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Comparing Constitutional Privacy and Data Protection Rights within the EU

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Although both data protection and the right to privacy (or respect for private life) are recognised within the EU Charter, they are otherwise generally seen as having very different constitutional histories. The right of privacy is often seen as traditional and data protection as novel. Based on a comprehensive analysis of rights within EU State constitutions, it is found that this distinction is overdrawn. Only five current EU States recognised a constitutional right to privacy prior to 1990, although approximately three quarters and also the European Convention do so today. Subsidiary constitutional rights related to the home and correspondence but not honour and/or reputation are more long-standing and this helps link the core of privacy to the protection of intimacy. Constitutional rights to data protection emerged roughly contemporaneously and were often linked to a general right to privacy but are still only found in around half of EU States. There is also no clear consensus on specific guarantees, although around half of the States which recognise these do include rights to transparency and a slightly lower number right to rectification. This could suggest that data subject empowerment over a wide range of connected information is an important emerging particularity tied to data protection as a constitutional guarantee.

Keywords: Constitutions, Correspondence, Data Protection, Defamation, Domicile, European Convention, European Union, EU Charter, Human Rights, Honour, Informational self-determination, Image Rights, Intimacy, Private Life, Privacy, Reputation

The Charter of Fundamental Rights of the European Union (EU Charter), which was adopted in 2000 and came into legal force in 2009, abstractly proclaims and also seeks to further specify both the right to respect for private life and the right to protection of personal data.² These rights are generally seen as somewhat wordy enunciations of the two interrelated rights, namely, the right to privacy and data protection respectively. Beyond this, however, the historical roots of these rights is generally understood to be very different. Privacy has been widely conceived to be “an old and venerable’ right, entrenched for many years as a fundamental right in national constitutions and international texts”.³ In contrast to these “more classic human rights”,⁴ data protection has generally been presented as a prime instance of a “third generation’ fundamental right”⁵ or an

¹ Email: doe20@cam.ac.uk. The research presented in this paper was presented at an earlier stage to the British and Irish Law Education and Technology Association (BILETA) Annual Conference 2021 and I am grateful to all who offered feedback there as well as Bert-Jaap Koops for his input in relation to the Netherlands. This is very much a work in progress and I would welcome any feedback including the pointing of any errors or omissions.

² Charter of Fundamental Rights of the European Union, OJ 2010 C 83/389, arts 7 and 8.

³ Maria Tzanou, ‘Data protection as a fundamental right next to privacy? “Reconstructing” a not so new right’ (2013) 3 IDPL 88, 90.

⁴ Bart van der Sloot, ‘Legal Fundamentalism: Is Data Protection Really a Fundamental Right?’ in Ronald Leenes, Rosamunde van Brakel, Serge Gutwirth and Paul De Hert (eds), *Data Protection and Privacy: (In)visibilities and Infrastructures* (Spring 2017) 4.

⁵ Manon Oostveen and Kristina Irion, ‘The Golden Age of Personal Data: How to Regulate an Enabling Fundamental Right?’ in Mor Bakhom, Beatriz Gallego, Mark-Oliver Mackenrodt, Gintarė Surblytė-Namavičienė, *Personal Data in Competition, Consumer Protection and Intellectual Property Law* (Springer, 2018) 9.

“innovation for traditional human rights”,⁶ albeit one which is now included in the EU Charter. This conceptualisation appears to find confirmation in the explicit instantiation of the right to respect for private life but not the right to data protection in the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).⁷ Nevertheless, the European Convention only came into legal force in 1953, has only clearly been recognised as a general legal principle of what is now the EU from the 1970s⁸ and has only been explicitly recognised in the EU Treaties themselves since 1992.⁹ More fundamentally, at the level of national constitutional law, the perceived historical distinction between privacy and data protection is only clearly apparent in relation to specific rights to in relation to home and correspondence, both of which are now generally subsumed with the right to privacy. The mean year for the earliest constitutional recognition of such rights within what are now the 27 EU States was 1895 and 1911 respectively. In contrast, the cognate figure in relation to a general right to privacy was 1990. This is almost identical both to the year when those EU States which have constitutionally recognised personal honour and/or reputation, two other specific rights often linked to the right to privacy,¹⁰ and also data protection rights took this step. Nevertheless, far more EU State constitutions explicitly recognise privacy as opposed to data protection rights. In sum, not only is constitutional protection of the ‘privacy’ of home and correspondence nearly ubiquitous, but almost three quarters of EU States recognise the right to privacy in general sense. These elements are also explicitly recognised in both the European Convention and the EU Charter. However, constitutional rights to reputation and/or honour are explicitly recognised by less than half of the EU States and other specific claims linked to the right to privacy such as image rights by considerably less. Meanwhile, only approximately half of EU State constitutions, as well as the EU Charter, grant any explicit recognition to data protection. It is also clear that specific rights within data protection have only emerged conterminously with a general right and that such specificity is still in the process of coalescing. Thus, both these types of rights emerged first only in the 1970s and whilst approximately one third of EU States grant data protection general recognition, less than one quarter recognise even the most popular specific type of data protection right, namely, that of transparency.

The finding that constitutional rights to privacy and to data protection have often emerged in parallel confirms the close and even symbiotic relationship between these two overarching rights. Beyond this, an analysis of the historical development of specific rights now found within privacy and data protection can speak to what might lie at their core. As regards privacy, rights protecting the inviolability of the home and the secrecy of communications both emerged early and remain more ubiquitously recognised than a general right to privacy. These rights clearly link privacy to “close and intimate relationships”,¹¹ although especially the confidentiality of correspondence also links to a need to safeguard the boundaries of wider forms of social participation. The story as regards data protection is more unstable and provisional, not only because specific data protection rights did not emerge prior to more general recognition but also there is no consensus on which specific guarantees are imperative. Nevertheless, although each is still only enunciated by less than one

⁶ Iris Benöhr, *EU Consumer Law and Human Rights* (OUP 2013) 58.

⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, ETS 5, 213 UNTS 221.

⁸ See Case C-4/73 *Nold v Commission*, EU:C:1975:114 and Case C-36/75 *Rutili v Minister for the Interior*, EU:C:1975:137.

⁹ Namely, in article F of the original Treaty on European Union, OJ 1992 C 191/1.

¹⁰ James Whitman, ‘The Two Western Cultures of Privacy: Dignity Versus Liberty’ (2014) 113 Yale L J 1151, 1161.

¹¹ See Oliver Diggelmann and Maria Cleis, ‘How the Right to Privacy Became a Human Right’ (2014) 14 H R L Rev 441, 458.

quarter of national constitutions, the two specific novel rights where are most widespread are those of transparency and rectification. These elements also find recognition within EU Charter.¹² This may tentatively suggest that the additional core within data protection can be linked to a perceived need within a ubiquitous data environment to empower data subjects over a wide range of information relating to them.

The rest of this paper is divided into seven sections. The first section lays out the rationale and methodology of the study including both its sources and terminology. The next two sections focus on the right to privacy. Section two looks at specific rights now seen as subsidiary to the general right to privacy, whilst section three examines the development of the overarching right itself. The paper then shifts to data protection, with section four looking generally at the emergence of data protection in a constitutional setting and section five exploring the recognition of specific rights in this context. Section six draws on these findings in order to further explored both the roots and core of privacy and data protection, whilst section seven closes with some brief conclusions.

Section One: Rationale and Methodology

1.1 - Overview

Over the past twenty years or so the field of privacy and data protection has greatly expanded. There is now a considerable literature exploring the rights to privacy and also data protection, as well as the interrelationship between them. However, notwithstanding some notable exceptions,¹³ this work has tended to focus either on philosophy,¹⁴ case law¹⁵ or a mixture between the two.¹⁶ Moreover, although an EU frame has increasingly been adopted especially as regards data protection, this has in most cases¹⁷ only involved exploration of the supranational level including, most especially, the EU Charter and its similarities and differences vis-à-vis the European Convention. This narrow framing is somewhat problematic since pan-EU rights are also meant to engage with those drawn from the “constitutional traditions common to the Member States”.¹⁸ Indeed, in the seminal case of *Nold* the Court of Justice stated that it could therefore “not uphold measures which are incompatible with the fundamental rights recognized by the Constitutions of those States”.¹⁹ Where national experiences have been explored, there has also been a tendency to examine just a few jurisdictions, most notably France and Germany.²⁰ Given that some State traditions have been more important and influential, this is understandable. Nevertheless, there is a danger that such a selective sample results in the broad picture being missed and the overall result

¹² See EU Charter, art 8(2).

¹³ See especially Gloria González-Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (Springer, 2013) who focuses principally on legal texts and their legislative history and Whitman (note 10) whose approach is more grounded in sociological history.

¹⁴ See, for example, Daniel Solove, *Understanding Privacy* (Harvard University Press 2003).

¹⁵ See, for example, Juliana Kokott and Christoph Sobotta, ‘The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR’ (2013) 3 IDPL 222.

¹⁶ See, for example, Orla Lynskey, ‘Deconstructing Data Protection: The “Added-Value” of a Right to Data Protection in the EU Legal Order’ (2014) 63 ICLQ 569.

¹⁷ A notable exception is Fuster (note 13) which primarily focuses on pan-EU developments but also includes a significant amount of detail at national level.

¹⁸ C-45/73 *Nold* (note 8) para 13.

¹⁹ *Ibid*, para 13.

²⁰ See, most especially, Whitman (note 10).

being reasonably criticized for being anecdotal. At the least, a bottom-up and systematic exploration would appear warranted as a complement to these other contributions.

In light of the above, it was decided to methodically examine not only relevant provisions in the European Convention and the EU Charter but also those in the national constitutions which have applied to all of what are now the twenty-seven EU Member States. As regards the contemporary situation, the research drew primarily on the open access *Constitute*²¹ database which aims to “include[e] the currently in-force constitution for nearly every independent state in the world”.²² Meanwhile, the primary historical data source was Hein Online’s *World Constitutions Illustrated Database* which includes substantial records of past constitutional texts drawn from a wide variety of historical materials. In a few cases, these two databases required complementing including with material on constitutional data protection collated by the Council of Europe in the early 1990s.²³ Texts translated into English or, if unavailable, then French as the other official language of the Council of Europe were preferred, as was material which had originally been published in systematic volumes such as *British and Foreign State Papers* or various edited volumes. The earliest text examined was the Swedish Instrument of Government 1772²⁴ which thereby constituted the historical starting point for the research.

1.2 – Dealing with Changing Jurisdictional Boundaries

Even since 1772, the national borders and even the juridical existence of many of the States which now make up the EU have been far from a given. Any historical study which is primarily orientated along the national boundaries of the present (or indeed any other single point in time) must find a means of reconciling the conflicts which arise. Although necessary, this clearly will remain both imperfect and contestable. On the one hand, only looking at instruments enacted by States as currently constituted would result in an unduly shrunken historical survey. At the extreme, it would mean that as regards the Czech Republic and Slovakia one would only be able to look at the period from 1 January 1993 onwards. On the other hand, it would appear unreasonable to take into account developments of another jurisdiction which either exercised control over the entire territory for a short and manifestly anomalous period or what was clearly only a segment of the relevant territory even for a long period of time. Nevertheless, care must still be taken to avoid one’s own or even present-day understandings unduly interfering with the very process of data collection. Addressing these and other evident tensions, the following rules were adopted. In general, and so long as it exercised *de facto* control over significant territory, acts of the current State or its direct predecessor were treated as overriding. In cases where constitutional autonomy was recognised, the legal architecture within that territory was examined even if it remained affiliated to a wider

²¹ Zachary Elkins, Tom Ginsburg, James Melton, *Constitute: The World’s Constitutions to Read, Search, and Compare* (Constitute Project, n.d.), <https://constituteproject.org/constitutions?lang=en> all links accessed 29 April 2021.

