

**Title**

*Personality, property and other provocations: exploring the conceptual muddle of data protection rights under EU law.*

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**Keywords:**

Data protection, fundamental rights, property rights, personality rights.

**Abstract:**

This article considers the right to data protection under EU law and examines a range conceptual and practical difficulties with which it is besieged. Particularly, the article engages with questions regarding whether the right to data protection as contained in the EU Charter of Fundamental Rights confers on individuals proprietary or personal interests in their personal data. The article considers arguments on either side of this debate and argues that there are notable flaws inherent in both. The article goes on to tentatively argue that rather than providing individuals with proprietary or personal interests in their personal data, the EU data protection framework perhaps confers upon them a different form of right entirely.

## Introduction

Since the mid-twentieth century, data, and perhaps especially personal data,<sup>1</sup> have become increasingly valuable and ubiquitous in commerce and industry worldwide. Whilst human interaction has always involved the processing of personal data in one form another, in our current “Information Society” the processing of personal data is now more important, and the consequences are more far-reaching, than at any other point in history. A rapidly-growing market now exists in which personal data are traded and employed as the basis for marketing and control strategies. Much of the “Internet Economy”, for instance, is fuelled by individuals exchanging their personal data, either actively or passively, in exchange for the use of online services and applications. Concurrently, public sector organisations and government agencies are increasingly reliant on the processing of personal data.

Alongside the digitisation of society, data protection law as a distinct field of law and legal scholarship has assumed an increasingly critical role in our everyday lives, regulating everything from legal responsibility for cyber-security breaches to how social media platforms store and share information regarding their users. In an attempt to stay astride the various regulatory challenges posed by the rapid pace of technological change EU data protection law has granted EU citizens an increasing range of rights in relation to their personal data.

Against this background a debate has emerged in respect of whether these rights grant individuals proprietary interests in their personal data (i.e. property rights) or, alternatively, if it instead grants them the lesser ability to exercise control over those personal data in certain contexts (i.e. personality rights). The purpose of the article is to provide an overview of this increasingly salient debate, highlight the some of the conceptual and practical limitations of arguments on both sides, and lay some preliminary foundations in respect of how the nature of the right to data protection might further be explored. To this end, the article comprises of five substantive sections.

The first section of the article examines the concept of rights as a fixture in the European legal tradition. Here it is explained how rights can be identified and delineated from other forms of legal relationships. The second section considers two categories of rights that are prominent in European legal order: personality rights and property rights. Here the article explains what distinguishes one from the other, and why it is they can be categorised as “rights”. The third section briefly outlines the emergence of data protection law in Europe and introduces the right to data protection as enshrined in the Charter of Fundamental Rights of the European Union. Section four considers how there has been considerable confusion as to the delineation and categorisation of the right to data protection, particularly in respect of whether rights granted under the European data protection framework can be said to provide individuals with proprietary or personal interests in their personal data. Here the article highlights how the cogency of various positions taken on both sides of this debate is somewhat dubious. In its fifth and final substantive section the article considers how the rights granted by EU data protection law are potentially neither property rights nor personality rights, but another form of right entirely. Here the article considers whether data protection rights under EU law might possibly be categorised as so-called “quasi-property rights”, a mechanism that can typically be found in the jurisprudence of the courts of the USA. The article concludes with a summation of its analyses, and some thoughts as to where future research is required.

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<sup>1</sup> In accordance with the definition of personal data contained within the General Data Protection Regulation, this article uses the term “personal data” to refer to “*any information relating to an identified or identifiable natural person*”. See: Art.4(1) General Data Protection Regulation.

## 1. Rights

The word “right” has multiple meanings in legal scholarship and discourse, with many being so entrenched in both ordinary and technical uses that it has been suggested that the best one can hope for is to keep the different meanings of the term distinct, and to see to it that these distinctions are consistently attended to.<sup>2</sup> It is a word that tends to be used indiscriminately and utilised to refer to any sort of legal advantage to which an individual is entitled. It has, however, long been recognised that such opacity in legal language can act as a considerable impediment to the clarity of legal analyses.<sup>3</sup>

When legal scholars speak of rights they, generally speaking, appear to refer to the existence of a state of affairs in which one party (the party in possession of a right), has a claim on an act or forbearance of another party (the party against whom the right can be enforced) in the sense that, should the claim be exercised or in force, and the act of forbearance not be done, it would be justifiable in the circumstances to use coercive measures to extract either the performance required or compensation in lieu of that performance.<sup>4</sup> Whilst this might initially seem straightforward, if we are to look at most familiar rights with a degree of analytical rigour, it quickly becomes evident that they possess a complex internal structure.

According to the American legal theorist Wesley Hohfeld, for instance, all rights necessarily consist of an arrangement of four basic components. Named after Hohfeld himself, the four core components of which all rights are made up, colloquially known as the “Hohfeldian Incidents”, are liberties, claims, powers and immunities. Each of these components has a distinct logical form, and can constitute a right when viewed in isolation, but they can also overlap and bond together to form rights of a more complex nature.<sup>5</sup> In this context, the term “liberty” refers to the ability of the right holder to abstain from acting in a certain way, “claim” refers to the ability of the right holder to be protected from interference from another, or protected from another interfering with something with which they are involved. “Power” refers to the ability of the right holder to initiate changes to their liberties and claims, and “immunity” refers to the ability of the right holder to not have the status of their liberties or claims altered by others without consent.<sup>6</sup> Though there have been scholarly disagreements about some of its details, and some contentions as to its usefulness more generally,<sup>7</sup> Hohfeld’s system for describing the structure of rights, first articulated in 1913, is now widely accepted and is thought to be an effective way by which the composition of all rights can be explained.<sup>8</sup>

To fully appreciate the true and precise meaning of an assertion of any right, it is critical that we understand how said right is constructed, and what said right purports to do. If this cannot be done, then this is not only will this impede any analysis and investigation of that right, but it will also raise questions in respect of its normative value. A right that lacks clarity in terms of its structure, function and purpose for instance, will likely be difficult to apply practically and enforce. As has been convincing

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<sup>2</sup> Becker, L. (2014) *Property Rights: Philosophic Foundations*, Oxon: Routledge

<sup>3</sup> See, for example: Thayer, J. (1898) *A preliminary treatise on evidence at the common law*, Boston: Little, Brown and Company.

<sup>4</sup> *Ibid*

<sup>5</sup> Hohfeld, W. (1913) “Some Fundamental Legal Concepts as Applied in Judicial Reasoning”, *Yale Law Journal* 23.

<sup>6</sup> *Ibid*

<sup>7</sup> See, for example: Newman, C. (2017) “Hohfeld and the Theory of in Rem Rights: An Attempted Mediation” in *The Legacy of Wesley Hohfeld: Edited Major Works, Select Personal Papers and Original Commentaries* ed. by Balganes, S. et al. Cambridge: Cambridge University Press.

<sup>8</sup> MacCormick, D. “Rights in Legislation” in *Law Morality and Society*, ed. by Hacker, P. and Raz, J. (1977) Oxford: Oxford University Press. Other notable theorists, such as Dworkin, have sought to explain rights in terms of their value. See: Andrews, M. (1983) “Hohfeld’s Cube”, *Akron Law Review*

argued elsewhere, for instance, vagueness and the absence of clarity within the law will often have profound impacts on meaning that bear heavily on judicial interpretation.<sup>9</sup>

Accordingly, against this background, Hohfeld's authoritative methodology is extremely useful when it comes to answering questions relating to whether an individual can be said to enjoy a genuine "right" in a given situation, or if they are merely bestowed with some other form of legal advantage. Being able to categorically state that an individual enjoys a "right", as opposed to another form of legal advantage, however, will not necessarily be where the complications regarding conceptual clarity end. Whilst it certainly appears to be true to say that all rights will be made up of Hohfeldian liberties, claims, powers and immunities, questions as to the nature and precise function of a right's constituent liberties, claims, powers and immunities will still require address if the true extent of that right's nature is to be fully understood.

## **2. Property Rights and Personality Rights**

In modern civil law it has been suggested that there are two clear cut notions of rights.<sup>10</sup> Public law recognises fundamental rights, such as traditional human rights and social and economic rights. Private law, conversely, provides an array of subjective rights, notably property rights in physical objects and resources. Personality rights, another important concept in contemporary civil law, do not fit neatly into this dichotomy, and instead function as so-called "private human rights", as a metaphor for non-physical aspects of an individual's persona. As is examined below, whether rights enjoyed by individuals under EU data protection law can be categorised as property rights or personality rights is a contentious matter and has become hotly contested. To contextualise the examination of that debate, the purpose of this section of the article is to outline the key identifying characteristics of property rights and personality rights and how it is they qualitatively and substantively differ from one another.

### **2.1 Property Rights**

Property rights grant their holder the exclusive authority to determine how a resource, item, or object is used. In other words, to have a property right in a thing is to have a bundle of Hohfeldian incidents that effectively grants ownership or sovereignty. For instance, an individual who has an absolute property right in an area of land has the sovereignty to determine whether to use the land themselves, destroy the land, make modifications to the land, or to abandon the land.<sup>11</sup> In this sense, it is noteworthy that property rights convey the right for an individual to destroy their property or deliberately act in a way that may be harmful to themselves or their interests.<sup>12</sup>

In addition to having the capacity to determine the use of a resource, however, property rights have two other main attributes. The first is that they grant their holder the right to the services of a resource. For instance, if the rights holder mentioned above were to opt to lease their area of land to another party, they would also have the right to claim all relevant rental income. The second is that having property rights in a resource or object allows the rights holder to delegate, lease, sell, or gift any portion of their rights to another on whatever basis the rights holder determines. In other words, such rights are alienable. The three key characteristics of a property right, therefore, are that they allow the rights holder exclusivity in respect of choosing how a resource is used, exclusivity to the services of that resource,

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<sup>9</sup> See, for instance: Schiffer, S. "Philosophical and Jurisprudential Issues of Vagueness" in *Vagueness and Law: Philosophical and Legal Perspectives*, ed. by Keil, G. and Poscher, R. (2016) Oxford: Oxford University Press, pp.23-48.

