Chapter 1
Introduction

Toda palabra llama a otra palabra. ('Every word calls another word' (translated by the author))

(Juarroz 2012)

The book studies the emergence of the right to the protection of personal data as a fundamental right in the law of the European Union (EU). It is the fruit of a double perplexity: it was born of the curiosity roused by the surfacing of a new fundamental right inside the EU legal system, but also of a feeling of puzzlement in face of the persistently limited recognition of the right's advent by the literature, as well as by the judiciary responsible for its interpretation and application,[1] and by those involved in discussing the future of the legal framework supposed to uphold it.

This introductory chapter offers a series of preliminary reflections on the nature of the inquiry. It puts forward the research subject, renders explicit some of the research premises, and describes the research's outline and sources.

1.1 The EU Fundamental Right to the Protection of Personal Data

In December 2000, the European Parliament, the Council and the European Commission solemnly proclaimed in Nice (France) the Charter of Fundamental Rights of the EU (hereafter, 'the Charter').[2] The Charter was the first catalogue of rights ever agreed jointly by the three major EU institutions. It represented the outcome of a decades-long debate on the opportunity of equipping the EU with its own, distinct inventory of rights—different from Council of Europe's 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and from a

[1] Noting how the nature of data protection confuses the literature and courts: (Tzanou 2013, p. 99).

[2] Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

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mere compilation of the rights set out at national level by EU Member States. The EU Charter formally designates the rights it 'recognises'[3] as 'fundamental rights'.[4]

According to its preamble, the Charter aims 'to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible'.[5] The act of rendering 'more visible' some rights appears to imply that they already existed, even if in a less visible manner. Developing this thought, the Charter's preamble adds that the instrument 'reaffirms'[6] fundamental rights as they result from 'the constitutional traditions and international obligations common to the Member States', as well as from EU primary law, the ECHR, the Social Charters adopted by the Community and the Council of Europe, and the case law of both the Court of Justice of the European Communities[7] and the European Court of Human Rights. If the Charter genuinely 'reaffirms' rights, it might be reasonable to infer that they must have been previously affirmed in any of the mentioned sources.

Article 8 of the EU Charter is titled 'Protection of personal data'. It establishes:

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

Article 8 of the Charter thus purportedly asserts the existence of a right to the protection of personal data enjoyed by 'everyone'. The right, however, had not been affirmed before in any of the sources mentioned in the Charter's preamble. If the Charter rendered this right 'more visible', it was essentially because previously it had been invisible. By re-cognising it, the Charter was as a matter of fact acknowledging its birth: creating it. In 2009, the Lisbon Treaty[8] granted legally binding force to the Charter,[9] consolidating the existence in EU law of a (by then visible, or newly created) fundamental right to the protection of personal data.

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[3] Preamble to the Charter (ibid. 8).

[4] Ibid.

[5] Ibid.

[6] Ibid.

[7] Named since December 2009 the EU Court of Justice.

[8] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon [2007] OJ C306/1.

[9] In a slightly modified version: Charter of Fundamental Rights of the European Union [2007] OJ C303/1.

The literature has generally regarded the Charter's Article 8 as an innovation,[10] potentially heralding a Copernican turn for personal data protection in Europe (Piñar Mañas 2009, p. 93). But the newness of this novel right has also been nuanced (Bernsdorff 2003, p. 160). It certainly did not emerge ex nihilo; rules applicable to the processing of personal data had materialised in the majority of the sources mentioned in the Charter's preamble (namely, in international obligations common to EU Member States, in EU primary law, and in the case law of the Court of Justice of the European Communities and the European Court of Human Rights), even if differently—not in the shape of a (EU) fundamental right.

The EU right to the protection of personal data has been portrayed as the outcome of a sort of dialogue between legal literature and international, European and national legal systems (Murillo de la Cueva 2009, p. 17), as well as the product of a process or concatenation of actions derived from each other (Coudray 2010, p. 21).[11] This research is directly concerned with examining the pivotal variation in such a dialogue from the absence of a right to its presence, and thus with the question of how could actions that admittedly referred to contrasting realities (the inexistence vs. the existence of a right) fluently interplay with each other, and concatenate.