²² *Constitute, About* (Constitute Project, n.d.), <https://www.constituteproject.org/content/about>, accessed 29 April 2021. Unfortunately, in a few cases the texts within the database have not been kept fully up to date. However, given that none of these failures appeared to impact this area of study it was felt that this admitted disadvantage was outweighed by referencing a freely available database which aimed to provide current information.

²³ Council of Europe, Committee of Experts on Data Protection, *Constitutional Provisions which Guarantee Data Protection* (CJ-PD (93) 32 2nd Rev), Council of Europe Archives, Strasbourg.

²⁴ Constitution publié par Gustave III, en 1772 in Pierre-Armand Dufau, Jean-Baptiste Duvergier and Joseph Guadet, *Collection des Constitutions, Chartes et Lois Fondamentales des Peuples de l’Europe et des Deux Amériques* (Chanson, 1823).

geographical unit. For example, Hungary was treated separately to that of Austria after the Austro-Hungarian Compromise of 1867 established the system of dual monarchy. Finally, where the great bulk of the relevant territory was fully subsumed as an integrated constituent of another jurisdiction (even if under questionable legality) then the research looked at constitutional texts forthcoming from that other entity. Since the research only looked for the earliest recognition of any given right and then its contemporary instantiation, this last rule only exercised a direct material impact²⁵ on the following cases:

- The Czech Republic in the period to 1920, where the research looked to Austria,
- The Czech Republic and Slovakia in the period 1920-1992, where the research looked to Czechoslovakia,
- The Baltic States prior to the 1920 and from 1944 to 1991, where the research looked to Russia/the Union of Soviet Socialist Republics (USSR),²⁶
- Croatia in the period 1921 to 1991, where the research looked to Yugoslavia.

In all these (admittedly somewhat problematic) cases, the research additionally footnoted the earliest constitutional recognition of the relevant right by the current jurisdiction.

1.4 – The Formal Focus of the Research

The research looked only at *de jure* as opposed to *de facto* enjoyment of the rights in question. This was justified by both its formal focus and by the fact that, especially as regards the historical aspects, its main aim was to reveal overall patterns of recognition rather than examine any particular case. Nevertheless, it must be recognised that in a number of jurisdictions *de jure* rights have been egregiously violated. Moreover, the principal purpose of constitutional rights provisions may have been to symbolically shield this appalling reality. In particular, writing on the (un)reality of rights included in the Soviet Constitution, Towe noted even in the late 1960s that

[t]he provisions of fundamental rights are included in the Constitution largely for propaganda reasons ... Individual interests are considered of secondary importance and are required to yield whenever they conflict with the economic and political goals of the state. Fundamental rights are conditioned on non-interference with the building of Communism. Primary emphasis is placed on economic as opposed to political rights. Finally, the judiciary is not truly independent.²⁷

This finding has significance both for the historic Soviet provisions cited in relation to Latvia and, by extension, also the Hungarian provisions adopted during the period of Soviet domination. Meanwhile, whilst somewhat more ambiguous, the constitutional rights applicable in Spain during the Francoist era from 1945 onwards are more ambiguous but clearly still problematic. Bowen comments thus on the broader context surrounding their adoption:

Summer 1945 saw even more superficial changes to the Spanish political system. Franco introduced a new constitution, declared that Spain was a monarchy – albeit without a

²⁵ In other cases, this rule could have exerted an impact but, due to the negative findings in the relevant period, the results reported would have been identical even if only constitutional texts forthcoming from the current jurisdiction or its immediate predecessor had been taken into account.

²⁶ The latter period only proved materially relevant as regards Latvia.

²⁷ Thomas Towe, 'Fundamental Rights in the Soviet Union: A Comparative Approach' (1967) 115 *U Pa L Rev* 1251, 1273.

monarch – and appointed a new cabinet dominated by lay Catholic leaders, technocrats, and nonthreatening conservatives, “a new period on the road to the spiritual and material restoration of our Patria.” With the exception of Labor Minister Girón, Falangist ministers lost their positions, as did Secretary General Arrese. The Falange also lost control over censorship and the press, powers transferred to the Ministry of National Education. Franco even announced municipal and syndical elections, although with suffrage limited to male heads of households. This was part of a general effort to emphasize the conservative Catholic aspects of the regime, while denying or minimizing the semi-fascist elements of Francoism.²⁸

Notwithstanding the formal focus of the research, these and other similar complexities should still be borne in mind.

1.5 – Questions of Terminology

As previously stated, the research explored the formal constitutional recognition of rights to, and within, privacy and data protection. It also took cognisance of the recognition of such rights within two primary pan-European instruments, namely, the European Convention and the EU Charter. This raised questions of terminology. In this context it is important to recall that the research’s subject matter was broad, covered a wide historical sweep and looked at texts drafted in many different languages which were also generally translated. One distinction drawn upon was that between general and specific rights. Given that there can be something of a spectrum between these two extremes, this distinction may appear somewhat artificial. Nevertheless, such an admitted simplification was justified both by the need to systematise a broad canvas and by an understanding that the drafting of the European Convention itself (and by extension also the EU Charter) was strongly influenced by a similar tension between a principles-based enumeration and a precisely defined approach to the formulation of rights.²⁹ Given the breath of the research and the reliance in many cases on translations, it also made sense to adopt a somewhat flexible approach to wording and to try and group different terms within relevant overarching categories. Thus, phrasing such as a right to private life, to respect for private life and a right to the inviolability of privacy were all treated as broadly equivalent to the general right to privacy. Meanwhile, the enunciation of safeguards related to personal data or data processing were treated as synonymous with data protection. Finally, terms such as domicile and dwelling were treated as equivalent to that of home and rights of access to data or information concerning an individual were grouped as specific rights related to transparency within data protection. Nevertheless, where terminological differences were clearly significant then this was noted and is discussed at a qualitative level within the research write-up. It is to that account that this article now turns.

Section Two: Specific Privacy Rights in EU National Constitutions

2.1. – ‘Privacy of the Home’

As previously stated, privacy has been conceptualised to be a long-standing and traditional right. This finds partial constitutional confirmation as regards the specific recognition of the ‘privacy’ of the home. This right is now subsumed within the overarching right to privacy or respect for

²⁸ Wayne Bowen, *Spain during World War II* (University of Missouri Press 2006), 91.

²⁹ See Ed Bates, *The Evolution of the European Convention on Human Rights* (OUP 2010), 88-93.

private life set out in Article 8 of the European Convention and Article of 7 of EU Charter, albeit through the particular nomenclature of “respect for” rather than “privacy of” the home. Table 1 details for each EU State the earliest reference to such this right within a national constitution applicable to that State. It also details relevant references found within contemporary national constitutions. Although the term ‘privacy of the home’ is used as the principal shorthand given the focus of this article, it should be noted that the usual reference in both the (invariably translated) historic and contemporary constitutions was rather to the ‘inviolability’ of the home or domicile. Often this was combined with more detailed provision on the parameters within which an entry or search into the home might be permitted.³⁰ Meanwhile, both the earliest and contemporary references applicable to Malta, the Netherlands and Sweden and also the earliest but *not* the contemporary reference applicable to Spain only explicitly deals with entry or search rather than enunciating any broader inviolability of the home as such. Finally, the historic provisions cited in relation to Croatia, Hungary, Ireland, Poland and Portugal appear to be limited to citizens (or subjects). In contrast, as regards contemporary texts, only the Irish provision remains explicitly limited to citizens.

As can be seen, the earliest constitutional recognition here dates to 1822 (in Portugal), such recognition had extended to what is now over half (14) of EU States by 1900 and by the time the European Convention was finalised in 1950 to almost all (25) of them. Overall, the mean age for recognition was 1888. Moreover, with the anomalous exception of France which dropped such textual recognition during the nineteenth century,³¹ all EU States formally recognise this right within their national constitutional instruments today.

Table 1 - Earliest and Contemporary Explicit Constitutional Recognition of the ‘Privacy of the Home’ (or Broad Equivalent)

Current EU State	Earliest (see Footnoted Reference) and Contemporary (see generally the Constitute Database – note 21) Constitutional Text	Initial Date & Current Recognition
Austria	Fundamental Law Concerning the Rights of the Citizens, art 9³²	1867
	Fundamental Law Concerning the Rights of the Citizens, art 9³³ via Austria's Constitution of 1920, Reinstated in 1945, with Amendments through 2009, art 12(2)	✓
Belgium	Constitution de La Belgique, art 10³⁴	1831
	Belgium's Constitution of 1831 with Amendments through 2014, art 15	✓

³⁰ See, for example, the current constitutional provisions in force in Germany, Italy, Poland and Spain.

³¹ The provision was not included in the Constitutional Laws of 1875 establishing the Third Republic. See Henry Lockwood, *Constitutional History of France* (Unspecified 1897), 403-408. It has also not been included in any subsequent constitutional text. The relative absence of express constitutional provisions in France would appear related less to a devaluing of these rights *per se* an more to a strong emphasis on limiting judicial power within the French constitutional tradition. See Jacqueline Lafon, ‘France’ in C. Neal Tate and Torbjörn Vallindé (eds.), *The Global Expansion of Judicial Power* (NYU Press 1995), 289-90.

³² Walter Dodd, *Modern Constitutions - A Collection of the Fundamental Laws of Twenty-two of the Most Important Countries of the World, with Historical and Bibliographical Notes* (University of Chicago Press 1909), 72.

³³ *Ibid*, 72.

³⁴ (1833) 18 British and Foreign State Papers 1052, 1053.

Bulgaria	Constitution du Royaume de Bulgarie as amended, art 74³⁵	1911
	Bulgaria's Constitution of 1991 with Amendments through 2015, art 33	✓
Croatia	Constitution of the Kingdom of the Serbs, Croats and Slovenes (Jugoslavia) (via Yugoslavia), art 11³⁶	1921
	Croatia's Constitution of 1991 with Amendments through 2013, art 34	✓
Cyprus	Constitution of Cyprus, art 16³⁷	1960
	Cyprus's Constitution of 1960 with Amendments through 2013, art 16	✓
Czechia	Fundamental Law Concerning the Rights of the Citizens (via Austria), art 9³⁸	1867
	Czechia's Constitution of 1993 with Amendments through 2013, art 12	✓
Denmark	Fundamental Law of the Kingdom of Denmark, art LXXXVI³⁹	1849
	Denmark's Constitution of 1953, art 72	✓
Estonia	Fundamental Laws of the Russia Empire (via Russia), art 33⁴⁰	1906
	Estonia's Constitution of 1992 with Amendments through 2015, art 33	✓
Finland	Constitution of Finland, art 11⁴¹	1919
	Finland's Constitution of 1999 with Amendments through 2011, sec 10	✓
France	Constitution de la République française, art 3⁴²	1848
	France's Constitution of 1958 with Amendments through 2008 – No express provision found.	✗
Germany	Constitution of the German Republic, art 115⁴³	1919
	Germany's Constitution of 1949 with Amendments through 2014, art 13	✓
Greece	Constitution of Greece, art 8⁴⁴	1844
	Greece's Constitution of 1975 with Amendments through 2008, art 9	✓

³⁵ (1917) 107 British and Foreign State Papers 615, 621.

³⁶ Howard McBain and Lindsay Rogers, *The New Constitutions of Europe* (Doubleday Page & Company 1922) 350. The earliest provision of the current State can be located in article 34 of the [Constitution of the Republic of Croatia 1990](#). See Croatian Parliament translation (Hein Online, n. d.), <https://heinonline.org/HOL/Page?handle=hein.cow/zzhr0022&id=1&collection=cow&index=> accessed 29 April 2021, 40.