<sup>10</sup> Bruggemeier, G. (2010) *Personality Rights in European Tort Law*, Cambridge: Cambridge University Press.

<sup>11</sup> Beckler, L. (1980) "The Moral Basis of Property Rights", *Property* 22, pp.187-220; Eleftheriadis, P. (1996) "The Analysis of Property Rights", *Oxford Journal of Legal Studies*.

<sup>12</sup> Demsetz, H. "Toward a Theory of Property Rights" in *Classic Papers in Natural Resource Economics* ed. by Gopalakrishnan, C. (2000) London: Palgrave Macmillan, pp.163-177;

and the ability to exchange that resource, object, or item with others on terms that they find agreeable.<sup>13</sup> As been noted in the literature, in other words, the crux of the notion of property rights is that such rights allow the rights holder to exclude others from accessing or making use of the resource or commodity to which the right pertains.<sup>14</sup>

From this we can ascertain that property rights can be identified as rights according to Hohfeldian analysis as they will typically be made up of a bundle of Hohfeldian incidents. The holder of a complete property right in a piece of land as considered above, for instance, will have a liberty to use their land as they see fit subject to any duties not to use their land in a certain way, a claim to exclude others from entering the land, a power to transfer ownership of the land or create an easement and, an immunity from others telling them how to use their land. Simultaneously, other individuals may also have an immunity to fly over the land or possibly to observe the land from an external standpoint.

## 2.2 Personality rights

As seen above, property rights focus on the control of resources, items and objects. Personality rights, conversely, focus on the control of aspects of an individual's being and identity, rather than any material objects, possessions, or land.<sup>15</sup> In other words, they are rights which recognise an individual as a physical, spiritual and moral being, and aim to guarantee and preserve that individual's sense of their own existence. The doctrine of personality rights is far from new. Natural law, with its notion of innate, and inalienable human rights, which included various rights relating to personality, forms the background to concept as it is widely understood today.<sup>16</sup>

In the 1970s, various scholars postulated the idea of a general right to personality, from which particular rights or interests of personality might develop, such as rights to physical integrity, freedom and dignity.<sup>17</sup> Some, such as Gierke, enumerated the key characteristics which distinguish personality rights from other forms of rights, arguing that personality rights are private rights of a non-patrimonial nature, are highly personal in the sense that they are connected to the personality of their holder, and terminate upon the death of the holder, rendering them non-transferable and non-hereditary.<sup>18</sup>

The idea of personality rights existing as a distinct category of rights is now firmly established throughout Europe, though there is some divergence between different legal systems in terms of the recognition and scope of protection of such rights.<sup>19</sup> Despite this divergence, however, it is clear they enjoy widespread recognition, with many European legal systems either acknowledging such rights by statute or through the courts. These rights *inter alia* include: the rights to life, physical integrity, bodily freedom, reputation, dignity, identity, and, as is examined below, potentially privacy and data protection.<sup>20</sup> As noted above, the key distinguishing feature of personality rights is that they are a form of rights that are intrinsically linked to fundamental components and aspects of an individual's

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<sup>13</sup> Hansmann, H. and Kraakman, R. (2002) "Property, Contract and Verification: The Numerous Clausus Problem and the Divisibility of Right", *Journal of Legal Studies*.

<sup>14</sup> See, for example: Penner, J. (1997) *The Idea of Property in Law*, Oxford: Oxford University Press, pg.71; Balganes, S. (2008) "Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions", *Harvard Journal of Law & Public Policy* 31, pg.593; Merrill, T (1998) "Property and the Right to Exclude", *Nebraska Law Review*, pg.730.

<sup>15</sup> Popovici, A. (2004) "Personality Rights – A Civil Law Concept", *Loyola Law Review*.

<sup>16</sup> Neethling, J. (2005) "Personality rights: a comparative overview", *The Comparative and International Law Journal of Southern Africa* 38(2), pp.210-245.

<sup>17</sup> Gareis, K. (1877), "Das juristische Wesen der Autorrechte, sowie des Firmen-und Markenschutzes", cited in Neethling, J. *Ibid*.

<sup>18</sup> Gierke, O. (1895) *Deutsches Privatrecht*, cited in Neethling, J. (2005) *Op Cit*.

<sup>19</sup> In the United Kingdom, for instance, personality rights are almost formally non-existent, with many being protected incidentally through torts such as breach of confidence and defamation.

<sup>20</sup> Modellmog, W. (1998) "Disowning "Personality": Privacy and Subjectivity in the House of Mirth", *American Literature* 70(2), PP.337-363.

character, allow individuals to control certain aspects of their personality, as opposed to their property, and, as a corollary, prevent components and aspects of their personality from being compromised or misused by others.

From this we can ascertain that personality rights, like property rights, can be identified as rights as per Hohfeldian analysis as they will typically be made up of a bundle of Hohfeldian incidents. The holder of a personality right, for instance, may have a liberty to behave or utilise aspects of their identity as they see fit, a claim to exclude others from utilising aspects of their identity, a power to allow others to utilise aspects of their identity, and an immunity from others dictating to them how to behave or utilise aspects of their identity.

### **2.3 Distinguishing property rights and personality rights**

By considering each in turn we can see that both property rights and personality rights can be identified as rights within the scope of Hohfeldian analysis. Particularly, we can identify that both property rights and personality rights can be considered rights in accordance with the Hohfeldian methodology, as both will likely have a combination of Hohfeldian incidents at their core. It can also be argued that both forms of rights also share some similarities in terms of their theoretical underpinnings and rationale. Various observers have suggested, for instance, that the ultimate purpose of both property rights and personality rights is to ensure economic efficiency, to protect of civil liberties, and to protect individuals from other parties making unjust interferences in their lives.<sup>21</sup>

However, despite these similarities, we can also discern that property rights and personality rights are qualitatively and conceptually distinct. Property rights are, as noted above, concerned with allowing individuals to assert their ownership or sovereignty over specific resources, items or objects. Whilst both property rights and personality rights may have the ultimate objective of protecting individuals from unjust interferences in their lives, the doctrine of property rights does so by way of attempting to secure an individual's legal interests in external things, objects or resources to which the individual can assert some connection. They are rights that tend to be infringed when the rights-holder experiences some form of interference in their enjoyment of an external thing to which they have a right, or when that thing experiences some form of pecuniary damage or harm. Such rights are also alienable. Accordingly, they are a form of rights which exist independently of an individual's personality.

The same, however, cannot be said for personality rights. The doctrine of personality rights attempts to shield individuals from unjust interferences in their lives through attempting to identify fundamental innate aspects of their personhood and expressing them as legal values. They are rights that come into being when an individual is born, cease to exist when the individual dies, cannot exist independently of an individual's personality, and are thus inalienable. The infringement of such rights primarily results in personality harm, non-pecuniary loss or damage, which is any damage of, or diminution to, an aspect of an individual's personality rather than a diminution in the individual's patrimony, and therefore cannot be calculated in money by way of reference to a market value.

Thus far, this article has considered the different criteria that can be used to identify the existence of a right and, pursuant of this, has outlined the key features and characteristics that can be used to identify two important categories of rights in contemporary civil law: property rights and personality rights. What is significant for the purposes of this article, however, is that whilst property rights and personality rights can, on paper at least, be clearly delineated, in practice issues can arise in respect of which of these two categories certain rights or bundles of rights fall within. One subject area in which this is

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<sup>21</sup> Walsh, C. (2013) "The justifications underlying personality rights", *Entertainment Law Review*; Samuelson, P. (1999) "Privacy as Intellectual Property?", *Stanford Law Review*; Neethling, J (2005) Op Cit.; Becker, J (2014) Op Cit; Becker, J. (1980) "The Moral Basis of Property Rights" in *Property*, ed. by Pennock, J. and Chapman, J. (1980) New York: New York University Press, pp.187-220.

particularly true, and one that comprises the focus of this article, are rights pertaining to an individual's personal data.

### **3. Historical background data protection as a legal concept: the emergence of the right to data protection**

Data protection as a specific field of law has developed over the last forty years at a European level, notably in the context of the Council of Europe and, more recently, in the context of the European Union. If we are to examine how the EU has continued on the basis of the work done earlier by the Council of Europe two prominent themes can plainly be identified. The first relates to the development of ever stronger privacy and data protection rights. The second relates to the need to ensure a more consistent and clearly delineated application of those rights across EU Member States.<sup>22</sup> Significantly, in relation to the development of both themes, recent history has demonstrated the increasing impact of the Charter of Fundamental Rights of the European Union, particularly in relation to the case law of the Court of Justice.<sup>23</sup>

The concept of a right to privacy only emerged in international law after the conclusion of the Second World War. The first notable example of this was Article 12 of the Universal Declaration of Human Rights, according to which nobody shall be subjected to arbitrary interference with their privacy, family, home or correspondence.<sup>24</sup> A more substantive protection followed in Article 8 of the European Convention on Human Rights,<sup>25</sup> according to which everyone has the right to respect for their private and family life, their home and their correspondence.<sup>26</sup> The scope of this protection has been articulated at length by the European Court of Human Rights in a series of high profile judgments. In cases concerning the protection and interpretation of the right to privacy the court will consider whether there has been an interference with the right to respect for a private life and, if so, whether that interference has an adequate legal basis.