1.2 Research Questions

The main question of this book is: How did the fundamental right to the protection of personal data surface in EU law, despite the lack of recognition of such a right in any of the sources that formally serve as references for the identification of EU fundamental rights?

Therefore, its central concern is to understand the way in which a specific change (that is, the appearance of the fundamental right to personal data protection) took effect in EU law. Premised on the idea that, for change to be possible in law, the conditions ensuring that a certain degree of consistency is maintained must be in place, a sub-question that needs imperatively to be addressed is: How has EU law achieved sufficient consistency as to allow for this concrete change to take place? Or, in other terms: How did EU law, prior to the appearance of the fundamental right to the protection of personal data, accommodate its absence, while at the same time potentially permitting a consistent materialisation of its existence?

The phenomenon explored is described as the *emergence* of the EU right to personal data protection in the understanding that this term refers to the whole process of the right's coming into being, including the legal conditions surrounding this surfacing. What is explored is not only how did the right develop, but also how was it possible for this to happen, and how did it occur.

[10] In this sense, for instance: (Braibant 2001, p. 47; Loncle 2002, p. 45; Vitorino 2003, p. 117; Battista Petti 2006, p. 247; Ehlers 2007, p. 382; Pérez Luño 2010, p. 623; Bignami 2009, p. 139; Kühling 2011, p. 489). Portraying it as advancing a curious approach to personal data protection: (Büllesbach et al. 2010, p. 3).

[11] Using the image of a 'game of influences': (García-Berrio Hernández 2003, p. 15).

The research inquiries *how* could a specific legal change take place, rather than *why* this change occurred. This is so because it aims to explore the way in which law evolves, rather than to search for reasons attempting to explain such evolution from a non-legal perspective. This approach does not pretend to refute the existence of a context in which law operates, or its possible significance. On the contrary, it stresses that such context can affect and permeate law, even though only through legal occurrences; thus, by integrating law and becoming law.

1.3 Scope and Limitations

Tracing out law's functioning in search for answers to these questions, the book examines the EU's involvement in the area of personal data protection, and necessarily also the way in which EU law connections to other legal systems have determined (and continue to determine) this involvement.

The exploration helps to illuminate what could be the meaning of the EU right to the protection of personal data, and the possible significance of its status as EU fundamental right. The right being relatively novel, literature about it is still fairly limited. Major investigations concerned with European personal data protection have often privileged the overview of EU data protection instruments and principles (Bygrave 2002), or applicable law (Kuner 2003), as opposed to an in-depth study of the particular fabrication of the EU fundamental right.[12]

The research is undertaken without relying on any pre-conceived definition of the content of the EU right to the protection of personal data, or even of personal data protection as a legal notion in abstract.[13] It is therefore confronted with the challenge of investigating the way in which emerged a notion that it refuses to circumscribe in advance.

To address this conundrum, it is assumed that the origins of the EU right to the protection of personal data might be traced back to the earliest manifestations of (what came eventually to be known as) 'data protection' law in Europe. Concretely, the book identifies as the symbolic starting point of EU data protection the adoption of the first legal instrument bearing the name of *Datenschutz* (a German composite word, translatable as 'data protection'), namely, the Data Protection Act of the German federal state of Hesse of 1970. From there, it attempts to unearth the paths leading to the recognition of the right to personal data protection as enshrined by the EU Charter, studying the progressive acknowledgment of the notion as a fundamental right, but also the roots of the six basic components that constitute requirements applicable to any processing of personal data according to Article 8 of the EU Charter: (a) the principle of fair processing; (b) the principle of purpose specification; (c) the principle of need of a legitimate basis, which might be the consent of the person concerned; (d) the right of access; (e) the right to have data rectified; and (f) the principle of independent supervision.

[12] As notable exceptions: (Siemen 2006; Arenas Ramiro 2006; Coudray 2010).

[13] As a matter of fact, it is debatable whether any legal notions can be described in such manner.

