends up resulting in something which is at the end very materialistic, that is money paid for as compensation or by the publishing of a statement as a way of restitution, is obvious. However, this, even more than anything, shows that natural law has its core influence in the foundations of privacy law.

There are opinions that claim that privacy law also expands to artificial legal bodies and legal entities such as corporations[57]. The prevailing opinion is (and should be) that those who bear the legal personality and ability to request protection for their privacy are physical (natural) persons. Individual physical persons should be treated as the bearers of privacy law. Although initially natural law theories argued that personal rights are linked to elitist concepts of the protection of people with special qualities, the prevailing attitude is still that those rights have to be recognized on the grounds of human dignity, and talents should be considered as natural or divine implants into humans creature which than have to be used in the proper way of serving the community. For such reasons and on those grounds, natural persons deserve to be protected.

Individual private life is protected: a greatest product of individual private life is family as a unity of two people who create their own private space. The greatest and the most important issue here is the right of the child to have their privacy, and to be protected in totality of their being. Children as well as people with disabilities have a right to privacy. This has to be examined through the lens of family law which prescribes that parents or other legal guardians have the explicit right to represent children and protect their privacy, including their capacity to restrict or expand the

56 Radolović, 2006, p. 139. See also: Declaration on human dignity for everyone everywhere. See supra.
57 See in Radolović, 2006, p. 14; and then Gavella and Klarić, 2000, pp. 1–63; p. 34; Klarić, 1998, p. 95.

child's privacy with respect to the public use of their image and/or work. A typical example for this arises when parents are required to sign permission for the usage of the child's face in filmed material (such as in kindergarten for a show which they have been performing). In the modern era this is most visible in situations where parents post tons of photographs of their children on social media, violating their privacy out in public space. This only shows that family holds, or is entitled, to a specific treatment when we discuss privacy; particularly, not the family itself, but the parents. Sometimes the consequences of this right are not what we might desire, as it is mentioned in the latter example with social networks. The real proof that family and parents in particular have the right to privacy and to control the privacy of their children is an institutional representation which is very explicit and gives to parent tremendous acknowledgment for performing their parental duties.[58]

In this respect, we have to acknowledge that privacy law encompasses all members of the family and that principal bearers of the right to privacy are parents who decide on behalf of children. Of course, it is more than clear that children have their own rights which have to be acknowledged and respected but, at this juncture, we will discuss the right of parents to educate their children in accordance with their moral and philosophical convictions, and that they should not be distracted from this role since children primarily belong to parents and to the State.

As it was elaborated in preceding paragraphs, the State has the right and duty to control and intervene in special and unusual circumstances. Family life connected with moral and philosophical convictions and attitudes which include various world-views followed by parents and subsequently by their children is a private affair of every family as an organizational unit of society. Of course, it might so happen that private life and life of a society as a whole produces different paths, but in those cases, balancing, which has been mentioned several times, plays a crucial role. The famous case of *Lautsi v. Italy*, is the perfect example to show how the philosophical convictions of parents came into some sort of clash with specific values which exist in society, and legal actions were needed to settle the issue.[59] In this landmark case,

58 Savić, 2021, p. 82; Hrabar et al., 2021, pp. 175 et seq.

59 Lautsi v. Italy, ECHR case [Online] Available at: https://adfinternational.org/lautsi-and-others-v-italy/ (Accessed: 21 September 2022). Also see Savić, 2020, pp. 11–37. The Lautsi family was an agnostic family from the Veneto region of Italy. Their claim was that the crucifix in the classroom presents a threat to the principle of the separation of Church and State guaranteed by the Italian Constitution. All Italian classrooms in public schools have crucifixes attached to a wall, all of them from Trieste to Sicily. Italian courts rejected the claim, but the first instance court of the European Court of Human Rights decided that the Lautsi family has the right and that the Italian state violated Art. 9 of the European Convention on Human Rights which guarantees freedom of religion (but also as J. H. Weiler nicely elaborated, 'freedom from religion'). The Grand Chamber of the Court decided that the crucifix in the classroom does not harm anybody but is a mere expression of Italian tradition and identity and that the claim of Lautsi family was not justified according to the Convention. The European Court of Human Rights uses (and it did so in this case) the Margin of Appreciation, an old British doctrine which allows the Court and judges to take into account all relevant elements and data which are existing in a particular state and its society, such as moral, religious, traditional, and geo-political elements, among others.

everything came to one table – the right of parents to educate children according to their moral and philosophical convictions was examined in conjunction with other values which exist in the Italian state. The Lautsi family has the right to educate their child in a specific worldview framework of their family. They have the right to live an agnostic life despite the fact that they live in Italy which is predominantly Catholic and where Christianity is obviously deeply rooted in its culture. Moreover, what we have here is a clear example of the secular State which uses the cooperation model, allowing the exercise of various interactions between Church and State for historical, traditional, and humanitarian reasons, among others.[60] We also see the exact consequence of balancing – family is entitled to have their own private life, but this has to be in accordance with the ultimate moral values of the state itself. It is not always easy to find that balance. As a matter of fact, sometimes it is quite hard.