Despite the ECtHR having made several high-profile judgments affirming the importance of the right to a private and family life, in the 1970s the Council of Europe concluded that Article 8 ECHR had several observable shortcomings. Particularly, there were notable concerns that the right to privacy, as envisaged by the ECHR, was not flexible enough to adequately protect individuals from harms and abuses stemming from the misuse of personal information linked to the computerised processing of data that was becoming increasingly prevalent in both public and private sectors.<sup>27</sup> These concerns culminated in the Council of Europe adopting the Data Protection Convention in 1981, also known as Convention 108, the purpose of which was to secure individuals' fundamental rights and fundamental freedoms, but particularly the right to privacy, in relation to the automatic processing of their personal data.<sup>28</sup> At this point it is important to note that the approach of the Convention was *not* that the processing of personal data would *always* amount to an interference with the right to privacy as per Article 8 ECHR, but that for the *protection* of privacy and other fundamental legal rights and freedoms any processing of personal data must observe certain legal conditions.<sup>29</sup>

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<sup>22</sup> Hustinx, P. (2013) "EU Data Protection Law: The Review of Directive 95/46/EC and the Proposed Data Protection Regulation" in "Collected Courses of the European University Institute's Academy of European Law, 24<sup>th</sup> Session on European Union Law, 1-12 July 2013".

<sup>23</sup> [hereinafter CJEU]

<sup>24</sup> Article 12 Universal Declaration of Human Rights.

<sup>25</sup> [hereinafter ECHR]

<sup>26</sup> Article 8 ECHR.

<sup>27</sup> Bygrave, L. (2014) *Data Privacy Law: An International Perspective*, Oxford: Oxford University Press; Hustinx, P. "The Reform of EU Data Protection" in *Emerging Challenges in Privacy Law* ed. by Witzleb, N. *et al.* (2014) Cambridge: Cambridge University Press. Pp.62-71.

<sup>28</sup> Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, January 1981, CETS no.108.

<sup>29</sup> Hustinx, P. (2013) *Op Cit.*

Despite Convention 108 putting data protection on the agenda, due to inconsistencies in its implementation across Member States, the European Commission, concerned that this lack of harmonisation may hamper the development of the internal market, submitted a proposal for a Data Protection Directive in 1990. After several years of negotiations, the Data Protection Directive was adopted in 1995 and required all EU Member States to protect the fundamental rights and freedoms of natural persons, particularly the right to privacy, with respect to the processing of personal data.<sup>30</sup> The Directive contains all the principles contained within Convention 108, but supplements them with additional rules and provisions. The Directive's lifespan, like the Convention before it, however, has been troubled and wrought with complication. Not only have problems relating to divergences in application between Member States persisted, but technological advancements, such as the emergence of new data mining and analytical technologies associated with the emergence of so-called "big data", have called into question the efficacy of several of the Directive's core tenets.<sup>31</sup>

So to address some of these concerns the imminent General Data Protection Regulation will replace the Directive and will come into force May 2018.<sup>32</sup> The GDPR is premised on the same principles and rationale as the Convention and Directive before it, but aims to overhaul the existing European data protection regime and has been drafted specifically to respond to the challenges posed by contemporary data-handling practices. Significantly in this regard, the GDPR contains various novel provisions designed to help individuals to protect themselves from harms that may stem from the processing of their personal data, and to put them in a position from which they can more easily and effectively control how their personal data are used by others. Perhaps the most prominent example of this is the much talked about right to be forgotten.<sup>33</sup>

What this brief overview of the development of data protection law in Europe shows is that out of the apparent shortcomings of Article 8 ECHR, data protection has emerged as distinct and extensive body of law at the European level. However, alongside the abovementioned legislative developments of the last few decades, other key developments were taking place elsewhere. Significantly, in June 1999 the European Council began drafting the Charter of Fundamental Rights of the European Union, eventually culminating in the Charter's proclamation at the European Summit in Nice in December 2000.<sup>34</sup>

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<sup>30</sup> Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data [hereinafter, the Data Protection Directive]

<sup>31</sup> See, for example: Pearce, H. (2017) "Big Data and the Reform of the European Data Protection Framework: An Overview of Potential Concerns Associated with Proposals for Risk Management-based Approaches to the Concept of Personal Data", *Information & Communications Technology Law* 26(3) pp.312-335; Pearce, H. (2016) "Systems thinking, big data and data protection law: Using Ackoff's Interactive Planning to respond to emergent policy challenges", *European Journal of Law Reform* 18(4) pp.475-504. Ohm, P. (2010) "Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization", *UCLA Law Review*, pg.1707; Colana, L. (2013) "Mo' Data, Mo' Problems? Personal Data Mining and the Challenge to the Data Minimization Principle", *The Future of Privacy Forum and Stanford Law School Center for Internet & Society*; Mayer-Schonberger, V. and Cukier, K. (2013) *Big Data: A Revolution That Will Transform How We Live, Work and Think*, Oxford: John Murray Publishers.

<sup>32</sup> Officially known as Regulation (EU) 2016/679 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 [hereinafter GDPR]

<sup>33</sup> In short, the right to be forgotten entitles bestows upon data subjects the right to acquire the deletion of any personal data held by a third party, and is enshrined in Article 17 of the GDPR. For various reasons it has, however, been a source of controversy with various observers highlighting a range of concerns in respect of its nomenclature and possible consequences of its enforcement. See, for instance: Koops, B. (2011) "Forgetting Footprints, Shunning Shadows: A Critical Analysis of the 'Right to Be Forgotten' in Big Data Practice", *SCRIPTed* 8(3); Ausloos, J. (2011) "The 'Right to Be Forgotten' – Worth Remembering?", *Computer Law & Security Review* 28(2).

<sup>34</sup> Charter of Fundamental Rights of the European Union OJ C 364, 18.12.2000.



Since the entry into force of the Lisbon Treaty<sup>35</sup> in 2009 the Charter has been binding on EU Member States and has the same legal status as other EU treaties. For the purposes of this article, one of the most significant elements of the Charter is the way in which it explicitly recognises separate rights to privacy and data protection. Article 7 of the Charter mirrors the wording of Article 8 ECHR and states that “everyone has the right to respect for his or her private and family life, home and communications”. Following this, Article 8 of the Charter states that “everyone has the right to the protection of personal data concerning him or her”. The inclusion of a right to data protection alongside the right to privacy formally differentiates the Charter from other key European human rights instruments, which tend to treat data protection as the subset of privacy.<sup>36</sup>

According to the Charter’s explanatory notes, the right to privacy guaranteed in Article 7 of the Charter corresponds to that guaranteed by Article 8 ECHR.<sup>37</sup> Both are examples of so-called “classical” fundamental rights, where interference with those rights is subject to strict qualifications. The explanatory notes also pass comment on Article 8 of the Charter, outlining the fact that it is based on Article 286 EC Treaty, the Data Protection Directive, Article 8 ECHR and the Data Protection Convention. It is further specified that the right to protection of personal data is to be exercised under the conditions laid down in the Directive.<sup>38</sup> As they are mentioned as two separate rights, it would seem logical to conclude that Articles 7 and 8 of the Charter do not have the same character and must be considered independent and distinct from one another.

Despite the fact that they are listed separately, however, it is sometimes debated whether the two rights can categorically be considered conceptually distinct or, instead, the right to data protection exists both theoretically and practically as a subset or relation of the right to privacy.<sup>39</sup> This is an issue that has now been well-traversed in the data protection literature, and for this reason it is not necessary, nor would it be useful, to recount it in any great detail here. As has been convincingly argued by others elsewhere, for instance, notably Lynskey, there are an array of compelling reasons as to why the right to data protection can be considered as completely distinct to the right privacy, and a fully-fledged right of its own.<sup>40</sup>

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<sup>35</sup> Formally known as the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007/C 306/01)

<sup>36</sup> For instance, data protection is treated as a subset to privacy by the national Constitutions of the Netherlands, Spain and Finland. It should be noted, however, that there are some EU Member States which historically have done the opposite, and have not envisaged one as a subset of the other. See: Fuster, G. (2014) *The Emergence of Personal Data Protection as a Fundamental Right of the EU*, London: Springer.

<sup>37</sup> Explanations relating to the Charter of Fundamental Rights of the European Union, document CONVENT 49 of 11.10.2000, explanation on Article 7.

<sup>38</sup> *Ibid.*, explanation on Article 8, footnote 75.

<sup>39</sup> See, for example: Fuster, G. and Gutwirth, S. (2013) “Opening up personal data protection: A conceptual controversy”, *Computer Law & Security Review* 29(5), pp.531-539; Oliver, P. “Privacy and Data Protection: The Rights of Economic Actors” in *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing*, ed. by de Vries, S. et al. (2015) Hart: Oxford; It should also be noted that there is some normative debate as to whether data protection should be considered a fundamental right at all, though an examination of this issue is beyond the scope of this research. See: van der Sloot, B. “Legal Fundamentalism: Is Data Protection Really a Fundamental Right?” in *Data Protection and Privacy: (In)visibilities and Infrastructures*, ed. by Leenes, R. et al. (2017) Springer: London. and McDermott, Y. (2017) “Conceptualising the right to data protection in an era of Bog Data”, *Big Data & Society*, available at: <http://journals.sagepub.com/doi/full/10.1177/2053951716686994>; For a detailed overview of the relevant CJEU and ECHR case law, see: Lynskey, O. (2014) “Deconstructing data protection: the ‘added-value’ of a right to data protection in the EU legal order”, *International Comparative Law Quarterly* 63(3), pp.569-597 and Kokott, J. and Sobotta, C. (2013) “The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR”, *International Data Privacy Law* 3(4), pp.222-228.

<sup>40</sup> This is primarily because studies of the right to data protection have revealed it to encompass a broader range of interests and activities than the right to privacy. See: Lynskey, O. (2014) *Op Cit*; Kokott, J. and Sobotta, C. (2013) *Op Cit*; Lynskey, O. “From Market-Making Tool to Fundamental Rights: The Role of the Court of

However, whilst the right to data protection can be considered conceptually distinct from other related rights, like privacy rights, there are unanswered questions as to the nature of the right to data protection. Specifically, there is confusion as to whether the right to data protection as contained within Article 8 of the Charter, along with the range of rights conferred on individual data subjects by various secondary EU legislation which makes up the European data protection framework, confers upon individuals proprietary or personal interests in their personal data.