In tracking down progress from the initial instances of data protection in Europe to the right to personal data protection as a EU fundamental right, the investigation soon encounters a legal notion of non-European origin: 'privacy' as referring to control over personal information, a concept that saw the light not in Europe, but in the United States (US), and actually sprang up before 1970s: by the end of the 1960s. The notion's significance in the process leading to the emergence of the EU right to the protection of personal data appears since the outset as being (at least) dual: first, its advent responded to concerns similar to those that prompted the surfacing of data protection laws in Europe; second, as a result of its usage in the US, the word 'privacy' was integrated as such into international and European legal instruments in the field of personal data protection and, partly as a result of this, eventually also entered EU law. Taking this into account, and despite its central focus on the right to the protection of personal data in EU law, the book also incorporates an exploration of the birth of the notion of privacy as control over personal information in the US.

The research does not terminate with the inclusion of the right to the protection of personal data in the 2000 Charter, but examines also the subsequent, post-2000 gradual assimilation of the right to the protection of personal data in EU law: concretely, in EU primary and secondary law, and in the case law of the EU Court of Justice. It additionally considers the legislative package introduced by the European Commission in January 2012 for the review of the EU personal data protection legal framework. In this package, the European Commission endorsed the existence of the EU right to personal data protection by placing it at the centre of future EU legal instruments in the field, heralding the almost complete disappearance from these instruments of the term privacy.

In sum, the book's material scope covers the advent of the right to the protection of personal data as a EU fundamental right starting from the earliest steps of data protection law in European countries up to the right's enshrinement in the EU Charter, and later incorporation in EU law, as well as its recognition by the EU Court of Justice. And it includes, as background, the prior development in the US of the notion of privacy as informational control, the prolonged embroilment of European (personal) data protection and privacy, and the announced vanishing of privacy from EU personal data protection law.

The research does not aim to provide an exhaustive historical account of personal data protection in Europe, or even in EU law. Similarly, it does not pretend to offer an overall analysis of the evolution of personal data protection (or privacy) in any specific Member State. It refers to such developments only insofar it is necessary and useful to illuminate the emergence of personal data protection as a EU fundamental right.

Because it focuses in studying law, the research might appear to set aside the relevance of factors other than law itself for explaining the change at stake. In relation to privacy and personal data protection, a factor customarily brought to the fore is technology. Technology is actually repeatedly mentioned both as a factor possibly justifying the birth of these legal notions, and their (regularly anticipated) demise.[14]

[14] Relativizing the importance of technology for the evolution of privacy as a legal notion: (Rigaux 1997, pp. 135–136).

Examples abound in the literature of attempts to apprehend, and communicate, how technology supposedly acts upon this legal field. They typically endeavour to pinpoint technological changes of a certain ubiquity,[15] nature or magnitude[16] that inescapably affect, or shall affect, law. Without dismissing the relevance of technology in this area, this research deliberately addresses it through the lens of law. Any technological consideration not incorporated by law is thus beyond the scope of this book.

The aim of this choice is not to negate the relevance of technology for the development of personal data protection, but to problematise it. The basic assumption behind this standpoint is that the exploration of what law does with technology, as well as of what technology does with law, can both have an explicative value for law's evolution, but that, whatever these events might be, they must take place (to be relevant for law) within law with the words of law: expressed in terms that evoke law's peculiar mode of existence, they must have entered the fabric of the legal.[17]

1.4 A Study of Change in (EU) Law

To investigate the emergence of the EU fundamental right to personal data protection, particular attention has been granted to language. This choice deserves some clarifications.

1.4.1 Multilingualism and EU Law

The foregrounding of language in the study of EU law is commonly identified with the coexistence of multiple languages in the EU, and with their peculiar treatment by EU law. These two features are often referred to as the 'multilingualism' of the EU, and of EU law.

[15] Devices are commonly portrayed as potentially having a major impact in the field when initially appearing in the market. See, for instance, on the transistor as a threat: Commission on Human Rights of the United Nations Economic and Social Council, Human rights and scientific and technological developments: Report of the Secretary-General (Addendum 1), E/CN.4/102, 26.2.1970; on the tape recorder as a threat: (Packard 1971, p. 16).