When we discuss the broader spectrum of application of personal laws and privacy in particular, we can see that civil law, which was traditionally connected to property law, shifts from that to a position with more delicate personal law protection. This represents a significant change in the treatment of privacy law and personal laws in general. Material substance is not any more a prevailing element of civil law, but rather only one part of it.[61] In the development of civil law in the EU (Civil Code of the European Union)[62], it was noted that traditionalist views on the nature of civil law caused delays in the acceptance of personal law within the broader meaning of civil law in general.[63] The development of the right of personality and its struggle to become a part of civil law follows several general trends and the development of complete law in general. Social and economic development opened humanistic approaches to law, and civil law was not the exception by any means. The special (avant garde) quality of humans are our 'bio – cultural value' which receive special form with legal protection.[64] The substance of this phenomena is the internal value of a human's existence, their characteristics, views, appearance and ways how they handle and produce things, their thoughts and secrets, opinions and aspirations, and all those values they consider important. This is the real background of the right to privacy and the basis for privacy law. Radolović is right when he says that this process is in the making; he states that normative regulation does not resolve everything and much depends on socio – legal conditions which are necessary for liberal democracy and cultures of respect (respect of human beings and their values)[65]. Here it is important to stress that respect for human beings and their values should be based on the concept of dignity, which has to be protected. Human dignity is, as it was mentioned before, a source of human rights and the source of basic needs of every human being to be protected in their internal values

60 See Norman, 2013, p. 14.
61 Radolović, 2006, p. 130.
62 See more in Collins, 2008.
63 Ibid.
64 Collins, 2008, p. 131.
65 Radolović, 2006, p. 131.

and manifestations of will, which is the most sacred part of man, received by God or Nature and as such should be protected by law. Man cannot really be free if their values and their family lives are not protected by law. Without protection, privacy law doesn't make sense, and only with legal protection of values, society gives what is necessary for dignitary actions.

Having said all that, the only logical conclusion is that the privacy law of a person who has the rights for self and for others (children) is protected by contemporary laws of the newest generation in this stage of human development, which is coming back to the core of legal protection – a human person in their totality. The scope of the rights of families to educate children in accordance with their moral, philosophical and religious beliefs is the cornerstone of the right of parents to guide the child *in* and *for* life. As Hrabar elaborates, education and upbringing (which includes moral lessons) are equally important and the totality of those rights belong to parents[66]. Therefore, discussions which may be dissonant and differently shaped and which precede parents' discussions on various questions are private affairs of the family and as such are protected by law. It is interesting to note that various legal systems define this through different wordings, but with the same meaning: it seems that development of law resulted, at least in this area, in the understanding that protection of integrity – which includes privacy – of family life means a just and balanced society in which *State and parents are partners*. Parents are trusted that children will be taken care of and the State intervenes only when it is necessary. Parents enjoy freedom in their private decisions, sometimes with social implications. Great examples are the Irish and German Constitutions mentioned in Hrabar's work. [67] At the same time, the German constitution describes the right to upbring and educate children as parents' *natural right.*[68] Similar solutions exists in the Croatian constitution.[69]

66 Hrabar, 2018, pp. 321–322.

67 Ibid. p. 324, see footnote 17. Irish Constitution: Art. 42.: "1) The State acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children."

68 Ibid. see footnote 18. „Pflege und Erziehung der Kinder sind das natürliche Recht der Eltern und die zuvörderst ihnen obliegende Pflicht. Über ihre Betätigung wacht die staatliche Gemeinschaft.", a autorica prema [Online] Available at: https://www.bundestag.de/parlament/aufgaben/rechtsgrundlagen/grundgesetz/gg_01/245122 (Accessed: 21 September 2022).