#### **4. Data protection rights: property rights or personality rights?**

The previous section of this article demonstrated that whilst privacy and data protection are overlapping concepts and share much in common, it has been demonstrated that they are configured and protected differently, and thus can and should be considered distinct. However, even if this can categorically be established, there is still a debate to be had in respect of the classification and categorisation of the right to data protection. As alluded to above there is disagreement between various scholarly observers as to whether the rights granted to individuals by EU data protection legislation can be considered property rights or personality rights. This is true not just in respect of whether a data subject's personal data *should* be thought of in terms of property or personality, but whether the law, as it is, objectively treats them as such.<sup>41</sup>

##### **4.1 Scholarly perspectives on whether data protection *should* be conceptualised as a means of protecting proprietary or personal interests**

As outlined above, the doctrine of personality rights aims to provide individuals with a means by which they can control aspects of their character, personality or identity. Significantly, over the last one hundred or so years, the basis of various scholarly conceptualisations of privacy, and more recently data protection, have been couched in such language. Perhaps most famously Alan Westin conceptualised privacy as the ability of the individual to control when, how, and to what extent information about them is communicated to other parties.<sup>42</sup> The notion of privacy as a means by which an individual can control aspects of their personality differs, therefore, from other prominent conceptualisations of privacy, such as considering privacy to be a "right to be let alone".<sup>43</sup>

The crux of privacy and data protection as conceived in this way is the idea that the individual's self-determination and choices in respect of how aspects of their identity are used or handled by others should take precedence over other competing values and interests. In this sense, when envisaged this way, privacy and data protection can essentially be conceptualised as forms of information management, where control is achieved through the expression of an individual's personal preferences. Theories of privacy and data protection as control of aspects of one's personality therefore, rely on the

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Justice in Data Protection's Identity Crisis" in *European Data Protection Law: Coming of Age*, ed. by Gutwirth, S. et al. (2013) Springer: London, pg.59; Gellert, R. and Gutwirth, S. (2013) "The legal construction of privacy and data protection", *Computer Law & Security Review* 29, pp.522-530; Fuster, G (2014) Op Cit; de Andrade, N. "Data Protection, Privacy and Identity: Distinguishing Concepts and Articulating Rights" in *Privacy and Identity Management for Life* ed. by Fischer-Hübner, S. et al. (2011) Berlin: Springer.

<sup>41</sup> Parallels can also be drawn with a larger debate that has been ongoing for some time, regarding whether individuals can be said to "own" their bodies. On this issue, see: Grubb, A. (1998) "I, Me, Mine": Bodies, Parts and Property", *Medical Law International*; Kenyon, M. and Laurie, G. (2001) "Consent or property? The shadow of Bristol and Alder Hey", *Modern Law Review*; Feldman, R. (2010) "Whose Body is it Anyway", *Stanford Law Review*.

<sup>42</sup> Westin, A. (1967) *Privacy and freedom*, New York: Atheneum Press.

<sup>43</sup> Fried, C. (1968) "Privacy", *Yale Law Journal*; Rachels, J. (1975) "Why privacy is important", *Philosophy & Public Affairs*; Schwartz, P. (2000) "Internet Privacy and the State", *Connecticut Law Review*; Cohen, J. (2000) "Examined Lives, Informational Privacy and the Subject as Object", *Stanford Law Review*; Solove, D (2013) "Privacy Self-Management and the Consent Paradox", *Harvard Law Review*.

presumption that individuals are autonomous and rational beings, capable of determining for themselves whether and when they wish to disclose aspects of their personal data to others.<sup>44</sup>

Alongside the notions of privacy and data protection as the ability for one to control aspects of one's personality, other scholars have taken a divergent approach, and conceptualised the two in terms of property. A notable, and apparently growing, part of the scholarly literature pertaining to privacy and data protection, for instance, considers how the two notions should be conceptualised as the ability of individuals to "own" their personal data. According to such views, privacy and data protection can be likened to property rights in that they are concepts that are directly and intrinsically linked to the idea that individuals should be able to stake legal, or possibly equitable, ownership of their personal data.

As has been remarked elsewhere, and in accordance with the discussion of property rights above, in this sense the concepts of privacy and data protection evoke ideas of absolute inviolable sovereignty over personal data which entail an exclusivity axiom, which theoretically allows the owner of personal data to protect those data from unwanted uses, sharing, and alteration, and grant them full alienable rights to those data.<sup>45</sup> Such views tend to be premised on the notion that all types of information constitute a form of property, and therefore it must be possible for them to be owned. Though much of the academic scholarship in this vein has historically emanated from the USA,<sup>46</sup> it is now a topic which, as is examined in greater detail below, is beginning to draw more attention from scholars within Europe.<sup>47</sup>

The competing conceptions of privacy and data protection as personality and as property clearly share some similar assumptions. Both, for instance, are necessarily reliant on the premise that individuals are rational and autonomous beings who are capable of forming personal preferences and determining courses of action by which those preferences can be expressed. In other words, both are concerned with establishing individual control over personal data. Both conceptions, therefore, appear to be linked to individualism, a philosophical school of thought which emphasizes the moral worth of the individual at the expense of any competing interests of groups of individuals or the state.<sup>48</sup> The two conceptions of privacy and data protection outlined above, for instance, bestow upon the individual the ability to define, unilaterally and independently, their relationships with others, effectively rendering the crux of privacy and data protection as the ability of the individual to detach themselves from other individuals and society at large.

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<sup>44</sup> Lazaro, C. and Le Metayer, D. (2015) "The control over personal data: True remedy or fairy tale?", scripted 12(1) pg.7. It should be noted that people have criticised the "privacy as control" conception of control, on the basis that "controlled" disclosures or uses of personal data can still lead to so-called "privacy harms", see: Allen, A. (2000) "Privacy-As-Data-Control: Conceptual, Practical, and Moral Limits of the Paradigm", *Connecticut Law Review* 32

<sup>45</sup> Lazaro, C. and Le Metayer, D. (2015) Op Cit.

<sup>46</sup> See, for example: Mell, P. (1996) "Seeking Shade in a Land of Perpetual Sunlight: Privacy as Property in the Electronic Wilderness", *Berkley Technology Law Journal* 11, pp.1-78; Samuelson, P. (1999) Op Cit; Litman, J. (2000) "Information Privacy/Information Property", *Stanford Law Review* 52, pg.1286; Lessig, L. (2002) "Privacy as Property", *Social Research* 69(1), pp.247-269; Bergelson, V. (2003) "It's Personal but Is It Mine? Toward Property Rights in Personal Information", *U.C. Davis Law Review* 37, pg.383; Zarsky, T. (2004) "Desperately seeking solutions: using implementation-based solutions for the troubles of information privacy in the age of data mining and the internet society", *Maine Law Review* 56, pp.13-59; Murphy, R. (2006) "Property Rights in Personal Information: An Economic Defense of Privacy", *Georgetown Law Journal* 84; Schwartz, P. (2004) "Property, Privacy, and Personal Data", *Harvard Law Review*.

<sup>47</sup> See, for example: Purtova, N. (2014) "Default entitlements in personal data in the proposed Regulation: Informational self-determination off the table...and back on again?", *Computer Law & Security Review* 30(1); Purtova, N. (2010) "Property in Personal Data: a European Perspective on the Instrumentalist Theory of Propertisation", *European Journal of Legal Studies* 6; Prins, C. (2006) "When personal data, behaviour and virtual identities become a commodity: Would a property rights approach matter?" *SRIPTed* 3(4).

<sup>48</sup> Wood, E. (1972) *Mind and Politics: An Approach to the Meaning of Liberal and Socialist Individualism*, Oakland, California: University of California Press, pg.6.

However, despite any overlying similarities, these two conceptions are clearly anchored in different theoretical backgrounds. The idea of privacy and data protection as personality, for instance, relies on the presumption that an individual's personal data intrinsically represents key constituent aspects of that individual's character, and that said individual should be able to control those data so to maintain the integrity of their identity. Conversely, the idea of privacy and data protection as property is based on the presumption that an individual's personal data, rather than being considered an intrinsic feature of their identity, can essentially be thought of as an external resource to which the individual is entitled to control due to their ownership of that resource.

The debate as to whether privacy and data protection should be couched in terms of property or personality in the context of the European data protection framework is now seemingly gathering momentum. Notably, in the context of contemporary data-handling practices, it is increasingly being questioned whether traditional approaches to the regulation of data processing activities, such as human rights law and data protection law, offer an adequate level of protection to individuals as would a property rights system of regulation.<sup>49</sup> Such debates tend to focus primarily on whether the explicit creation of a proprietary right in personal data would be too drastically out of line with continental European legal tradition for such a move to ever be successful.<sup>50</sup> Others, recognising that the idea of individuals enjoy property rights in respect of their personal data has some attractive benefits, suggest in practical terms that such a regime could be unworkable.<sup>51</sup>

Other notable concerns that are frequently espoused tend to focus on the fact that the creation of a property right in personal data would likely create fresh regulatory challenges relating to the emergence of personal data marketplaces. Particularly, some observers have remarked that the risk of a market failure in such markets would be so severe that any benefits to be accrued from the propertisation of personal data would be outweighed by the risk of potential harms.<sup>52</sup> In a similar vein, it has also been argued that privacy and data protection are public goods, rather than private resources, and that granting absolute rights in personal data could prevent the imposition of restrictions on an individual's use of their data, possibly to the detriment of others.<sup>53</sup>

#### **4.2 Does European data protection law protect proprietary or personal interests?**

Despite the existence of the abovementioned normative debates as to whether personal data *should* be categorised as property or as aspects of an individual's personality, none of the ECHR, the Charter of Fundamental Rights of the European Union, EU data protection legislation, nor the jurisprudence of the ECtHR or the CJEU explicitly categorise the rights to privacy and data protection as one or other. Consequently, another strand of debate has emerged, which focuses not on whether privacy and data protection *should* be viewed through the lenses of property or personality, but whether existing legal frameworks, the absence of any formal demarcations notwithstanding, *do* view them through either of these lenses.