³⁷ Amos Peaslee and Dorothy Xydis (eds) *Constitutions of Nations* (3rd edn Nijhoff 1968) vol 3, 144.

³⁸ Dodd (note 32) 72. The earliest recognition by the current State dates to 1993 when Resolution 2/1993 Sb. of the then Presidium of the Czech National Council granted the Czechoslovakian Charter of Fundamental Rights and Basic Freedoms 1991 constitutional status including article 12 which sets out these rights.

³⁹ (1873) 58 British and Foreign State Papers 1218, 1227.

⁴⁰ Dodd (note 32) 187. The earliest recognition by what is now the current State dates from 1920 when article 10 of the Constitution of the Esthonian [sic] Republic enunciated this right. See McBain and Rogers (note 36) 456.

⁴¹ McBain and Rogers (note 36) 469-70.

⁴² (1861) 36 British and Foreign State Papers 1072, 1073.

⁴³ (1922) 112 British and Foreign State Papers 1063, 1083.

⁴⁴ Unattributed English translation published in Athens and dated 1844 (Hein Online, n.d.), <https://heinonline.org/HOL/Page?handle=hein.cow/zzgr0044&collection=cow> accessed 29 April 2021, 6.

Hungary	Constitution of the Hungarian People's Republic, art 57⁴⁵	1949
	Hungary's Constitution of 2011 with Amendments through 2016, art VI	✓
Ireland	Constitution of the Irish Free State, art 7⁴⁶	1922
	Ireland's Constitution of 1937 with Amendments through 2019, art 40(1)	✓
Italy	Fundamental Statute for the Government of the States of the King of Sardinia, art 27 (originally 1848 and extended to Italy on its establishment in 1861)⁴⁷	1861
	Italy's Constitution of 1947 with Amendments through 2012, art 14	✓
Latvia	Fundamental Laws of the Russia Empire (via Russia), art 33⁴⁸	1906
	Latvia's Constitution of 1922, Reinstated in 1991, with Amendments through 2016, art 96	✓
Lithuania	Fundamental Laws of the Russia Empire (via Russia), art 33⁴⁹	1906
	Lithuania's Constitution of 1992 with Amendments through 2019, art 24	✓
Luxembourg	Constitution du Grand-Duche de Luxembourg, art 16⁵⁰	1848
	Luxembourg's Constitution of 1868 with Amendments through 2009, art 15	✓
Malta	Malta Independence Constitution, art 39⁵¹	1964
	Malta's Constitution of 1964 with Amendments through 2016, art 38	✓
Netherlands	Constitution du Royaume des Pays-Bas, art 158⁵²	1848
	Netherlands's Constitution of 1814 with Amendments through 2008, art 12	✓
Poland	Constitution of the Republic of Poland, art 100⁵³	1921
	Poland's Constitution of 1997 with Amendments through 2009, art 50	✓
Portugal	Constitution Politique de la Monarchie Portugaise, art V⁵⁴	1822
	Portugal's Constitution of 1976 with Amendments through 2005, art 34	✓
Romania	Constitution de la Roumanie, art XV⁵⁵	1866
	Romania's Constitution of 1991 with Amendments through 2003, art 27	✓

⁴⁵ Amos Peaslee (ed) *Constitutions of Nations* (Rumford Press 1950) 195.

⁴⁶ (1925) 116 British and Foreign State Papers 262, 263.

⁴⁷ (1861) 36 British and Foreign State Papers 888, 890.

⁴⁸ Dodd (note 32) 187. The earliest recognition by the current State appears to date from 1998. See [amended Latvija Republikas Satversme](#) [Constitution of the Republic of Latvia], art 96 (*Hein Online*, n.d.), <https://heinonline.org/HOL/Page?handle=hein.cow/zzlv0018&id=1&collection=cow&index=> accessed 29 April 2021.

⁴⁹ Dodd (note 32) 187. The earliest recognition by the now current State dates from 1922 when article 12 of the Constitutional Law of the Republic of Lithuania set out this right (see (1923) 120 British and Foreign State Papers 791, 792).

⁵⁰ [Official Gazette] Memorial Legislatif et Administratif, Year 1848, No. 52, 389, 392.

⁵¹ Statutory Instruments [UK], 1964 No. 1398, The Malta Independence Order 1964.

⁵² Constitution du Royaume des Pays-Bas. Revision de 1848 (Imp. de S. Trouillart Hanssen, 1848).

⁵³ McBain and Rogers (note 36) 420.

⁵⁴ (1821-22) 9 British & Foreign State Papers 921, 922.

⁵⁵ (1866-67) 57 British & Foreign State Papers 263, 264.

Slovakia	Constitutional Charter of the Czechoslovak Republic (via Czechoslovakia), art 112 ⁵⁶	1920
	Slovakia's Constitution of 1992 with Amendments through 2017 , art 21	✓
Slovenia	Fundamental Law Concerning the Rights of the Citizens (via Austria), art 9 ⁵⁷	1867
	Slovenia's Constitution of 1991 with Amendments through 2016 , art 36	✓
Spain	Democratic Constitution of the Spanish Nation , art 5 ⁵⁸	1869
	Spain's Constitution of 1978 with Amendments through 2011 , sec 18	✓
Sweden	Instrument of Government of 1809 as amended , art 16 ⁵⁹	1866
	Sweden's Constitution of 1974 with Amendments through 2012 , art 6	✓

2.2 – ‘Privacy of Correspondence’

A similar, albeit slightly later, pattern was revealed as regards the ‘privacy’ of correspondence, another subsidiary right within Article 8 of the European Convention and Article 7 of the EU Charter. As Table 2 below indicates, this right was also first recognised in Portugal in 1822. By 1900 recognition extended to what now encompasses over one third (ten) of the EU States and by 1950 to over eighty percent (22) of them. As also indicated by Table 2, today all EU national constitutions other than in France and Ireland expressly recognise this right. The mean initial date of recognition is 1903, which is still well before the modern era of human rights but nevertheless fifteen years later than privacy of the home.

Again, notwithstanding the use of ‘privacy of communications’ as a shorthand, the phrasing found in the (translated) constitutional texts was usually somewhat different. In general, the term ‘secrecy’ or ‘confidentiality’ was used in preference to ‘privacy’ and in very historic instruments the term ‘letters’ and in more recent ones ‘communications’ was used in preference to ‘correspondence’. Sometimes, a number of types of communications such as postal, telegraphic or telephonic were explicitly enumerated. In many cases this enunciation was also combined with further detail of the exceptional circumstances when an interception or other restriction on this right may be permitted. Divergence was even apparent at pan-European level, with the more recent Article 7 of the EU Charter referencing ‘communications’ and the older Article 8 of the European Convention ‘correspondence’, albeit with both (as with the home above) speaking of ‘respect for’ in preference to privacy, secrecy or confidentiality. These differences in nomenclature do not detract from the broadly equivalent value which is declared and, in many cases, merely reflect a divergent socio-technological setting at the time the time of drafting. Indeed, Article 52(3) of the EU Charter

⁵⁶ McBain and Rogers (note 36) 331. The earliest recognition by the current State dates from 1993 with the coming into force of article 21 of [The Constitution of the Slovak Republic 1992](#) (Hein Online, n.d.), https://heinonline.org/HOL/Page?collection=cow&handle=hein.cow/zzsk0064&id=9&men_tab=srchresults accessed 29 April 2021.

⁵⁷ Dodd (note 32) 72. The earliest recognition by the current State can be traced to article 36 of the [Constitution of the Republic of Slovenia 1991](#) (Hein Online, n.d.), <https://heinonline.org/HOL/Page?handle=hein.cow/zzsk0064&id=1&collection=cow&index=> accessed 29 April 2021.

⁵⁸ Luis Velasco, English translation for Hein Online (Hein Online, 2012), <https://heinonline.org/HOL/Page?handle=hein.cow/zzes0128&collection=cow> accessed 29 April 2021, 3.

⁵⁹ Dodd (note 32) 223.

explicitly states that “[i]n so far as this Charter contains rights which correspond to rights guaranteed by the [European] Convention ... the meaning and scope of those rights shall be the same as those laid down by the said Convention”. Notwithstanding the slight change in terminology, it is clear that “[t]he rights guaranteed in Article 7 correspond to those guaranteed by Article of the [European Convention]”.⁶⁰ Finally, with the exception of the historic recognition in Hungary, all the provisions cited below appear to apply irrespective of citizenship.

Table 2 - Earliest and Contemporary Explicit Constitutional Recognition of the ‘Privacy of Correspondence’ (or Broad Equivalent)

Current EU State	Earliest (see Footnoted Reference) and Contemporary (see generally the Constitute Database - note 21) Constitutional Text	Initial Date & Current Recognition
Austria	Fundamental Law Concerning the Rights of the Citizens, art 10⁶¹	1867
	Fundamental Law Concerning the Rights of the Citizens, art 10⁶² via Austria's Constitution of 1920, Reinstated in 1945, with Amendments through 2009, art 12(2)	✓
Belgium	Constitution of Belgium as amended, art 22⁶³	1893
	Belgium's Constitution of 1831 with Amendments through 2014, art 29	✓
Bulgaria	Constitution du Royaume de Bulgarie as amended, art 77⁶⁴	1911
	Bulgaria's Constitution of 1991 with Amendments through 2015, art 34	✓
Croatia	Constitution of the Kingdom of the Serbs, Croats and Slovenes (Jugoslavia) (via Yugoslavia), art 17⁶⁵	1921
	Croatia's Constitution of 1991 with Amendments through 2013, art 36	✓
Cyprus	Constitution of Cyprus, art 17⁶⁶	1960
	Cyprus's Constitution of 1960 with Amendments through 2013, art 17	✓
Czechia	Fundamental Law Concerning the Rights of the Citizens (via Austria), art 10⁶⁷	1867
	Czechia's Constitution of 1993 with Amendments through 2013, art 13	✓
Denmark	Fundamental Law of the Kingdom of Denmark, art LXXXVI⁶⁸	1849
	Denmark's Constitution of 1953, art 72	✓
Estonia	Constitution of the Esthonian [sic] Republic, art 14⁶⁹	1920

⁶⁰ Explanations relating to the Charter of Fundamental Rights 303 OJ C 17, 14.12.2007.

⁶¹ Dodd (note 32) 72-73.

⁶² Ibid, 72-73.

⁶³ Ibid, 129.

⁶⁴ (197) 107 British and Foreign State Papers 615, 621.

⁶⁵ McBain and Rogers (note 36) 352. The earliest recognition by the current State can be found in article 34 of the Constitution of the Republic of Croatia 1990 (note 36).

⁶⁶ Peaslee and Xydis (note 37) vol 3, 144.

⁶⁷ Dodd (note 32) 72-73. The earliest recognition by the current State dates to 1993 and is found in article 13 of the Czechoslovakian Charter of Fundamental Rights and Basic Freedoms (see note 38).

⁶⁸ (1873) 58 British and Foreign State Papers 1218, 1227. This protection was linked to, and therefore potentially narrowed, to that of privacy/inviolability of the home.

⁶⁹ McBain and Rogers (note 36) 456.