69 Constitution of the Republic of Croatia (Ustav Republike Hrvatske), National gazette of the Republic of Croatia (Narodne novine), br. 56/90, 135/97, 113/00, 28/01, 76/10, 5/14.; Art. 63 'Parents shall bear responsibility for the upbringing, support and education of their children, and they shall have the right and freedom to make independent decisions concerning the upbringing of their children. Parents shall be responsible for ensuring the right of their children to the full and harmonious development of their personalities. Children with physical and mental disabilities and socially neglected children shall be entitled to special care, education and welfare. Children shall be obliged to take care of their elderly and infirm parents. The state shall devote special care to orphans and minors neglected by their parents.' Full and consolidated text of the Croatian Constitution in English is [Online] Available at: https://www.usud.hr/sites/default/files/dokumenti/The_consolidated_text_of_the_Constitution_of_the_Republic_of_Croatia_as_of_15_January_2014.pdf (Accessed: 24 May 2022).

The right to education is defined in Article 2 of the 1st Protocol of the European Convention of Human Rights:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.[70]

This is directly connected with the right of parents to educate children in their own view and according to their principles of conscience. Thus it is well elaborated in the Guide on Art. 2 of Protocol, No. 1 to the European Convention on Human Rights – Right to Education, wherein several articles are connected with those specific parent's rights through Arts. 8, 9, 10 and 14 of the ECHR. The wording of the First Protocol is connected with Art. 9 (conscience and religious freedom) through cases *Folgerø and Others v. Norway*; *Lautsi and Others v. Italy*; *Osmanoğlu and Kocabaş v. Switzerland*; Art. 8 (privacy) through cases like *Catan and Others v. the Republic of Moldova and Russia;* and Art. 10 (free expression) through case like *Kjeldsen, Busk Madsen and Pedersen v. Denmark*.[71] At the same time, the European Court is clear that parents cannot deny children's right to education *(Konrad and Others v Germany)* and that the child cannot sue parents on the grounds that they have performed rights guaranteed by Convention and Protocols *(Eriksson v. Sweden)*. This is the perfect example of how *rights have to be balanced in order to protect public order and public morals*. Yes, parents have the right to privacy of family life, but there are 'public limits' to those.

8. Conclusion: Balancing

It seems that the perception of the contemporary world is one comprising individuals with numerous identities which are protected by law. Human identity has many faces, some of them external (visible) and some of them internal (not visible; hidden). Both hidden and visible identities, in a world governed by the rule of law and human rights, are protected by personality rights and privacy law, which became the most delicate and profound manifestation of modern civil law. We also live in a world of controversies and often between highly antagonized positions which have been dug into deep corridors without real and honest communication. In such a world, *law has a crucial role in shaping and balancing different worldviews that exist in the public sphere*. This is the personal dimension of law: to secure different and often

70 Hrabar, 2018, p. 330.
71 Ibid.

polarized stands and attitudes and ensure they can live harmoniously in one society. There is another dimension of law which arises from the obligation of the state to protect public values of the state which are not of conflicting nature. What does this mean? It means that the body of law comprises many values which are spread around various branches of law and legal institutions. As law is (or at least should be) a coherent body, it has to be presumed that different norms and solutions have to be in accordance with each other, but even more importantly it is necessary that law looks like coherent body which has parts which work on the same frequency.

Historically, there were numerous shifts between collective and individual rights, from the rights of tribes and nations to the rights of groups and finally individuals. Changes in the society, and therefore in law, are usually circular, and our civilization departed from collective right to the rights of individuals and back. Aristotle's views on *mesotes* usually give a solution which is inclusive and seeks to accommodate values the both ends of the spectrum; that those values have to belong to the same coherent system of law. It means that we need a system which will take into account both realities: *individual freedoms and private space, but also obligation of the state to protect public order and the most vulnerable*. After examining many aspects of privacy law, especially doctrines which can be found in the European context, it becomes clear that protection of family law and privacy of family life has it all, and it is a real amalgam of an example of protecting both – privacy of parents and their rights to educate children in accordance with their philosophical, moral and religious beliefs which includes, but it is not limited to religious education, church attendance, praying etc. on one side; and protection of children on the other. Parents do have the right to educate children, but they have to obey the general educational framework of the state and therefore should follow at least the minimal requirements of the society in which they live. As always elaborated, the relationship between physical persons and the State should always be made in the form of *dialogue*. This means that relationships between individuals and the State, which are so evident and visible in privacy law, are *two way streets*. On one hand there are high and excepted standards of personal status and private life, but on the other hand there are requests of security and protection of the most vulnerable. Obviously the key is *balancing*. Only a society which is taking care of the *needs of its individual citizens on the one side and social cohesion on the other can really be democratic and prosperous.* Hence, there is no prosperity for the nation where there is no prosperity for the individual. In line with that, there is no security of the individual where there is no security of the nation.

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