In this respect, it might be asked if the practical consequences of the rights of privacy and data protection are ultimately the same (i.e. they both provide legal mechanisms by which individuals can assert influence and control, and restrict the use of their personal data by others), then does their categorisation really matter? For reasons alluded to above in this article's introductory sections, the answer to this question is plainly yes. Far from being an indulgent question, as noted above, for any legal right to be fully understood it is critical that its internal structure can be identified, and that the precise nature of

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<sup>49</sup> Prins, C. (2006) Op Cit.

<sup>50</sup> See: Putova, N. (2010) "Private Law Solutions in European Data Protection: Relationship to Privacy, and Waiver of Data Protection Rights", *Netherlands Quarterly of Human Rights* 28(2), pp.179-198.

<sup>51</sup> Bernal, P. (2014) *Internet Privacy Rights: Rights to Protect Autonomy*, Cambridge: Cambridge University Press, pg.178.

<sup>52</sup> Schwartz, P. (2004) Op Cit.

<sup>53</sup> *Ibid*

that right can be stated with certainty. If this cannot be done the situation will be unsatisfactory for several reasons. Namely, if the conceptual foundations of a right cannot be identified and stated the resultant lack of conceptual clarity will likely severely impede any legal analyses of it. In turn, this will inevitably lead to problems in terms of its practical application and enforcement, and raise doubts as to its normative value. How, for instance, can any purported right be convincingly described as fundamental if its nature, character and purpose cannot be rigorously defined?

These concerns are perhaps particularly salient in the context of the right to data protection where, due to a lack of conceptual clarity, doubts have already been expressed in respect of its long-term future.<sup>54</sup> In this vein, there is widespread disagreement as to the character of the right to data protection, with some observers arguing that the EU data protection framework already constitutes a property-like regulatory regime in everything but name, whilst others argue that individuals only enjoy something akin to personality rights in respect of their personal data. As will be argued below, however, there are doubts as to cogency of both positions.

#### **4.2.1 Arguments that EU data protection law grants proprietary interests in personal data**

Perhaps the most significant driver of the growing body of opinion that the European data protection framework can be considered a property regime is the GDPR which, as noted above, contains several new provisions and rights which purport to allow individuals to control their personal data. The right to be forgotten and right to data portability are two of the most prominent examples of this. Significantly, some have suggested that despite the GDPR *prima facie* being premised on human rights rhetoric and employs no explicit property terminology, its substantive provisions function remarkably similarly to regulated property regimes.<sup>55</sup> Particularly, for instance, Victor suggests that not only does the GDPR in effect create a property regime in personal data in which a property entitlement belongs to the individual to whom any personal data relate, but that more specifically the GDPR appears to implicitly acknowledge that the concept of personal data itself has become akin to a commodity that is capable of changing hands and being traded.<sup>56</sup> In particular, he suggests that three elements of the GDPR particularly lend themselves to a property-based conception of data protection.

First, it can be argued that the various requirements imposed on data controllers by the GDPR are all predicated on the notion that the individual data subject maintains a default entitlement to their personal data. In particular, the GDPR lists a number of grounds by which the processing of an individual's personal data can be rendered legitimate, one of which is the unambiguous consent of the individual.<sup>57</sup> Under these grounds the individual to whom the personal data relate must be informed that their data have been collected and that they have the prerogative to object to any uses of their personal data,<sup>58</sup> or possibly to have those data erased.<sup>59</sup> In this sense, it is argued that the GDPR is premised on the assumption that although personal data is a commodity that is capable of changing hands, the individual always retains the ultimate entitlement to their personal data. In other words, even if an individual imparts with their personal data, and the personal data enter the possession of a third party, the individual to whom those data relate retains the ultimate authority to determine how those data are used.

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<sup>54</sup> Rodota, S. "Data Protection as a Fundamental Right" in *Reinventing Data Protection?* ed. by Gutwirth, S. et al. (2009) Dordrecht: Springer.

<sup>55</sup> Purtova, N. (2014) *Op Cit*; Ausloos, J. (2012) "The 'Right to be Forgotten' – Worth Remembering?", *Computer Law & Security Review* 28(2).

<sup>56</sup> Victor, J. (2013) "The EU General Data Protection Regulation: Toward a Property Regime for Protecting Data Privacy", *Yale Law Journal*.

<sup>57</sup> Art.6(a) and Art.4(11) GDPR

<sup>58</sup> Arts. 13, 14 & 15 GDPR

<sup>59</sup> Art.17 GDPR

The sovereignty to determine the use of a resource or commodity in such a way, Victor argues, is a habitually characteristic of regulated property regimes.<sup>60</sup>

Second, not only does the GDPR establish the individual's default entitlement to their personal data, but this default entitlement creates a burden that metaphorically runs with those data and has the effect of binding others.<sup>61</sup> In other words, the rights to which the individual is entitled under the GDPR, such as the right to erasure, can be enforced not just against a party with which the individual initially shared their personal data, but against any other third parties who may have gained access to those data. This indicates that rather than perceiving data protection and its associated rights as attached to a specific person (i.e. a personality right), the GDPR grounds these rights in the individual's personal data themselves, allowing them to function as a form of negative covenant. Again, this is a trait that can be described as "property-like".<sup>62</sup>

Third, the system of remedies established by the GDPR mirrors schemes traditionally used to protect proprietary interests. As noted previously, property rights protect an individual's interest in a certain object or resource. Notably, an interest will be protected from an unwanted use or taking by another party, under the assumption that property can only legitimately change hands if the consent of the rights holder is given. The interest of rights holders in this context tend to be protected by courts and legislatures by way of fines, punitive damages or injunctions. Correlatively, the GDPR provides a variety of avenues for individuals to enjoin a third party to erase their personal data, essentially enforcing the abovementioned default entitlement of the individual by "returning" the personal data to their ownership. Individuals are also able to "lodge a complaint" against third parties through their local "supervisory authority", a body that has the power "to order the rectification, erasure or destruction" of data,<sup>63</sup> and may also bring a direct action against a third party in local courts, which are empowered to enforce the provisions of the GDPR by way of granting compensation for any breach that can be established.<sup>64</sup> Finally, in the event a third party who either negligently or intentionally ignores an individual's attempts to exercise their rights under the GDPR may be subject to fines.<sup>65</sup>

Recognising the fact that the GDPR envisages personal data as a commodity that is capable of changing hands and effectively being traded, others have built on Victor's arguments, and have offered differing perspectives. Purtova, for instance, suggests that so long as personal data bear a high economic value, any attempt to portray such data as *res nullius*, or as nobody's property, as the European data protection framework appears to do, would be to attempt to perpetuate a fallacy that cannot be reconciled with the practical realities of contemporary data-handling practices.<sup>66</sup> Rather than accepting Victor's argument that the default entitlement in personal data rests with the individual to whom those data relate, Purtova argues that the European data protection framework does not assign clear default entitlements. Despite this, however, using the work of the American economist John Umbeck as a basis, she argues that in the absence of any *de jure* allocation of default entitlements in any tradable commodity or economic asset, the actor with the greatest market influence will always necessarily *de facto* be able to stake ownership of that commodity or asset. In the context of personal data the actors with the greatest market share are of course information industry conglomerates such as Google.<sup>67</sup>

In Purtova's view, therefore, due to the European data protection framework not specifically specifying default entitlements in personal data, information industry actors have been able to take greater control

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<sup>60</sup> Victor, J. (2014) Op Cit.

<sup>61</sup> *Ibid*

<sup>62</sup> *Ibid*

<sup>63</sup> Arts.58 and 77 GDPR

<sup>64</sup> Art.82 GDPR

<sup>65</sup> Art.83 GDPR

<sup>66</sup> Purtova, N. (2015) "The illusion of personal data as no one's property", *Law, Innovation and Technology* 7, pp.83-111.

<sup>67</sup> *Ibid*

of individuals' personal data, rendering them *de facto* owners. This conclusion is based on the findings that such actors are able to effectively deny individuals meaningful opportunities to avoid data collections<sup>68</sup> and, due to the rivalrous nature of data-driven business models, have the ability to exclude their competitors from accessing any of the personal data harvested from their users.<sup>69</sup> Significantly, whilst both Purtova and Victor evidently disagree about where the default entitlement to an individual's personal data lies, they are both in firm agreement that the EU data protection framework constitutes a property regime in everything but name, and that so long as personal data maintain a high economic value the real question is not whether there are, or should be, property rights in personal data, but who those rights belong to.

#### **4.2.1.1 Dissecting the property rights arguments**

The suggestions that EU data protection law grants individuals proprietary interests in their personal data, such as those considered above, are not *prima facie* unreasonable, and the logic behind them is easy to follow. There are, however, several flaws to these arguments.

Firstly, as noted above, the key distinguishing feature of property rights are the way in which they guarantee exclusivity to a resource. Victor's argument that under the data protection framework individuals enjoy a default entitlement to their personal data, therefore, appears to be consistent with the notion of them being afforded proprietary interests in those data. However, the claim that individual data subjects truly have a default in their personal data is dubious. Whilst rules regarding consent and other data subject rights undoubtedly give individuals influence over their personal data even after those data are shared with another party, from this it cannot be inferred that the individual is in any way has the ultimate default entitlement in those data. The fact that the GDPR explicitly allows for the processing of personal data to be undertaken without the consent, or even the knowledge, of the data subject should alone be enough to dispel any suggestion that the data subject is the ultimate authority in respect of how their personal data are used by others.<sup>70</sup> This is not to say that data subjects do not enjoy some authority in this respect, but evidently their entitlement is far from absolute.