	Estonia's Constitution of 1992 with Amendments through 2015 – no formal express provision found ⁷⁰	✘
Finland	Constitution of Finland, art 12 ⁷¹	1919
	Finland's Constitution of 1999 with Amendments through 2011 , sec 10	✓
France	<i>No express constitutional provision found at any time.</i>	
	France's Constitution of 1958 with Amendments through 2008 – No express constitutional provision found.	✘
Germany	Constitution of the German Republic, art 117 ⁷²	1919
	Germany's Constitution of 1949 with Amendments through 2014 , art 10	✓
Greece	Constitution of Greece, art 14 ⁷³	1844
	Greece's Constitution of 1975 with Amendments through 2008 , art 19	✓
Hungary	Constitution of the Hungarian People's Republic, art 57 ⁷⁴	1949
	Hungary's Constitution of 2011 with Amendments through 2016 , art VI	✓
Ireland	<i>No express constitutional provision found at any time.</i>	
	Ireland's Constitution of 1937 with Amendments through 2019	✘
Italy	Constitution of the Republic of Italy, art 15 ⁷⁵	1947
	Italy's Constitution of 1947 with Amendments through 2012 , art 15	✓
Latvia	Constitution of the Union of Soviet Socialist Republics 1936, art 128 (de facto extended to Latvia from 1944) ⁷⁶	1944
	Latvia's Constitution of 1922, Reinstated in 1991, with Amendments through 2016 , art 96	✓
Lithuania	Constitutional Law of the Republic of Lithuania, art 14 ⁷⁷	1922
	Lithuania's Constitution of 1992 with Amendments through 2019 , art 22	✓
Luxembourg	Constitution du Grand-Duché de Luxembourg, art 29 ⁷⁸	1848
	Luxembourg's Constitution of 1868 with Amendments through 2009 , art 28	✓
Malta	Malta Independence Constitution, art 41 ⁷⁹	1964
	Malta's Constitution of 1964 with Amendments through 2016 , art 41	✓
Netherlands	Constitution du Royaume des Pays-Bas, art 159 ⁸⁰	1848
	Netherlands's Constitution of 1814 with Amendments through 2008 , art 13	✓

⁷⁰ Article 33 of this Constitution establishes restraints around the search of real or personal property under the control of a person. However, this would not explicitly appear to protect correspondence as such.

⁷¹ McBain and Rogers (note 36) 470.

⁷² (1922) 112 British and Foreign State Papers 1063, 1083

⁷³ Unattributed English translation (Note 44) 7.

⁷⁴ Peaslee (note 45) 195.

⁷⁵ (1948) 152 British and Foreign State Papers 476, 479.

⁷⁶ (1937) 18 Int'l Conciliation 143, 161. The earliest recognition by the current State appears to be article 96 of the amended Latvian Constitution in 1998 (note 48).

⁷⁷ (1923) 120 British and Foreign State Papers 791, 792.

⁷⁸ [Official Gazette] Memorial Legislatif et Administratif, Year 1848, No. 52, 389, 395.

⁷⁹ Statutory Instruments [UK], 1964 No. 1398, The Malta Independence Order 1964.

⁸⁰ Constitution du Royaume des Pays-Bas (Note 52) 3.

Poland	Constitution of the Republic of Poland, art 106⁸¹	1921
	Poland's Constitution of 1997 with Amendments through 2009, art 49	✓
Portugal	Constitution Politique de la Monarchie Portugaise, art XVIII⁸²	1822
	Portugal's Constitution of 1976 with Amendments through 2005, art 34	✓
Romania	Constitution de la Roumanie, art XXV⁸³	1866
	Romania's Constitution of 1991 with Amendments through 2003, art 27	✓
Slovakia	Constitutional Charter of the Czechoslovak Republic (via Czechoslovakia), art 116⁸⁴	1920
	Slovakia's Constitution of 1992 with Amendments through 2017, art 22	✓
Slovenia	Constitution of the Kingdom of the Serbs, Croats and Slovenes (Jugoslavia) (via Yugoslavia), art 17⁸⁵	1921
	Slovakia's Constitution of 1992 with Amendments through 2017, art 22	✓
Spain	Democratic Constitution of the Spanish Nation, art 7⁸⁶	1869
	Spain's Constitution of 1978 with Amendments through 2011, sec 18	✓
Sweden	Instrument of Government, Ch.2, art 6⁸⁷	1974
	Sweden's Constitution of 1974 with Amendments through 2012, Ch. 2, art 6	✓

2.3 – Other subsidiary rights within the right to privacy

The right to ‘privacy’ or ‘inviolability’ of the home and ‘privacy’ or ‘secrecy’ of communications are not the only specific rights which are often seen as tied to privacy or personality rights in general. To the contrary, the right to protection of one’s image has also received prominence especially in the civil law tradition.⁸⁸ Thus, it has been argued that “[i]n Western society, where individualism plays a central role, the protection of one’s image from unauthorized use has long been recognised as an essential attribute of the human person, reflecting one’s soul and uniqueness”.⁸⁹ Moreover, the European Court of Human Rights has stated “[a] person’s image constitutes one of the chief attributes of his or her personality” and the right to its protection is “one of the essential components of personal development and presupposes the right to control the use

⁸¹ McBain and Rogers (note 36) 421.

⁸² (1821-22) 9 British & Foreign State Papers 921, 924.

⁸³ (1866-67) 57 British & Foreign State Papers 263, 266.

⁸⁴ McBain and Rogers (note 36) 332. The earliest recognition by the current State dates from 1993 when article 22 of the Slovakian Constitution came into force (note 56).

⁸⁵ McBain and Rogers (note 36) 352. The earliest recognition by the current State dates to 1991 when article 37 of the Slovenia Constitution was adopted (note 57)

⁸⁶ Velasco (Note 58) 4.

⁸⁷ Constitution of Sweden (1974),

<https://www.equalrightstrust.org/ertdocumentbank/CONSTITUTION%20OF%20SWEDEN.pdf> accessed 29 April 2021.

⁸⁸ Stig Stromholm, *Right to Privacy and the Rights of Personality: A Comparative Study* (Norstedt 1967) 127-132.

⁸⁹ Elisabeth Logeais and Jean-Baptiste Schroeder, ‘The French Right of Image: An Ambiguous Concept Protecting the Human Persona’ (1998) 18 Loy. L A Ent L J 511, 511.

of that image”.⁹⁰ Nevertheless, these kind of rights are not explicitly mentioned in the European Convention, the EU Charter or the great bulk of EU national constitutions. The clear exceptions to this are Bulgaria which shields the individual from being “followed, photographed, filmed, recorded or subjected to any similar activity without his knowledge or despite his express disapproval”,⁹¹ Portugal which recognises the right both to “likeness” and “personal identity”⁹² and Spain which correspondingly acknowledges the right one one’s “own image”.⁹³

The European Court of Human Rights has also found that individuals enjoy a right to be protected any unwarranted defamation which threatens their “psychological integrity”.⁹⁴ However, this right is also not specified in either the European Convention or the EU Charter.⁹⁵ In contrast, and as Table 3 below indicates, just over 40% (11) of EU State constitutions do include explicit safeguards here. Most commonly, these recognise rights both to personal honour and reputation although, in some cases (at least as translated), only honour (e.g. Finland, Greece, Spain) or in one case (Hungary) reputation is included. These two concepts are clearly bound in a “tight independence”, although it can be argued that honour is “innate” to each individual whilst reputation must be “gained”.⁹⁶ Indeed, reflecting this, many of the translations of the latter refer not to a right to reputation *simpliciter* but rather to a right to “good reputation” (e.g. Czechia, Hungary and Poland). Both personal honour and reputation connect to “[t]he law of defamation” which is “a well-established field” present “in almost every legal system”.⁹⁷ As also shown in Table 3, the earliest constitutional reference here dates back to 1827 in Greece which, although now repealed, may suggest a somewhat comparable development to that of protection of the home and of correspondence. However, a look at the data in Table 3 reveals something quite different. Aside from Greece, no country granted formal constitutional recognition to these rights prior to 1945 and aside from one other case (Portugal) all such explicit inclusion dates from the 1990s. As a result, excluding the Greek provision which is no longer found in the law, the mean year for inclusion is 1986 which is almost a century later than inviolability or privacy of the home. As with the European Convention and the EU Charter, a majority of EU constitutions still exclude mention of these rights. Aside from the last element, this historical pattern is broadly similar to that of the general right to privacy. It is to that overarching provision that this article now turns.

⁹⁰ *Reklos v Greece*, App no 1234/05 (2009) 27 BHRC 420 and *Couderc v France*, App no 40454/07 [2016] EMLR 19 at [85].

⁹¹ [Bulgaria’s Constitution of 1991 with Amendments through 2015](https://www.constituteproject.org/constitution/Bulgaria_2015.pdf?lang=en) art 32(2) (Constitute Project, n.d.), https://www.constituteproject.org/constitution/Bulgaria_2015.pdf?lang=en accessed 30 April 2021.

⁹² [Portugal’s Constitution of 1976 with Amendments through 2005](https://www.constituteproject.org/constitution/Portugal_2005.pdf?lang=en), art 26(1) (Constitute Project, n.d.), https://www.constituteproject.org/constitution/Portugal_2005.pdf?lang=en accessed 30 April 2021.

⁹³ [Spain’s Constitution of 1978 with Amendments through 2011](https://www.constituteproject.org/constitution/Spain_2011.pdf?lang=en), sec 18(1) (Constitute Project, n.d.), https://www.constituteproject.org/constitution/Spain_2011.pdf?lang=en accessed 30 April 2021. In each case, it is clear that these rights were introduced during the transition to democracy in the early 1990s (in Bulgaria) and late 1970s (in Portugal and Spain).

⁹⁴ *Axel Springer v Germany*, App no 39954/08 (2012) 55 EHRR 6 at [83] (noting that a relevant “attack on a person’s reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life”).

⁹⁵ In contrast, Article 17 of the International Covenant on Civil and Political Rights does explicitly require protection against “unlawful attacks” on both “honour and reputation”.

⁹⁶ Ramona Popescu, ‘Constitutionalisation of Civil Law: The Right to Respect for Private Life and Human Dignity’, [2013] AGORA Int’l J Jurid Sci 150, 154.

⁹⁷ Gert Brüggemeier, ‘Protection of Personal Rights in the Law of Delict/Torts in Europe: Mapping Out Paradigms’ in Gert Brüggemeier, Aurelia Ciacchi and Patrick O’Callaghan (eds), *Personality Rights in European Tort Law* (CUP, 2010) 6.

Table 3 - Earliest and Contemporary Explicit Constitutional Recognition of Rights to Personal Honour (✦) and/or Reputation (✧) (Excluding Nil Returns)

Current EU State	Earliest (see Footnoted Reference) and Contemporary (see Constitute Database – note 21) Constitutional Text	Initial Date & Current Recognition
Bulgaria ✦✧	Constitution of the Republic of Bulgaria, art 32(1)⁹⁸	1991
	Bulgaria's Constitution of 1991 with Amendments through 2015, art 32(1)	✓
Croatia ✦✧	Constitution of the Republic of Croatia, art 35⁹⁹	1990
	Croatia's Constitution of 1991 with Amendments through 2013, art 35	✓
Czechia ✦✧	Charter of Fundamental Rights and Basic Freedoms, art 10(1) (via Czechoslovakia)¹⁰⁰	1991
	Czechia's Constitution of 1993 with Amendments through 2013, art 10(1)	✓
Estonia ✦✧	Constitution of the Democratic Republic of Estonia, art 17¹⁰¹	1992
	Estonia's Constitution of 1992 with Amendments through 2015, art 17	✓
Finland ✦	Constitution Act of Finland 1919 as amended, sec 8¹⁰²	1995
	Finland's Constitution of 1999 with Amendments through 2011, sec 10	✓
Greece ✦	Constitution Politique de la Grece, art XII¹⁰³	1827
	Greece's Constitution of 1975 with Amendments through 2008 - no express provision found	✧
Hungary ✧	Constitution of the Republic of Hungary 1949 as amended, art 59(1)¹⁰⁴	1990
	Hungary's Constitution of 2011 with Amendments through 2016, art VI	✓
Lithuania ✦	Constitution of the Republic of Lithuania, art 22¹⁰⁵	1992

⁹⁸ Joint Publications Research Service, Report Supplement Eastern Europe Recent Legislation Bulgaria's Constitution (22 August 1991) JPRS-EER-91-126-S, 3.