For similar reasons the second of Victor's arguments can also be contested. Though the GDPR appears to treat personal data as a commodity that is, in effect, capable of changing hands and being traded, the fact that in so doing it appears to attach legal obligations to personal data themselves, rather than the individuals to whom those data relate, is not in itself enough to categorically demonstrate that the GDPR confers upon individuals proprietary interests in those data. Whilst rules that allow individuals to enforce rights against other parties, including those with whom they have not directly shared their personal data themselves, can certainly be considered "property-like", when viewed in isolation they stop short of confirming that personal data can definitively be considered property. As noted in the previous paragraph, a key feature of property rights is the way in which they guarantee exclusivity to a resource. Whilst the rights conferred on individuals by the GDPR, such as the right to be forgotten and the right to data portability clearly provide individuals with a means of exerting influence over their personal data, the text of the GDPR explicitly makes it clear that the rights of the data subject will not

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<sup>68</sup> When attempting to make use of information industry services individuals tend to be given the option to accept a service provider's terms and conditions in their entirety, or be excluded from using the service. Such a situation can hardly be described as analogous of the individual having a meaningful choice as to how their personal data are used and, thus, undermines any idea of them possessing genuine ownership of those data. See: Cate, F. "The Failure of Fair Information Practice Principles" in *Consumer Protection in the Age of the Information Economy*, ed. by Winn, J. (2006) Farnham: Ashgate.

<sup>69</sup> Purtova, N. (2015) Op Cit.

<sup>70</sup> See: Arts. 2(c), 7, 23, 85 & 89 GDPR.

always necessarily prevail against other competing interests.<sup>71</sup> The obvious implication of this is that whilst personal data certainly appear “property-like”, they cannot truly be considered property

Another problem with pro-property rights arguments links closely to the fact that arguments that EU data protection law confers proprietary interests in personal data is reliant on the notion that personal data can be considered a form of commodity, capable of simple commodification. Property rights, after all, stem from the ability of an individual to stake ownership of that commodity. In the context of personal data, this might not initially seem especially problematic. As has been noted elsewhere, for instance, the ability of a thing to change hands, or for it to be traded, is certainly suggestive of it being considered a commodity.<sup>72</sup> Furthermore, it is widely accepted in the legal literature that notions of property should not be limited to physical items or goods, and should also encompass intangible property and things in action.<sup>73</sup> As EU data protection law evidently allows for the transfer of personal data between parties, we might conclude personal data is certainly a commodity, and thus can be considered property-like.<sup>74</sup>

An individual might, for instance, choose to share certain aspects of their biographical data with a social networking site, or to share certain aspects of their medical data with a hospital or medical research organisation. The idea of personal data as a commodity fits well with both scenarios. In both instances the individual can segregate aspects of their personal data into defined categories and choose with which parties they wish for those data to be shared. This behaviour is certainly suggestive of a property-like regime. This idea, however, begins to break down when we consider the enormity of personal data as a concept.

When considering whether it is possible to commodify an individual’s personal data for instance, we must remember that the jurisprudence of the CJEU has repeatedly stressed that the concept of personal data is to be treated expansively, and is not limited to information that can be used to obviously or directly identify an individual, such as an individual’s name, age, address, contact information and so on.<sup>75</sup> Whilst it may be possible to easily commodify some aspects of an individual’s personal data, such as contact information, health data, financial data, other types of data are more difficult, or perhaps impossible, to effectively commodify. To take a mundane example, imagine Person A walks down a

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<sup>71</sup> This is made explicitly clear by Art.6(1)(g) GDPR where it is stated specified that the processing of personal data will be lawful when it is “necessary for the purposes of the legitimate interests pursued by the controller or a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject”. Art.6(1)(g), therefore, implies that a balancing exercise which weighs the legitimate interests of the data controller against the rights of data subjects if personal data processing activities are to be legitimised on the basis of the data controller’s legitimate interests. This is an issue that has been considered by both the Article 29 Working Party and, more recently, the CJEU. See: Article 29 Working Party (2014) Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, WP 217 and Case C-13/16 *Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde v Rīgas pašvaldības SIA ‘Rīgas satiksme’*, EU:C:2017:336. More generally, EU data protection law also allows for the rights and interests of individual data subjects to be balanced against other competing interests, such as national security imperatives. On this issue, see: Dimitrova, A. and Brkan, M. (2017) “Balancing National Security and Data Protection: The Role of EU and US Policy Makers after the NSA Affair”, *Journal of Common Market Studies*.

<sup>72</sup> Radin, J. (1986) “Market-inalienability”, *Harvard Law Review* at 1861.

<sup>73</sup> Lynskey, O (2015) *The Foundations of EU Data Protection Law*, Oxford: Oxford University Press, pg.234.

<sup>74</sup> As an interesting point of reference, the World Economic Forum have used this sort of logic as a foundation for a claim that personal data can be considered a new “asset class”. World Economic Forum (2011) “Personal Data: The Emergence of a New Asset Class”. Available at: [http://www3.weforum.org/docs/WEF\\_ITTC\\_PersonalDataNewAsset\\_Report\\_2011.pdf](http://www3.weforum.org/docs/WEF_ITTC_PersonalDataNewAsset_Report_2011.pdf)

<sup>75</sup> See, for example, the decisions of the CJEU in Case C-101/01 *Bodil Lindqvist* EU:C:2003:596 and joined Cases C-465/00 and C-138/01 *Rechnungshof* [2003] ECR I-6041. See also: Millard, C. and Kuan Hon, W. (2012) “Defining ‘Personal Data’ in e-Social Science”, *Information Communication and Society*. For a recent discussion on the breadth and scope of the concept of personal data, see: Purtova, N. (2017) “The Law of Everything. Broad Concept of Personal Data and Future of EU Data Protection Law”, *Law, Innovation and Technology* 10(1).



street on a Saturday morning, and is seen by various other people. The information that the individual was on the street at this time clearly constitutes personal data for the purposes of data protection law. Yet how could that information possibly be commodified and controlled, let alone owned? If we also stop to consider that personal data is non-rivalrous,<sup>76</sup> and that certain types of data might potentially include information relating to two or more individuals,<sup>77</sup> this issue becomes even more complicated.

#### **4.2.2 Arguments that EU data protection law grants personal interests in personal data**

Contra to the view that the data protection framework can be considered a regime which grants proprietary interests in personal data, others have argued that it instead offers individuals personality rights in respect of those data. In other words, it merely affords individuals rights by which they can control those data in certain circumstances. One proponent of such a view is van der Sloot, who, makes this argument based on an examination of ECtHR case law.<sup>78</sup> Particularly, van der Sloot argues that the authors of the ECHR originally intended that the purpose of the right to privacy, enshrined in Art.8, to be a classic right, providing a negative right to individuals to be free from arbitrary interferences in their lives. Over time, however, the ECtHR has given a much broader interpretation, providing protection to matters relating to the development of the individual's personality.<sup>79</sup> Under this interpretation, individuals can claim positive freedoms and states may be held to actively facilitate said individuals in their quest to develop their personality. Accordingly, despite its origins, Art.8 ECHR has transformed into a personality right, the purpose of which, as noted above, is not only protect the individual from interference in their private lives but, inter alia, provide them with a positive freedom to control their personal information, engage in reputation management, and to develop their identity and personality.

Using these observations about Art.8 ECHR as a starting point, van der Sloot goes on to suggest that similar observations can be made about the evolution of EU data protection law. Particularly, he notes that data protection, a concept which was devised specifically to address possible harms that may stem from large scale data processing activities, was originally intended to be a negative doctrine which focused predominantly on the duties of care of data processors. It is argued, however, that over the course of its existence it has transformed from a doctrine concerned with the liability of data processors into doctrine primarily concerned with protecting the personal interests of individuals, inter alia by granting them rights to control data, to object to certain types of processing, or to claim a right to erasure or data portability. This is a trend that can be seen in both legislative developments and the case law of the CJEU.<sup>80</sup>

Focusing on the possible harms that may stem from data processing operations linked to big data analytics, such as discriminatory consumer profiling,<sup>81</sup> which may adversely affect the ability of individuals to manage their identities,<sup>82</sup> he argues that the European data protection affords individuals the ability to control aspects of their personal data in certain circumstances where an absence of control

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<sup>76</sup> On this issue see: Lynskey, O (2015) Op Cit, pg.239.

<sup>77</sup> On this issue see: Grimmelmann, J. (2009) "Saving Facebook", *Iowa Law Review* 94, pg.1194.

<sup>78</sup> van der Sloot, B. (2015) "Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of "Big Data", *Utrecht Journal of International and European Law* 31(80), pp.25-50.

<sup>79</sup> For instance, the right to marry, the right to a fair trial, the protection of honour and reputation, the right to personal development, the right to property, and the right to nationality. See: van der Sloot, B. *Ibid*.

<sup>80</sup> See, for example: the GDPR, and Case C-131/12 *Google Spain SL & Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2013] ECR I-0000.

<sup>81</sup> On this issue see: Magnani, L. "Adducing personal data, destroying privacy: Diagnosing profiles through artefactual mediators" in *Privacy, Due Process and the Computational Turn: The Philosophy of Law Meets the Philosophy of Technology*, ed. by Hildebrandt, M. and de Vries, K. (2013) Oxford: Routledge; Rodota, S. (2009) Op Cit.

<sup>82</sup> For instance: credit scores can be calculated on the basis of several pieces of personal data

may adversely affect the development of their personality or identity, but stops short of affording them property rights in those data.

Whilst the ability of the individual to exert influence and control over their personal data has undoubtedly increased over time, there is nothing, according to van der Sloot, in EU legislation or CJEU case law which indicates any control-related provisions are tantamount to the creation of any proprietary interests. Support for this general sentiment can also be found in the work of various other observers. Lynskey, for instance, noting that a key feature of the doctrine of property rights is that such rights are alienable, and thus the rights holder has the ability to discard ownership of those rights should they wish, highlights that whilst the rules of the data protection framework allow an individual to effectively discard their personal data, and give free reign to other parties to use those data how they please, it would appear that they cannot discard their right to data protection itself.<sup>83</sup> In other words, even if an individual's personal data is alienable, under EU law the right to data protection itself, as contained within the EU Charter of Fundamental Rights is inalienable. Not only does this inalienability make the right to data protection incompatible with a fundamental tenet of the notion of property rights but, as the reason for this inalienability is linked to human dignity, a concept closely tied to the idea of individual personality. This of course, suggests that an individual's data protection rights grant them personal rather than proprietary interests in their personal data.<sup>84</sup>

#### **4.2.2.1 Dissecting the personality rights arguments**

Much like the arguments which claim the EU data protection framework provides individuals with proprietary interests in their personal data, arguments which suggest in fact EU data protection law instead confers personality rights on individuals, such as those made by van der Sloot, are not *prima facie* unreasonable. Once again, however, there are several factors which suggest that whilst data protection rights can be considered "personality-like", they cannot truly be considered personality rights in accordance with the orthodox understanding of the doctrine. There are two obvious reasons as to why this is the case.

Firstly, as noted above, one key constituent element is the notion of personality rights is the fact that, as their name suggests, such rights are attached to an individual's personality, and cannot exist independently of that personality.<sup>85</sup> In other words, once the individual who holds such rights is no longer alive, the rights are taken to have extinguished upon their death. Interestingly, however, data protection rights cannot necessarily be described in this way. As has been argued by others, notably Harbinja, whilst the ECtHR has on several occasions stated that privacy is only a right enjoyed by the living,<sup>86</sup> the same cannot necessarily be said for the right of data protection. As Harbinja points out, the national legislation of various EU Member states responsible for implementing the terms of the outgoing Data Protection Directive, notably that of Estonia and Bulgaria, grant various data protection rights which exist after death, and can be exercised by the heirs of the deceased.<sup>87</sup> Moreover, her recent analysis of the GDPR also suggests that its substantive provisions appear to allow for some of the rights it confers on individuals to be, to some extent at least, exercisable after death, a concept she refers to as

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<sup>83</sup> Lynskey, O. (2015) Op Cit, pp.240-241.

<sup>84</sup> *Ibid.*, pp.242-244. See, also: Eltis, K. (2016) "Privacy: A Personality, Not Property, Right", available at: <https://freedom-to-tinker.com/2016/11/07/privacy-a-personality-not-property-right/>; Lynskey, O. (2014) Op Cit.

<sup>85</sup> See above at 2.2

<sup>86</sup> See, for instance, the decisions in: *Jäggi v Switzerland*, no.58757/00, ECHR 2006-X; *Estate of Kresten Filtenborg Mortensen v Denmark*, no.1338/03, ECHR 2006-V; *Koch v Germany*, no.497/09, ECHR 19/07/2102.

<sup>87</sup> Harbinja, E. (2013) "Does the EU Data Protection Regime Protect Post-Mortem Privacy and What Could be the Potential Alternatives?", *SCRIPTed* 10(1), pg.26.

“post-mortem privacy”.<sup>88</sup> This would imply that the rights enjoyed by individuals under the GDPR are incompatible with the orthodox understanding of the doctrine of personality rights.

Secondly, also noted above, another key constituent feature of personality rights, is that their infringement tends to lead to non-pecuniary loss or damage that cannot be calculated in monetary terms. This ethos, however, appears to be at odds with the general spirit of the GDPR. As noted by Victor, for instance, the GDPR contains a system of remedies that are typically used to protect proprietary interests.<sup>89</sup> Perhaps the most notable example of this is the way in which the GDPR introduces a bespoke right to compensation that can be invoked by data subjects in the event of them suffering material or non-material damage pursuant of a breach of the GDPR’s terms.<sup>90</sup> In so doing, the GDPR appears to acknowledge, implicitly at least, that the harms that may stem from the errant processing of their personal data can potentially be pecuniary in nature, and that redress for those infringements can be measured in monetary terms.

#### **4.2.3 Discussion**

The above analyses of the debates regarding the European data protection framework bestows upon individual data subjects proprietary or personal interests in their personal data have revealed that whilst arguments made on both sides might appear initially attractive, there are several, possibly fundamental, doubts as to their cogency. It is undeniable that many of the characteristics of the data protection framework, for instance, render personal data either “property-like” or “personality-like”. However, simultaneously, there are a range of factors that appear to metaphorically torpedo and rule out any suggestion that they can categorically be considered either one or the other. In other words, the rights individuals enjoy under EU data protection law cannot be neatly categorised as either property rights nor personality rights, perhaps suggesting they in fact they belong to neither grouping.

This leaves things in a rather troublesome position. As outlined at the beginning of this article, and reiterated throughout, in order for any right to be considered meaningful, it must be possible to identify with a degree of certainty what the precise nature of that right is. Quite clearly, however, the nature of the right to data protection, and those of the range of rights bestowed upon individuals by the data protection framework, are far from universally, or even consistently, understood. This is problematic, as this lack of certainty, by necessary implication, is suggestive of these rights having a low normative value. One conclusion that can immediately be drawn at this stage, therefore, is that not only is more research into their precise nature needed if their normative value is ever to be fully realised, but that this should be considered a matter of priority.

However, whilst this debate rages on, and observers continue to debate whether the data protection framework treats personal data as property or as an aspect of one’s personality, there is perhaps another way of categorising these rights that has to date not been meaningfully explored. The remainder of this article is dedicated to an exploration of this “third way”, and the implications it may hold.

### **5. Quasi-property rights**

Generally speaking, quasi-property is a term, most frequently found in the jurisprudence of courts in the USA rather than that of European legal systems, which refers to situations in which the law seeks to simulate the idea of exclusion, normally associated with property rights, through a relational liability regime, by focusing on the nature and circumstances of interactions between parties which are thought to merit a highly circumscribed form of inclusion. As has been noted elsewhere, US equity courts began using the term “quasi-property” in the Nineteenth Century to describe legal interests that *resembled*

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<sup>88</sup> Harbinja, E. (2017) “Post-mortem privacy 2.0: theory, law and technology”, *International Review of Law, Computers & Technology*”.

<sup>89</sup> See above at 4.2.1

<sup>90</sup> Art.82 GDPR

property rights in their functioning even when they could not truly be considered property rights or, strictly speaking, ownership interests at all.<sup>91</sup> A “lien” on the property of another,<sup>92</sup> an owner’s right to any improvements made to their realty,<sup>93</sup> or a beneficial, as opposed to legal, interest in a property were all frequently termed by courts as interests that were of a quasi-proprietary nature.<sup>94</sup> Since then, the term has more recently been used to refer to an individual’s interest in relation to matters involving the desecration of a corpse,<sup>95</sup> trademark dilution<sup>96</sup> and the news.<sup>97</sup>

In all these different areas of application it has been remarked that, though the subject matter of the quasi-property rights in question differ substantially between them, they all share important structural similarities. Common themes that can be identified between all of the above areas of application, for instance, include the way in which in relation to them all, the law has consistently avoided the creation, or recognition, of a genuine property right in the subject matter involved; that despite this avoidance the law has evinces a belief that there is some value in the idea of imposing a limited duty of forbearance on that subject matter; and that this duty is heavily circumscribed by considerations that emanate directly from the actions, interactions and statuses of the parties involved, and only indirectly relate to the subject matter itself.<sup>98</sup>

As noted above, the primary key function of a property right is the way in which it guarantees the right holder’s exclusive interest in the object or commodity that forms the subject matter of the right. In so doing, the right allows the rights holder to exclude others from accessing or using that subject matter. Such rights, therefore, operate on behalf of the rights holder against the world at large, regardless of any contextual peculiarities of their subject matter. Quasi-property rights, however, take a different, and more relaxed, approach. Specifically, quasi-property rights deemphasise the connection between the interest of the rights holder and the subject matter of the right, rendering the subject matter of the right itself devoid of objective exclusionary significance.

Instead, quasi-property rights generate an exclusionary framework through a liability regime that focuses on interests that are implicated in the interactions between different parties, rather than emanating from the subject matter of the right.<sup>99</sup> In other words, it is only through the interactions of relationships of the parties involved that the subject-matter of the right becomes endowed with exclusionary significance that resembles the functioning of property. From this description, it is possible to identify two interrelated analytical elements for quasi-property interests: a trigger for the exclusionary signal, and its communication to the actors to whom it applies.<sup>100</sup>

Generally speaking, the exclusionary signal in the subject matter of a quasi-property right can be triggered by several factors, namely: the status/relationship of the involved parties, vis-à-vis one another; the unique environment or context in which they interact; the nature (wrongful or otherwise) of one party’s actions; or a combination of all three.

So far as the status of the involved parties are concerned, surveys of relevant case law have suggested that the subject-matter of a purported quasi-property right will be endowed with a limited exclusionary significance in settings in which the objectives and relative positions of the parties taking an interest in

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<sup>91</sup> Balganes, S. (2012) “Quasi-Property: Like, but Not Quite Property”, *University of Pennsylvania Law Review* 160, pg.1895.

<sup>92</sup> See, for example: *Hunter v Blanchard*, 18 Ill. 318, 324 (1857)

<sup>93</sup> See, for example: *Horner v Pleasants*, 7 A. 691, 692 (Md. 1887)

<sup>94</sup> See, for example: *Woodruff v United States*, 7 Ct. Cl. 605, 626 (1871)

<sup>95</sup> See, for example: *Fuller v Marx*, 724 F.2d 717, 719 (8<sup>th</sup> Cir. 1984)

<sup>96</sup> See, for example: *Autozone, Inc. v Tandy Corp.*, 373 F.3d 786, 801 (6<sup>th</sup> Cir. 2004)

<sup>97</sup> See, for example: *International News Service v Associated Press* 248 U.S. 215 (1918)

<sup>98</sup> Balganes, S. (2012) Op Cit. pg.1898.