⁹⁹ Parliament of Croatia English Translation (*Hein Online*, n.d.) <https://heinonline.org/HOL/Page?handle=hein.cow/zzhr0022&id=1&collection=cow&index=> accessed 30 April 2021.

¹⁰⁰ (28 December 1992) Czech Official Gazette [Sbirka Zakonu] 114, 116. The earliest recognition by the current State dates to 1993 when this Charter was granted constitutional status within the internal Czech legal order (note 38).

¹⁰¹ Comparative Constitutions Project English Translation 2008 (*Hein Online*, n.d.) <https://heinonline.org/HOL/Page?handle=hein.cow/zzee0017&id=1&collection=cow&index=> accessed 30 April 2021.

¹⁰² Parliament of Finland English Translation (*Hein Online*, n.d.) <https://heinonline.org/HOL/cowdocs?state=&tf=cowresd0354.pdf> accessed 30 April 2021.

¹⁰³ (1829) 15 British and Foreign State Papers 1069, 1070.

¹⁰⁴ English translation of text in (24 August 1990) 84 Magyar Kozlony [Official Gazette] (*Hein Online*, n.d.) <https://heinonline.org/HOL/Page?handle=hein.cow/zzhu0029&collection=cow> accessed 30 April 2021.

¹⁰⁵ Seimas [Parliament] of the Republic of Lithuania (*Hein Online*, n.d.) <https://heinonline.org/HOL/Page?handle=hein.cow/zzlt0061&id=1&collection=cow&index=> accessed 30 April 2021.

	Lithuania's Constitution of 1992 with Amendments through 2019 , art 22	✓
Poland ✦✦	Constitution of the Republic of Poland , art 47 ¹⁰⁶	1997
	Poland's Constitution of 1997 with Amendments through 2009 , art 49	✓
Portugal ✦	Constitution of the Portuguese Republic , art 33(1) ¹⁰⁷	1976
	Portugal's Constitution of 1976 with Amendments through 2005 , art 26(1)	✓
Slovakia ✦✦	Charter of Fundamental Rights and Basic Freedoms , art 10(1) (via Czechoslovakia) ¹⁰⁸	1991
	Slovenia's Constitution of 1991 with Amendments through 2016 , art 36.	✓
Spain ✦	Charter of the Spanish People , art 4 ¹⁰⁹	1945
	Spain's Constitution of 1978 with Amendments through 2011 , sec 18	✓

Section Three: A General Right to Privacy in EU National Constitutions

When the literature talks about privacy as “‘an old and venerable’ right, entrenched for many years as a fundamental right in national constitutions and international texts”¹¹⁰ or as a “more classic human righ[t]”¹¹¹ compared with that of data protection, it is clearly addressing privacy as an overarching guarantee rather than only in terms of specific rights such as the inviolability of the home or the secrecy of correspondence. Albeit using the different language of a “right to respect for private ... life”, this general right was recognised through Article 8 of the European Convention from 1950. However, as Table 4 indicates, national constitutions within what is now the EU have only come to include similar provisions much more recently. Indeed, the first reference dates to the 1960s (Cyprus),¹¹² the next to 1975 (Greece) and prior to 1990 only three other constitutions (the Dutch, Portuguese and Spanish) provided likewise. During the 1990s, however, there was a dramatic shift and today almost three quarters (20) of EU national Constitutions do recognise privacy in this general sense, usually in very similar terms to that found in Article 8 of European Convention and now also Article 7 of the EU Charter. Only in Bulgaria is the guarantee in question restricted to citizens. Nevertheless, in two further cases,¹¹³ recognition is confined to a legislative instruction rather than a fully autonomous right. Thus, the Sweden Instrument of Government merely states that “[t]he public institutions shall ... protect the private ... li[fe] of the individuals”, whilst the

¹⁰⁶ Comparative Constitutions Project English Translation 2008, 12 (*Hein Online*, n.d.) <https://heinonline.org/HOL/Page?handle=hein.cow/zzpl0009&id=1&collection=cow&index=> accessed 30 April 2021.

¹⁰⁷ Secretary of State for Mass Communication (*Hein Online*, n.d.)

<https://heinonline.org/HOL/Page?handle=hein.cow/zzpt0014&collection=cow> accessed 30 April 2021.

¹⁰⁸ See Czech Official Gazette [Sbirka Zakonu] No. 1, 28 December 1992 (in Czech). This provision was carried forward in article 19(1) of the Slovakian Constitution which applied from 1993 (note 57).

¹⁰⁹ Peaslee (note 45) 77.

¹¹⁰ Tzanou (note 3) 90.

¹¹¹ van der Sloot (note 4) 4.

¹¹² This inclusion was part of an emerging general policy by the British Government to include the wording of the European Convention in the Constitutions of newly independent Commonwealth countries. See generally Charles Parkinson, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories* (OUP 2007).

¹¹³ Namely, Luxembourg (“The State guarantees the protection of private life”) and Sweden (“The public institutions shall ... protect the private ... li[fe] of the individuals”).

Luxembourg Constitution specifies that “[t]he State guarantees the protection of private life”. Even more significantly, outliers remain where no constitutional right of privacy or respect for private life is set out as such. These include such weighty EU States as France, Germany and Italy. In one of these cases, namely, Germany a broader guarantee of the “free development of ... personality”¹¹⁴ can and has been taken to encompass privacy.¹¹⁵ Nevertheless, at a constitutional level, this data still demonstrates that an express and general constitutional right to privacy is far from old or venerable and has still not achieved ubiquity. Their recent recognition may, therefore, have more in common with data protection than is generally recognised. Indeed, as will be seen in the next section, many EU States came to recognise constitutional rights to both privacy in general and data protection at precisely the same time.

Table 4 - Earliest and Contemporary Constitutional Recognition of a General 'Right to Privacy' (or Broad Equivalent)

Current EU State	Earliest (see Reference) and Contemporary (see generally the Constitute Database – note 21) Constitutional Text	Initial Date & Current Recognition
Austria	<i>No express constitutional provision found in any period (aside from within data protection – see Table 5 below)</i>	
	Austria's Constitution of 1920, Reinstated in 1945, with Amendments through 2009	✘
Belgium	The Coordinated [Belgian] Constitution, art 22 ¹¹⁶	1994
	Belgium's Constitution of 1831 with Amendments through 2014, art 22	✘
Bulgaria	Constitution of Republic of Bulgaria, art 32(1) ¹¹⁷	1991
	Bulgaria's Constitution of 1991 with Amendments through 2015, art 32(1)	✓
Croatia	Constitution of the Republic of Croatia, art 35 ¹¹⁸	1990
	Croatia's Constitution of 1991 with Amendments through 2013, art 35	✓
Cyprus	Constitution of Cyprus, art 15 ¹¹⁹	1960
	Cyprus's Constitution of 1960 with Amendments through 2013, art 15	✓
Czechia	Charter of Fundamental Rights and Basic Freedoms, art 10(2) (via Czechoslovakia) ¹²⁰	1991

¹¹⁴ [Germany's Constitution of 1949 with Amendments through 2014 art 2\(1\) \(Constitute Project, n.d.\)](#) accessed https://www.constituteproject.org/constitution/German_Federal_Republic_2014.pdf?lang=en 30 April 2021.

¹¹⁵ As Kommers and Miller note, this right has also been even been read to include data protection rights grounded in a broader right to self-determination. See generally Donald Kommers and Russell Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke University Press 2012) 405-411.

¹¹⁶ Belgian Chamber of Representatives English Translation (*Hein Online, n.d.*) <https://heinonline.org/HOL/Page?handle=hein.cow/zzbe0020&id=1&collection=cow&index=> accessed 30 April 2021.

¹¹⁷ Joint Publications Research Service (note 98) 3.

¹¹⁸ Parliament of Croatia (note 99).

¹¹⁹ Peaslee and Xydis (note 37) 144.

¹²⁰ [28 December 1992] Sbirka Zakonu [Official Gazette] 114, 116. The earliest recognition by the current State dates to 1993 when this Charter was granted constitutional status within the internal Czech legal order (note 38).

	Czechia's Constitution of 1993 with Amendments through 2013 , art 10(2)	✓
Denmark	<i>No express constitutional provision found in any period.</i>	
	Denmark's Constitution of 1953	✗
Estonia	Constitution of the Democratic Republic of Estonia , art 26 ¹²¹	1992
	Estonia's Constitution of 1992 with Amendments through 2015 , art 26	✓
Finland	Constitution Act of Finland 1919 as amended , sec 8 ¹²²	1995
	Finland's Constitution of 1999 with Amendments through 2011 , sec 10	✓
France	<i>No express constitutional provision found in any period.</i>	
	France's Constitution of 1958 with Amendments through 2008	✗
Germany	<i>No express constitutional provision found in any period.</i>	
	Germany's Constitution of 1949 with Amendments through 2014	✗
Greece	Constitution of Greece , art 9(1) ¹²³	1975
	Greece's Constitution of 1975 with Amendments through 2008 , art 9(1)	✓
Hungary	Constitution of the Republic of Hungary 1949 as amended , art 59(1) ¹²⁴	1990
	Hungary's Constitution of 2011 with Amendments through 2016 , art VI	✓
Ireland	<i>No express constitutional provision found in any period.</i>	
	Ireland's Constitution of 1937 with Amendments through 2019	✗
Italy	<i>No express constitutional provision found in any period.</i>	
	Italy's Constitution of 1947 with Amendments through 2012	✗
Latvia	Latvijas Republikas Satversme [Constitution of the Latvian Republic] (as consolidated) , art 96 ¹²⁵	1998
	Latvia's Constitution of 1922, Reinstated in 1991, with Amendments through 2016 , art 96	✓
Lithuania	Constitution of the Republic of Lithuania , art 22 ¹²⁶	1992
	Lithuania's Constitution of 1992 with Amendments through 2019 , art 22	✓
Luxembourg	Constitution of the Grand Duchy of Luxembourg 1868 as amended to 2009 , art 28 ¹²⁷	2009
	Luxembourg's Constitution of 1868 with Amendments through 2009 , art 28	✓
Malta	<i>No express constitutional provision found in any period.</i>	
	Malta's Constitution of 1964 with Amendments through 2016	✗

¹²¹ Comparative Constitutions Project (note 101).

¹²² Parliament of Finland (note 102).

¹²³ [Greek] House of Parliament English Translation 1975, 9 (*Hein Online*, n.d.)
<https://heinonline.org/HOL/Page?handle=hein.cow/zzgr0016&id=1&collection=cow&index=> accessed 30 April 2021.

¹²⁴ English translation at note 104.

¹²⁵ (1 July 1993) 43 *Latvijas Vestnesis* [Latvian Gazette].

¹²⁶ Seimas [Parliament] of the Public of Lithuania (note 105).

¹²⁷ Jefri Ruchti English Translation (*Hein Online*, n.d.)

<https://heinonline.org/HOL/Page?handle=hein.cow/zzlu0002&collection=cow> accessed 30 April 2021.

Netherlands	Constitution of the Kingdom of the Netherlands, art 10¹²⁸	1983
	Netherlands's Constitution of 1814 with Amendments through 2008, art 10	✓
Poland	Constitution of the Republic of Poland, art 47¹²⁹	1997
	Poland's Constitution of 1997 with Amendments through 2009, art 49	✓
Portugal	Constitution of the Portuguese Republic, art 33(1)¹³⁰	1976
	Portugal's Constitution of 1976 with Amendments through 2005, art 26(1)	✓
Romania	Constitution of Romania, art 26¹³¹	1991
	Romania's Constitution of 1991 with Amendments through 2003, art 26	✓
Slovakia	Charter of Fundamental Rights and Basic Freedoms, art 10(1) (via Czechoslovakia)¹³²	1991
	Slovakia's Constitution of 1992 with Amendments through 2017, art 19(2)	✓
Slovenia	Constitution of the Republic of Slovenia, art 35	1991
	Slovenia's Constitution of 1991 with Amendments through 2016, art 35	✓
Spain	The Constitution of Spain, sec 18(1)¹³³	1978
	Spain's Constitution of 1978 with Amendments through 2011, sec 18(1)	✓
Sweden	Instrument of Government as amended, Ch. 1, art 2¹³⁴	2011
	Sweden's Constitution of 1974 with Amendments through 2012, Ch. 1, art 2	✓

Section Four: The Emergence of Constitutional Rights to Data Protection

Data protection as it developed from the 1970s onwards was generally conceived of as a detailed system of statutory and regulatory control linked to the need to further safeguard privacy in the face of computerisation and associated socio-technological change. Only from the turn of the millennia has it also been widely conceptualised in the literature to be a fundamental right in and of itself.¹³⁵ From a pan-European standpoint, these understandings are readily comprehensible. Not only was there no right to data protection as such within the European Convention, but the first European data protection instruments in the 1970s were badged as being only about privacy¹³⁶ and

¹²⁸ Ministry of Home Affairs of the Netherlands English translation of the Dutch original, 3 (Hein Online, n.d.), <https://heinonline.org/HOL/Page?handle=hein.cow/zznl0023&collection=cow> accessed 29 April 2021.

¹²⁹ Comparative Constitutions Project (note 106).

¹³⁰ [Portuguese] Secretary of State for Mass Communication (note 107).

¹³¹ Foreign Broadcast Information Service, English Translation (23 December 1991) FBIS-EEU-91-246-S.

¹³² [28 December 1992] Sbirka Zakonu [Official Gazette] 114, 116. This provision was carried forward in article 19(2) of the Slovakian Constitution which applied from 1993 (note 57).

¹³³ (1979-80) 7 Hastings Const L Q 79, 83.

¹³⁴ Riksdagen [Parliament of Sweden] English translation [2011], 80 (Hein Online, n.d.) <https://heinonline.org/HOL/Page?handle=hein.cow/zzse0022&id=1&collection=cow&index=> accessed 30 April 2021.

¹³⁵ Moreover, this conceptualisation remains controversial within the normative literature. See van der Sloot (note 4).

¹³⁶ [Resolution \(73\) 22 adopted by the Committee of Ministers of the Council of Europe on the Protection of the Privacy of Individuals vis-à-vis Electronic Data Banks in the Private Sector](#); [Resolution \(74\) 29 adopted by the](#)

later one's from both the 1980s and 1990s as concerned "in particular" to protect the "right to privacy".¹³⁷ Only following the inclusion of an explicit right to data protection itself within the EU Charter in the 2000s¹³⁸ has this formal rationale been modified in the General Data Protection Regulation 2016/679 (and associated instruments¹³⁹) to protecting "in particular" a *sui generis* right to data protection as such.¹⁴⁰

Nevertheless, from the perspective of those EU States which *do* include data protection rights within their own primary or constitutional texts, what is striking is that this recognition has almost invariably emerged in parallel with, rather than later from, inclusion of a general right to privacy. Table 5 details these cases where data protection has been included as a general right and/or as one or more specific guarantees. As can be seen, data protection first came to be recognised constitutionally in the mid-1970s in Portugal and there were only three more examples (in Austria, The Netherlands and Spain) of such inclusion prior to 1990. Every other case of initial constitutional recognition emerged in the 1990s or, in one case (Greece), at the turn of the millennium. These patterns broadly mirror those revealed in relation to the general right to privacy above. Nevertheless, two crucial caveats to this must be noted. Firstly, in contrast to the approximately three-quarters of EU States that now constitutionally recognise a general privacy right, only around half (14) explicitly recognise any data protection rights. Moreover, this recognition often remains rather inchoate. In particular, in three cases (the Czech Republic, Slovakia and Spain) no specific rights are recognised at all and in four (Estonia, The Netherlands, Poland and Sweden) no general right.

As in the EU Charter, the great majority of EU State Constitutions do not define the term 'personal data'. However, it is (increasingly) reasonable to assume that this concept is confined to natural as opposed to legal persons.¹⁴¹ Nevertheless, from 1978 through to 2012 Austria explicitly extended constitutional (as well as statutory) data protection also to legal persons, albeit with the caveat that this would need to be asserted through the ordinary courts (as opposed to special data protection supervisory mechanisms).¹⁴² In the case of Estonia and Sweden, these rights are further restricted to citizens and/or residents¹⁴³ and in Poland and Portugal some but not all of the specific

[Committee of Ministers of the Council of Europe on the Protection of the Privacy of Individuals vis-à-vis Electronic Data Banks in the Public Sector.](#)

¹³⁷ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS 108), art 1; Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ 1995 L 281/31, art 1(1).

¹³⁸ EU Charter, art 8.

¹³⁹ Notably, Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA OJ 2016 L 119/89.

¹⁴⁰ See especially 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 (General Data Protection Regulation) OJ 2016 L 119/1, art 1(2).

¹⁴¹ For a detailed analysis of the emergence of such an understanding especially at statutory level see David Erdos 'Dead ringers? Legal persons and the deceased in European data protection law' (2021) 40 CSLR.

¹⁴² See Article 1(6) of Data Protection Act of Austria (1978) in Council of Europe (note 23). This provision was repealed by BGBl. I Nr. 51/2012.

¹⁴³ The Swedish provision is reserved entirely to citizens. In principle this is also the case in Estonia but it is also stated that foreign citizens and stateless persons in Estonia shall have the same rights unless otherwise provided in law.

rights are similarly restricted to citizens.¹⁴⁴ In almost all cases, the guarantees established are potentially applicable not only to digital but also to the manual handling of personal information. However, in several jurisdictions, data protection's particular concern to set boundaries around the spread of automation remains apparent. Thus, in Spain the provision talks about restricting "the use of data processing" ("*el uso de la informática*")¹⁴⁵ which could be understood as limited to digital manipulation.¹⁴⁶ Meanwhile, in Portugal most the guarantees are set out to only apply to computerised data but, as a result of amendment introduced in 1997,¹⁴⁷ it is stated that "[p]ersonal data contained in manual files shall enjoy the same protection as that provided in the previous paragraphs, as laid down by law". Finally, the Greek Constitution states that the right to data protection applies "especially" when the collection, processing and/or use of personal data takes place "by electronic means".

Given that the next section will consider particular specific data protection rights, the rest of this section confines itself to examining the recognition of a general right to data protection. As Table 4 details, nine EU State constitutions, as well as the EU Charter, enunciate some such guarantee. In all but one of these cases, this right have been present from the beginning of any primary or constitutional recognition of data protection. The exception is Portugal where data protection rights were first included in the Constitution in 1976 but where an explicit overarching requirement that the law "guarantees" the protection of personal data only came to be inserted in 1997.¹⁴⁸ In most cases a general right is simply directly enunciated, examples being the Slovenian Constitution which stipulates that "[t]he protection of personal data shall be guaranteed" and both Czech and Slovak ones which indicate that "[e]veryone has the right to be protected from the unauthorized gathering, public revelation, or other misuse of [their] personal data". Similarly, the EU Charter states that "[e]veryone has the right to the protection of personal data concerning him or her". Nevertheless, in Finland this recognition is not only umbilically linked to a more strongly substantive guarantee of a general right of privacy, but the additional data protection element is confined to a legislative requirement, namely, that "[m]ore detailed provisions on the protection of personal data are laid down by an Act". Somewhat similarly, the Greek Constitution only guarantees such protection "as specified by law". This parliamentary focus was also present in a Swedish provision from 1989 which (uniquely) was later repealed in 2011.¹⁴⁹ In sum, this stated that "[c]itizens shall be protected to the extent determined in detail by law against any infringement of their personal integrity resulting from the registration of information about them by means of electronic data processing".¹⁵⁰

¹⁴⁴ Namely, in Poland that public authorities must not acquire, collect or make accessible information "other than that which is necessary in a democratic state ruled by law" and in Portugal rights to information and rectification and also the prohibition of being allocated a single national identification number.

¹⁴⁵ For the Spanish wording see (29 December 1978) 311 Boletín Oficial del Estado, Gaceta de Madrid 29315, 29317.

¹⁴⁶ Indeed, a precise translation of the Spanish "*el uso de la informática*" might even be "the use of computing".

¹⁴⁷ Lei Constitucional 1/97 (DE I série no. 281, 20.09.1997). This change was clearly motivated by the adoption of the Directive 95/46/EC which required the extension of at least statutory safeguards not only to data processing "wholly or partly by automatic means" but also to data "which form part of a filing system or are intended to form part of a filing system" (art 3(1)).

¹⁴⁸ Lei Constitucional 1/97.

¹⁴⁹ See SFS 2010:1408 Lag om ändring i regeringsformen (effective 1 January 2011).

¹⁵⁰ See Council of Europe (note 23).

Table 5 - Earliest and Contemporary Constitutional Recognition of General (✦) and Specific (★) Rights to Data Protection (Excluding Nil Returns)

Current EU State	Earliest (see Footnoted Reference) and Contemporary (see generally the Constitute Database – note 21) Constitutional Text	Initial Date & Current Recognition
Austria ★	Data Protection Act 1978, art 1 (Constitutional Provision) ¹⁵¹	1978
	Federal Act concerning the Protection of Personal Data, art 1 (Constitutional Provision) , art 1 (Constitutional Provision)	✓
Croatia ✦★	Constitution of the Republic of Croatia , art 37 ¹⁵²	1990
	Croatia's Constitution of 1991 with Amendments through 2013 , art 37	✓
Czechia ✦	Charter of Fundamental Rights and Basic Freedoms , art 10(3) (via <i>Czechoslovakia</i>) ¹⁵³	1991
	Czechia's Constitution of 1993 with Amendments through 2013 , art 10(3)	✓
Estonia ★	Constitution of the Democratic Republic of Estonia , art 44 ¹⁵⁴	1992
	Estonia's Constitution of 1992 with Amendments through 2015 , art 44	✓
Finland ✦	Constitution Act of Finland 1919 as amended , sec 8 ¹⁵⁵	1995
	Finland's Constitution of 1999 with Amendments through 2011 , sec 10	✓
Greece ✦★	Constitution of 1975 as revised by Parliamentary Resolution of the VIIth Revisionary Parliament of 2001 , art 9A ¹⁵⁶	2001
	Greece's Constitution of 1975 with Amendments through 2008 , art 9A	✓
Hungary ✦★	Constitution of the Republic of Hungary 1949 as amended , art 59(1) ¹⁵⁷	1990 ✦
	Hungary's Constitution of 2011 with Amendments through 2016 , art VI (and Article U(4))	✓ ✦★
Netherlands ★	Constitution of the Kingdom of the Netherlands , art 10 ¹⁵⁸	1983
	Netherlands's Constitution of 1814 with Amendments through 2008 , art 10	✓
Poland ★	Constitution of the Republic of Poland , art 51 ¹⁵⁹	1997
	Poland's Constitution of 1997 with Amendments through 2009 , art 51	✓
Portugal	Constitution of the Portuguese Republic , art 35 ¹⁶⁰	1976 ★

¹⁵¹ See Council of Europe (note 23).

¹⁵² Parliament of Croatia (note 99).

¹⁵³ [28 December 1992] Sbirka Zakonu [Official Gazette] 114, 116. The earliest constitutional recognition by the current State dates from 1993 (note 38).

¹⁵⁴ Comparative Constitutions Project (note 101).

¹⁵⁵ Parliament of Finland (note 102).

¹⁵⁶ Hellenic Parliament English Translation 2004, 24 (*Hein Online*, n.d.)