<sup>99</sup> Balganes, S. (2012) Op Cit. pg.1899. See also: Scholz, L. (2016) “Privacy as Quasi-Property”, *Iowa Law Review*, pg.1115.

<sup>100</sup> *Ibid*

that subject matter mandate that they pay greater attention to the manner in which they obtain and use that subject matter. In other words, the normative focus of the quasi-property rights regime is on the harms that may occur from the status of the parties (e.g. the parties might be competitors, and their dealings and interactions may lead to issues in respect of insider trading and/or unfair competition), rather than any harm that may come to the subject matter in abstract terms.<sup>101</sup> So far as issues relating to the context in which the parties interact is concerned, it would seem that quasi-property interests most commonly arise in situations where the parties' interactions are likely to have a detrimental effect on the wellbeing of one of the involved parties or that of another, rather than having a detrimental effect on the purported quasi-property itself.<sup>102</sup> The third set of situations in which quasi-property interests tend to arise involves the morally ambiguous behaviour of one of the interacting parties in relation to the purported quasi-property. Put simply, in situations where a party's behaviour is morally ambiguous and directed at another party, but is affected or mediated an asset or commodity, this may also give rise to a quasi-property interest.<sup>103</sup>

On the issue of communication, it can be remarked that the notion of quasi-property revolves around a directive that might best be described as "relational forbearance". As noted by Balganesch:

*"Such a regime imposes (and communicates) a limited duty of forbearance on individuals when they acquire a particular status in relation to the interest holder, or when the context of their interaction or conduct necessitates limited exclusion. This duty of forbearance is only ever imposed relationally, by reference to the interest-holder rather than the object of the interest. Individuals are directed by the law to avoid interfering with the object of the interest under a particular set of circumstances, defined with a good measure of specificity."*<sup>104</sup>

In so doing, the law moves away from the subject matter of the purported right and towards the relationship of the holder of the interest and the interfering party. As a result, the normative basis moves away from the boundaries of the subject matter of the interest, and towards the circumstances necessitating exclusion. In other words, the exclusionary interests conferred by quasi-property rights not only arise as a result of the relationship between the parties involved, but their character and scope will depend on the nature of the relationship between the involved parties.

### **5.1 Viewing data protection rights through a quasi-property lens**

The preceding section of the article introduced the notion of quasi-property rights, and explained their functions, characteristics, and how they can arise. In summary, the key functions of quasi-property rights can be described as follows. They are rights that grant an individual a limited exclusionary interest in a commodity which allows that individual to exclude others from accessing or using that asset or commodity in a limited number of circumstances depending on the interests of the rights holder that are affected but stops short of affording them a complete and unfettered property right in that commodity. These rights will typically arise as a result of particular features relating to the relationships between affected parties, the context in which the parties interact, and the nature of their interactions. What is significant for the purposes of this article is that these key constituent features of quasi-property rights appear to closely resemble the rights EU citizens enjoy under the data protection framework in respect of their personal data.<sup>105</sup> This appears to be the case for several reasons.

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<sup>101</sup> *Ibid.*, pp.1902-1903.

<sup>102</sup> *Ibid.*, pg.1904.

<sup>103</sup> *Ibid.*, pg.1905.

<sup>104</sup> *Ibid.*, pg.1907.

<sup>105</sup> As an interesting point of comparison research in the USA has investigated whether privacy (which as noted above, has several features that overlap with data protection) can be conceptualised as a quasi-property right. See: Scholz, L. (2016) "Privacy as Quasi-Property", *Iowa Law Review* 101, pp.1113-1140.

Firstly, as was touched upon above, the substantive tenets of the European data protection framework evidently do not confer upon individual data subjects a total and unfettered sovereignty in respect of their personal data. This is made abundantly clear by the way in which the GDPR lists multiple bases through which the processing of an individual's personal data can be legitimised, the majority of which require no input or authorisation of the individual to be successfully invoked.<sup>106</sup> Furthermore, the GDPR also lists a number of exceptions, where the personal data of an individual can be processed without engaging its substantive provisions at all.<sup>107</sup> The rights individuals' enjoy in respect of their personal data under the GDPR are also, in many cases, subject to limitations.<sup>108</sup> That said, there is no doubt that whilst these limitations exist and data subject rights are not absolute, the GDPR affords individuals a range of ways in which they can attempt to control and exert influence over their personal data. As also noted above, the text of the GDPR also envisages personal data as a commodity that is capable of changing hands. As touched upon in this section of the article, legal rules which allow individuals to enjoy some limited, but not absolute control and/or exclusivity, over an asset or commodity are hallmarks of a quasi-property regime.

Secondly, the fact that quasi-property rights arise because of the interactions between the purported rights holder and the alleged interferer in those rights is also significant due to further parallels that can be drawn between this position and the rights of individuals under the data protection framework. As mentioned in the previous paragraph, under the GDPR individuals enjoy a range of rights in respect of their personal data. Many of these rights, however, can only be exercised against parties that are can be identified as "data controllers".<sup>109</sup> The effective exercise of these rights, therefore, is dependent on the existence of a data subject/data controller relationship. If such a relationship does not exist, these rights cannot be exercised. The fact that the exercise of these rights, appears to depend entirely on the existence of a relationship between the data subject and the data controller therefore, is inherently quasi-property-like.

Thirdly, the fact that the scope of a quasi-property right will depend on the nature of the relationship between the parties involved in the subject matter of that right is also noteworthy. As noted above, the obligations imposed on a party against whom such a right is enforced will depend on the nature of that party's relationship with the rights holder, and there will be limits to the extent to which the former can be bound. In other words, the bound party's liability will be qualified depending on the nature of their relationship with the rights holder. Once again, is reminiscent of the situation under the European data protection framework. The primary relationship in the context of data protection law is that of data subject and data controller. Data controllers have obligations regarding the use of individuals' personal data imposed on them by data protection law precisely because of the nature of their relationship with data subjects (i.e. because they *are* data controllers). These obligations, however, are not absolute. They do not, for instance, completely proscribe the use, collection or sharing of personal data. Data controllers are free to utilise personal data in any way they wish so long as it does not infringe one of EU data protection law's substantive provisions. When viewed this way, we can see the scope and existence of a data controller's obligations under EU data protection law are dependant and qualified upon the controller's relationships with data subjects.

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<sup>106</sup> See: Art.7 GDPR

<sup>107</sup> See: Arts. 2(c), 23, 85 & 89 GDPR.

<sup>108</sup> For instance, Art.17 of the GDPR specifies that the right to be forgotten can only be invoked where a one or more of a listed number of grounds applies. Similarly, as noted above, the rights of individual data subjects under the GDPR will not always necessarily prevail against competing interests. See above at n.71.

<sup>109</sup> Both the right to be forgotten and the right to data portability, for instance, can only be enforced against data controllers. See: Arts.17 and 20 GDPR. Data controllers are defined by Art.4(7) GDPR as "*the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data*".

Finally, the fact that quasi-property interests most commonly arise in situations where the parties' interactions are likely to have a detrimental effect on the wellbeing of one of the involved parties or that of another, rather than a detrimental effect to the purported quasi-property itself, can also be pointed to as a noteworthy point of comparison. This feature of quasi-property rights, for instance, seems to correlate resoundingly with one of the primary rationales for the inception of data protection law in Europe. Whilst the data protection framework has over time evolved and morphed into a state where the concept of personal data is now treated as a tradeable commodity in everything but name, we must remember that one of the main motivations for the inception of data protection as a body of law was to protect individuals from events capable of harming their wellbeing that were thought to stem from their relationships with private and public sector organisations. This is something that has been widely acknowledged in the privacy and data protection literature.<sup>110</sup> Put simply, the existence of both data protection rights and quasi-property rights are routed, at least partially, in extremely similar foundations.

## 6. Conclusion

This article opened by considering how for the true and precise meaning of an assertion of any right to be fully appreciated it is important to be able to state with some certainty how that right is constructed and precisely what that right purports to do. As also noted above, if it is not possible to make these determinations in respect of a right any analyses of that right will inevitably be imprecise. This will unavoidably generate confusion and raise questions as to the normative value of that right.

Property rights and personality rights were then discussed, and it was explained how they could be categorised as rights as per the now widely accepted Hohfeldian methodology. Following this, the right data protection as enshrined in the Charter of Fundamental Rights of the European Union was discussed. Whilst it can be convincingly argued that despite some overlap with the right to privacy, the right to data protection can be delineated and considered a free-standing right, considerable doubts persist as to whether data protection rights can, or should, be conceptualised as property rights or personality rights.

Evidently, there is now significant disagreement in the scholarly literature as to whether European data protection law can be said to grant individuals ownership of their personal data, or if instead it allows individuals to exercise control of those data in certain situations as a means of managing aspects of their identity and personality. Not only does the debate between these two positions cause difficulties in terms of clarity of legal analysis, but it also raises questions about the normative value of the right to data protection. Until this debate is resolved, the existence of the right to data protection is arguably somewhat parlous. There is, therefore, evidently a need, and ample room, to investigate this issue in greater detail.

As a means of furthering this debate, the article then introduced the notion of quasi-property rights, habitually a creature of US jurisprudence, and considered whether the rights conferred on data subjects under EU data protection law could be categorised as such. The results of the above analyses suggest that there are in fact several consistent themes and similarities between data protection rights and rights which grant quasi-proprietary interests. The upshot of this is that it seems possible, or even plausible, that EU data protection rights are neither proprietary nor personal in nature, and that there are perhaps additional dimensions to the ongoing property vs personality debate that are yet to be fully explored.

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<sup>110</sup> See, for example: Lloyd, I. (2017) *Information Technology Law*, Chapter 2; Bygrave, L. (2014) *Data Privacy Law: An International Perspective*, Oxford: Oxford University Press, pp.12-24; Hustinx, P. "The Reform of EU Data Protection" in *Emerging Challenges in Privacy Law* ed. by Witzleb, N. et al. (2014) Cambridge: Cambridge University Press. Pp.62-71.