<https://heinonline.org/HOL/Page?handle=hein.cow/zzgr0001&id=3&collection=cow&index=> accessed 30 April 2021.

¹⁵⁷ English translation at note 104.

¹⁵⁸ Ministry of Home Affairs of the Netherlands (note 128) 2-3.

¹⁵⁹ Comparative Constitutions Project (note 106).

¹⁶⁰ Secretary of State for Mass Communication (note 107).

✦ ✦	Portugal's Constitution of 1976 with Amendments through 2005 , art 35	✓ ✦ ✦
Slovakia ✦	Charter of Fundamental Rights and Basic Freedoms , art 10(1) (via Czechoslovakia) ¹⁶¹	1991
	Slovenia's Constitution of 1991 with Amendments through 2016 , art 19(3)	✓
Slovenia ✦ ✦	Constitution of the Republic of Slovenia , art 38 ¹⁶²	1991
	Slovenia's Constitution of 1991 with Amendments through 2016 , art 35	✓
Spain ✦	The Constitution of Spain , sec 18(4) ¹⁶³	1978
	Spain's Constitution of 1978 with Amendments through 2011 , sec 18(4)	✓
Sweden ✦	Constitution of Sweden [as amended] , Ch. 2, art 3 ¹⁶⁴	1989 ✦ ✦
	Sweden's Constitution of 1974 with Amendments through 2012 , Ch. 2, art 3	✓ ✦

Section Five: Specific Data Protection Rights in EU National Constitutions

Ten EU State Constitutions, as well as the EU Charter, include one or more specific data protection rights as detailed in Table 6 below. In stark contrast to privacy, and as previously emphasised, data protection within the EU is a detailed statutory regime and includes a myriad of safeguards and guarantees. This might suggest a need for any primary or constitutional recognition of the latter to similarly include many specific rights. This understanding does appear to have been partially accepted at pan-EU level. Thus, whereas the EU Charter only specifies two specific rights (related to home and communications) within its right to privacy/respect for private life,¹⁶⁵ it includes six specific rights within data protection. In some contrast, EU State Constitutions which currently include specific data protection rights on average only enunciate between two and three of these. This is almost identical to the situation as regards privacy where, as section two indicated, specific protections are almost invariably set out as regards home and correspondence and in somewhat under half of cases also honour and/or reputation. However, in contrast to home and correspondence which in most cases achieved constitutional recognition much earlier than other privacy rights, each of specific constitutional data protection rights have generally been included within national constitutions at the same time and in parallel to the recognition of a general right to data protection. Two clear exceptions must be noted. In Hungary, the initial recognition of data protection in 1990 did not include any specific rights but in 2011 a particular procedural guarantee of supervision “by an independent authority” was enunciated.¹⁶⁶ In addition, in 2013 this State uniquely set out specific constitutional limits to data protection, as well as associated privacy and personality rights, by stating that:

¹⁶¹ [28 December 1992] Sbirka Zakonu [Official Gazette] 114, 116. The earliest recognition of this right by the current State dates from 1993 (note 56).

¹⁶² Unattributed Translation (Hein Online, n.d.),

<https://heinonline.org/HOL/Page?handle=hein.cow/zcsi0028&collection=cow> accessed 30 April 2021.

¹⁶³ (1979-80) 7 Hastings Const L Q 79, 83.

¹⁶⁴ See Council of Europe (note 23).

¹⁶⁵ EU Charter, art 8(1).

¹⁶⁶ The Fundamental Law of Hungary (25 April 2011) (English translation by the Hungarian Constitutional Court), art VI (3) (Hein Online, n.d.),

<https://heinonline.org/HOL/Page?handle=hein.cow/zzhu0008&id=1&collection=cow&index=> accessed 30 April 2021.

The holders of power under the communist dictatorship shall be obliged to tolerate statements of facts about their role and acts related to the operation of the dictatorship, with the exception of deliberate statements to the public which are untrue in essence; their personal data related to such roles and acts may be disclosed to the public.¹⁶⁷

Meanwhile, whilst originally drawn up in 1976, the Portuguese provisions only came to include a specific guarantee of secrecy or confidentiality¹⁶⁸ from 1982 and only a specific requirement for supervisory oversight and a general guarantee of data protection¹⁶⁹ from 1997.¹⁷⁰

Turning to look at the particular specific data protection rights which have been recognised, rights focused on ensuring necessary privacy or secrecy as regards personal data are relatively common, being found in five EU State constitutions. Arguably this need is also emphasized in the Czech and Slovakian Constitutions which only include a general right to data protection but do explicitly mention unauthorised “publication” as a form of misuse which be particularly countered. However, the most common family of specific rights relate not secrecy or privacy as such but rather to ensuring the transparency of processing for data subjects, primarily on an on-demand or reactive basis.¹⁷¹ Not only the EU Charter but also five national constitutions include an overarching provision here, whilst one (Estonia) sets out rights which apply only as regards information “held in state agencies and local governments and in state and local government archives”. In some cases (e.g. EU Charter, Poland and Slovenia) the law simply refers to ensuring access to personal data itself. However, in other cases there is explicit reference to certain ‘envelope’ information setting out the context within which processing is taking place. The fullest elucidation is found in Austria which enunciates a constitutional right not only to accessing the personal data itself but also to information on “where the data originated from, for which purpose they are used, and in particular to whom the data are transmitted”. In four national constitutions, as well as the EU Charter, transparency is in turn linked to a subjective right to ‘rectify’ personal data. At a minimum this concept encompasses the correction of any incorrect information. Moreover, in Portugal it also explicitly extends to the updating of data, in Poland potentially also to the erasure of information which is incomplete or has been acquired by means contrary to statute and in Austria to erasure in any case of illegal processing.

The next most common grouping emphasizes the need for a clear legal basis for processing either in general (EU Charter, Croatia), where various forms of ‘sensitive’ data are at issue

¹⁶⁷ Venice Commission, Courtesy Translation of the Consolidated Version of ‘The Fundamental Law of Hungary’ (Effective as of 1 April 2013), art U(4) CDL-REF(2013)016, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2013\)016-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2013)016-e) accessed 30 April 2021.

¹⁶⁸ This provision specifies that “third-party access to personal data shall be prohibited” apart from “in exceptional cases provided for by law” (Lei Constitucional 1/82 [30 September 1992] *Diario de Republica* [Official Gazette] 1st series No 227). Originally the clause placed the same restrictions on international data flows but this was replaced in 1989 by a much looser requirement that the law define the rules applicable to such flows (Lei Constitucional 1/89 [8 July 1989] *Diario de Republica* [Official Gazette] 1st series No 155).

¹⁶⁹ Namely, that the State shall “guarantee” the protection of personal data “particularly by means of an independent administrative body”.

¹⁷⁰ See Lei Constitucional 1/97 (20 September 1997) *Diario de Republica* [Official Gazette] 1st series No 218. Further modifications to the detail of the Portuguese constitutional provisions have also been made, the most important of which are noted elsewhere in this article.

¹⁷¹ The only potential exception is the Netherlands which speaks of established rules concerning “the rights to persons to be informed”. However, it is likely that the rules envisaged here at least principally concerned on-demand access rather than the proactive transparency or data protection notice duties which are nevertheless an important part of statutory data protection.

(Portugal)¹⁷² or (most narrowly) where processing involves a record in a public register based solely on political opinions (Sweden). Often these provisions prioritise some form of choice or consent by the data subject. Thus, consent is the only basis for the specified processing in Sweden and in Portugal it is set down as the default rule for ‘sensitive’ data unless this for processing deidentified statistics. Meanwhile, Poland states that “[n]o one may be obliged, except on the basis of statute, to disclose information concerning his person”, whilst the EU Charter only enumerates consent as a basis for processing personal data but also states that this might otherwise be grounded on “some other legitimate basis laid down by law”. The only other specific substantive right found in more than one instrument relates to purpose limitation. In sum, both the Croatian and Slovenian Constitutions prohibit the use of personal data “contrary to the purpose” for which it was collected, whilst the EU Charter more loosely states that the purposes of processing must at least be “specified”. Turning to certain anomalously recognised specific substantive rights, the EU Charter requires that personal data be processed “fairly”, whilst Portugal which has established the fullest and most distinctive enumeration *inter alia* prohibits the establishment of single national identification numbers and requires the establishment of particular rules on international data flows. A final and also relatively common guarantee is procedural in nature. In sum, not only the EU Charter but also the Greek, Hungarian and Portuguese Constitutions require that personal data processing be controlled by an independent supervisory authority. A more limited provision is found in the Croatian Constitution which merely states that supervision here “shall be regulated by law”.

Table 6 - Specific Data Protection Rights Currently Generally or Partially Recognized in EU National Constitutions (see Table 5 for Relevant References) and the EU Charter

EU State (Total)	(Reactive) Transparency	Rectification	Legal Basis	Secrecy/ Privacy	Other Substantive	Supervisory Oversight
Austria (3)	✓	✓		✓		
Croatia (3½)			✓	✓	✓ x 1	✓ (½)
Estonia (½)	✓ (½)					
Greece (1)						✓
Hungary (1)						✓
Netherlands (3)	✓	✓		✓		
Poland (3)	✓	✓	✓ (½)			
Portugal (6½)	✓	✓	✓ (½)	✓	✓ x 2	✓
Slovenia (2)	✓			✓	✓	
Sweden (1)			✓ (½)			
(EU Charter) (6)	✓	✓	✓		✓ x 2	✓

Section Six: Exploring the Historical Roots and Core Nature of Constitutional Privacy and Data Protection Rights

6.1 – Privacy

The empirical findings presented above can speak to both the historical roots and core nature of EU constitutional privacy and data protection rights. Turning first to privacy, the widespread perception of this constitutional right as “old and venerable”¹⁷³ is, in the final analysis,

¹⁷² More precisely defined as “data concerning philosophical or political convictions, party or trade union affiliations, religious beliefs, private life or ethnic origins”.

¹⁷³ Tzanou (note 3) 90.

incorrect. In reality, this right was not itself constitutionally recognised anywhere within what is now the EU until well into the post-World War II era and, in most cases, was absent until the 1990s. Nevertheless, the right to privacy within Europe clearly does have a longstanding constitutional ancestry. It has been asserted by James Whitman that this lies in a preoccupation with a type of “dignity” grounded in “rights to guarantee that people see you the way you want to be seen”.¹⁷⁴ This, in turn, is posited as fundamentally distinct from the American focus on “liberty”, with its ultimate roots in the presentation of “the home as a citadel of individual sovereignty”.¹⁷⁵ Whatever the general merits of Whitman’s account, it does not seem to best explain the historic development of constitutional privacy rights within the EU. As section two demonstrated, a right to privacy arose out of specific and traditional guarantees of the inviolability of the home and the confidentiality of correspondence. The former was widely constitutionally recognised by the turn of the nineteenth century and the later shortly thereafter. Both these specific rights uniquely now find explicit recognition within an overarching privacy guarantee in most EU national constitutions, as well as both the European Convention and EU Charter. In contrast, notwithstanding their long history within the civil and criminal law, constitutional rights to personal honour and/or reputation only clearly emerged at the same time as a general right to privacy and are not explicitly recognised in a majority of EU national constitutions or in either the European Convention or EU Charter.

The confidentiality of communications and, even more so, the inviolability of the home connect at least as strongly to “liberty, and especially liberty from the state” or “freedom from intrusions”¹⁷⁶ as to the protection of “public dignity”.¹⁷⁷ However, what may best encapsulate the core of both of these specific safeguards, and by extension the right of privacy in general, is not liberty or dignity but rather intimacy. Whilst intimacy is itself a rather elusive concept, we can helpfully draw on Julie Inness’ work which relates it to “matters that draw their meaning and value from the agent’s love, liking and care”.¹⁷⁸ When examined through the prism of fundamental rights, the inviolability of the home may be considered to centrally protect the domicile as space for this kind of intimate action (or, indeed, inaction), whilst the confidentiality of correspondence can similarly be considered to focally ensure the possibility and actuality of such intimate relationships at a distance. It is of course true that the home is also the regular location for many activities, particularly commercial or work-related ones, which are not in fact intimate. Similarly, notwithstanding the increasing centrality of (now almost invariably electronic) correspondence to “the maintenance of intimacy in the face of physical separation”,¹⁷⁹ many such communications do not have such concerns or purposes. Nevertheless, this does not remove the special connection between home, correspondence and the protection of intimacy. These strong connections are emphasised not only in the civil European but also the Anglo-American tradition. Thus, writing what came the standard authority on the law relating to English Justices of the Peace, Richard Burn emphasised in 1755 that “a man’s [*sic*] house is his castle, for safety and repose to himself and his family”.¹⁸⁰ Meanwhile, a century later Thomas Cooley, Chief Justice of the Michigan Supreme Court,

¹⁷⁴ Whitman (note 10) 1161.

¹⁷⁵ *Ibid*, 1162.

¹⁷⁶ *Ibid*, p. 1161.

¹⁷⁷ *Ibid*, p. 1161.

¹⁷⁸ Julie Inness, *Privacy, Intimacy and Isolation* (OUP 1992) 11.

¹⁷⁹ David Vincent, *Privacy: A Short History* (Polity Press 2016) 18. This has been a long-range development and the quote cited directly relates to the much earlier period of 1530-1730.

¹⁸⁰ Richard Burns (1755) quoted in Amanda Vickery, *Behind Closed Doors: At Home in Georgian England* (Yale University Press 2009) 30.

argued in favour of the need for telegraphic confidentiality by emphasising its centrality to the protection of “intimate social and family correspondence”.¹⁸¹

However, just as the home and even more so correspondence is not always the location for intimacy, so it is also clear that activities and information may be intimate notwithstanding the lack of a connection to either of these settings. Therefore, recognition of the need for a broader protection of privacy or private life can likewise be connected to a need to safeguard intimacy. If we accept that intimacy requires respect for persons “as beings with the capacity for love, care, and liking”,¹⁸² then it is also clear that this can be undermined not only through the invasion of private spaces and the dissemination of private information but also by attacks on a person’s honour or reputation which question or even fully deny their capacities in this regard. However, not only does defamation not always carry such an imputation or pose such a threat, but its connection to intimate life itself is only ever indirect. This can help explain why recognition of constitutional rights to honour and reputation only clearly emerged with, rather than before, the general expansion of rights to privacy and still remain absent from the majority of EU national constitutions as well as both the European Convention and the EU Charter. The protection of honour and reputation will also inevitably require systematic limits on the freedom of private actors including as regards expression. Undoubtedly, and as Whitman stresses, the civil European legal tradition has, far more so than the Anglo-American one, been ready to see positive State action as required in order to properly vindicate rights. It is, therefore, also unsurprising that whilst a good portion of EU States do recognise honour and reputation as a constitutional fundamental, this has not been the case within the United States.

6.2 – Data Protection

As indicated above, a clear rationale can be forwarded for holding that both the roots and current core of the right to privacy lie in the protection of intimate places, activities and information. Whilst even this connection is far from straightforward or trouble-free, much more formidable problems arise when looking at constitutional data protection. Whilst a general constitutional right to data protection was recognised as early as the 1970s, specific guarantees which attach to it only emerged at the same time. Moreover, even today there is no consensus on what, if any, these are. One relatively common family of specific commitments links data protection back to privacy or secrecy. This serves to emphasise the roots of data protection in privacy imperatives, something which is even clearer in those EU States which have recognised privacy but *not* data protection as a constitutional fundamental. Thus, in recognition of this and also the lack of a specific mention of data protection in the European Convention, all pan-European data protection instruments prior to the EU Charter in the 2000s were grounded at least ‘in particular’ on the protection of privacy. However, drawing a connection between privacy and data protection provides little elucidation of the “added-value”¹⁸³ core of the latter, beyond perhaps some inchoate recognition of the need to connect privacy to contemporary digital developments. Moreover, whilst aspects of data protection

¹⁸¹ Thomas Cooley, ‘Inviolability of Telegraphic Correspondence’ (1879) 79 *The American Law Register* 65, 78. Cooley did also note that the absence of confidentiality would also operate as a “restraint upon industry and enterprise”. Nevertheless, given a context where the vast majority of telegraphic (as opposed to postal) communications would be commercial in nature, it is still striking that he sought to emphasise the connection to intimacy.

¹⁸² Inness (note 178) 140.

¹⁸³ Lynskey (note 16) 569.

including the special protection of sensitive categories such as “sex life” and “health”¹⁸⁴ do clearly link to privacy as conceptualised above, it is manifest that the scope of the data protection regime stretches far beyond these concerns. Most fundamentally, “personal data” has been defined as “any information relating to an identified or identifiable”¹⁸⁵ individual or natural person including, as relevant, published data¹⁸⁶ and/or “innocuous” data such as “a public figure’s job title”.¹⁸⁷ The implications of this breadth have been increasingly recognised¹⁸⁸ and it is notable that unlike many previous texts the EU Charter, which is the sole applicable pan-European instrument and acquired legal status only in 2009, does not seek to explicitly tie data protection to privacy at all.

In any case, specific rights linking data protection to privacy or secrecy are not the most common subsidiary right instantiated at a constitutional level. Instead, these are rights to transparency which, in most cases, are further linked to rights to rectification. Both sub-rights are also found within the EU Charter. Taken together, they suggest that the additional core of a constitutional or primary right to data protection may consist in the direct empowerment of the individual in relation to a wide range of information which relates to them within a ubiquitous data environment. Transparency rights can be seen as particularly focused on addressing “information asymmetries”,¹⁸⁹ whilst rights to rectification can be understood as seeking to grant individuals a measure of subjective control or self-determination over data processing. Requirements for a legal basis for processing are also found in many EU national constitutions, as well as the EU Charter. Their wording similarly tends to prioritise the right to exercise some form of choice over any applicable data processing. Taken together, it could be asserted that all these substantive rights seek “to readjust the balance of power between the individual data subject and those who process personal data”.¹⁹⁰ Finally, there is commonly a procedural emphasis on the need for a statutory supervisory authority. This might be conceptualised as grounded in an understanding that, in light of the often grave imbalances between those who process personal data and individual data subjects, the empowerment of the latter would not be possible without the support of a regulator.

These primarily national understandings map quite closely to those which have been advanced at pan-EU level.¹⁹¹ Nevertheless, they must be considered both tentative and provisional. Two reasons for this have already been mentioned and so will only be briefly recapitulated. Firstly, in contrast to the right to privacy, there is no tradition of the recognition of specific constitutional rights which subsequently became treated as subsidiary to the overarching general right. To the extent to which they can be unearthed, the long-term roots of the right to data protection principally trace back to the same constitutional values as that of privacy. Nevertheless, this connection between privacy and data protection is indirect and increasingly partial. Secondly, even today, no clear consensus has emerged either as to whether data protection should itself be considered a constitutional right or, if so, what specific rights are fundamental to it. Beyond this,

¹⁸⁴ General Data Protection Regulation 2016/679, art 9(1).

¹⁸⁵ See, for example, Data Protection Convention 1981, art 2(a); Data Protection Directive 95/46, art 2(a); General Data Protection Regulation 2016/679, art 4(1) (emphasis added).

¹⁸⁶ Case C-73/07 Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy, EU:C:2008:727, paras 48-49.

¹⁸⁷ UK Information Commissioner’s Office, *Data Protection and Journalism: A Guide for the Media*, 22 (ICO, 2014), <https://ico.org.uk/media/for-organisations/documents/1552/data-protection-and-journalism-media-guidance.pdf> accessed 30 April 2021. Although the UK is no longer a part of the EU, this guide was produced whilst it was a full member.

¹⁸⁸ See, for example, Kokott and Sobotta (note 15).

¹⁸⁹ Lynskey (note 16) 592.

¹⁹⁰ *Ibid*, 591.

¹⁹¹ See, most notably, the account provided by Lynskey (note 16).

and thirdly, the exact rationales for the specific rights which have been recognised remains contestable. Thus, it has been argued above that additional specific rights which are generally found within data protection are best understood as aiming to empower the data subject over a wide range of information relating to them. Nevertheless, a more 'paternalistic' rationale is also plausible. For example, the specific rights which emphasise the close connection between data protection and privacy apply irrespective of any active choice on the part of the data subject. Requirements for a legal basis for processing (and, in a few cases, purpose limitation) as well as oversight by a regulator may also be seen as predicated on the need to ensure *ex ante* discipline on the part of those who processing personal data, only one aspect of which might entail respect for a data subject's choices. Finally, whilst not entirely severable from data subject empowerment, rights to rectification and concomitantly to transparency could be understood as representing an additional mechanism to undergird data accuracy and wider legitimacy standards which should be respected by controllers of personal data processing in any case and *ex ante*.

Section Seven: Conclusions

Whilst a right to privacy has often been understood as a longstanding constitutional guarantee in Europe, the right to be data protection has been seen as novel and innovative. As the detailed analysis of national developments within what is now the EU has demonstrated, these understandings are only partially true. Constitutional guarantees to the inviolability of the home and the confidentiality of correspondence but not to honour or reputation were widespread by the beginning of the twentieth century. These specific guarantees later became integrated as subsidiary rights within an overarching right to privacy or respect for private life. However, despite its inclusion in the European Convention in the 1950s, the later did not emerge strongly at national level until the 1990s. Whilst far from confined to this value, the pre-history of privacy and those specific subsidiary rights which are now nearly ubiquitously recognised within it link most clearly to an imperative to protect intimacy rather than either dignity or liberty.

Some kind of constitutional guarantee to data protection can be traced back to the 1970s although, as with specific rights to honour or reputation which are now explicitly included within or alongside privacy rights in approximately 40% of EU States, these did not become common until the 1990s. Data protection now finds some constitutional recognition in just over half (14) of the EU Member States, with ten acknowledging a general right and eleven one or more specific entitlements. Both general and specific data protection rights are also found in the EU Charter. Nevertheless, beyond a widely acknowledged (but clearly only partial) link to the right of privacy and thereby indirectly to long-standing subsidiary privacy rights, there is no constitutional pre-history to the recognition of the specific additional rights which are now encompassed within data protection. The most common guarantees concern transparency and rectification. These rights may be conceptualised as attempting, within a saturated data environment, to empower individuals and grant them a degree of control or self-determination over a wide range of information relating to them. The focus on choice or consent within various rights to a legal basis for processing may also be conceived as aiming to empower and the emphasis on a supervisory authority similarly understood as based on a recognition that without regulatory support true empowerment would not be possible. Nevertheless, this rationale must be considered both tentative and provisional. Thus, most of the specifically recognised rights including the concept of a legal basis for processing, purpose limitation and regulatory control could also be seen as premised on the 'paternalistic' rationale of securing *ex ante* discipline on the those processing personal data, quite apart from any active choice of the data subject.

Beyond this, there is still no consensus on what specific rights should attach to a right to data protection or even whether this should be a constitutional or primary right at all. The inclusion of both this general right and a range of specific guarantees within the EU Charter is, therefore, an important galvanising development. Nevertheless, it is clear that neither the general right nor the specific guarantees constitute an explicit constitutional tradition common to the Member States. Should it occur, the coalescence of such a constitutional tradition is likely to be experienced as sequential to the general right to privacy which is now an integral part of the EU's common constitutional fabric. In that sense, the right to data protection does remain a novel and mercurial phenomenon.