[16] Descriptions of unprecedented expansions of data processing capabilities are perhaps the most challenging for authors and readers alike (for instance, asserting that ten reels containing each 1.500 meters of tape 2,5 centimetres wide could store a 20-page dossier on every man, woman and child of the world: (Robertson 1973, p. viii); noting that a single optical disk can store four billion characters, comparable to 40 reels of tape: (Flaherty 1989, 2). Some authors chose to illustrate the significance of the issue at stake by providing figures on the number of users; for instance, noting the existence of an estimated 97 million Internet users in 1998: (Tan, p. 664).

[17] See notably, on this perspective: (Gutwirth 2010).

Multilingualism has marked EU law since its very origins.[18] Already in 1952, four languages of what were later to become the six founding Member States of the European Economic Community (EEC)[19] (that is, Belgium, France, Germany, Italy, Luxembourg, and the Netherlands) were put forward as its official and working languages: French, German, Dutch and Italian (Berteloot 2000, p. 347). Since the beginning, the EEC construed its multilingualism on the basis of the principle of equality between official languages (Rideau 2007, p. 63). This approach has survived through the decades, even if the number of official languages has significantly increased. As a result of the different accessions of new Member States, the EU incorporated as official languages English and Danish, in 1973; Greek, in 1981; Spanish and Portuguese, in 1986; Finnish and Swedish, in 1995; Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak, Slovene, in 2004; Irish,[20] Bulgarian, and Romanian, in 2007; and Croatian, in 2013.

Multilingualism is nowadays regarded as consubstantial with EU law (Derlén 2009, p. 3). It is as such enshrined in the Treaties.[21] All versions of EU legal instruments in the 24 official languages are regarded as equally authentic, and in principle all legal acts of the EU shall be published in all official languages.[22]

EU multilingualism affects both law making and adjudication, but each EU institution can apply it differently. Although official languages are in theory also 'working languages' everywhere,[23] each institution might stipulate particular obligations in its own rules of procedure.[24] The European Parliament has traditionally put special emphasis on multilingualism across its activities. In the Council and the European Commission, the working languages are primarily English and French, and to some extent German (Derlén 2009, p. 5). Before the Court of Justice of the EU, any EU official language can be used,[25] but the judgments of the Court (unlike other EU documents) are only authentic in the language of the case.[26] The EU Court's working language has traditionally been French (Derlén 2009, p. 5).

EU law's own multilingualism evolves in the context of the system's pervading linkages with other legal systems and instruments. Thus, in addition to being multilingual per se, EU law is intrinsically connected to other systems that might also

[18] The key instrument in EU secondary law is: Regulation No 1 determining the languages to be used by the European Economic Community [1958] OJ L17/385.

[19] Which would eventually become the EU.

[20] Irish had acquired in 1973 'Treaty language' status.

[21] Consolidated version of the Treaty on European Union (TEU) [2010] OJ C83/13, Article 55.

[22] Two derogations from Article 4 of Regulation No.1, which provides for the simultaneous publication of the Official Journal of the European Union in all the official languages, have been foreseen: for Maltese in 2004 and for Irish in 2005.

[23] Article 1 of Regulation No 1.

[24] Ibid. Articles 6 and 7.

[25] Article 29 of the Rules of Procedure of the EU Court of Justice establishes that all EU official languages can be used before the Court; with some exceptions, the plaintiff has the right to choose the language of the case (Rules of Procedure of the Court of Justice of the European Union [1991] OJ L176/7 and further amendments).

[26] Ibid. Article 31.

have a (different) multilingual nature, and with which it will often share the use of sometimes one, but often more, natural languages. As a notable example, EU law grants a particular relevance to instruments emanating from the Council of Europe, such as the ECHR, and to the case law of the ECHR's maximum interpreter, the European Court of Human Rights (ECtHR). The Council of Europe is an international organisation that has 47 member countries, including all EU Member States, but a different linguistic regime, grounded on the (mere) coexistence of French and English.

EU law is also intertwined with the national legal systems of EU Member States. Contrary to international treaties, typically more self-contained, EU law directly enters into national law (Cielito Lindo Kommunikációs Szolgáltató Bt. 2010, p. 69). There exists therefore, inevitably, a continuous interaction between the national and EU usages of legal terms of a same natural language.[27] Moreover, some EU official languages (such as French, German, Dutch, English and Greek) simultaneously pertain to different national systems, and thus, in these systems, national provisions coexist with others emanating from the EU in a language which is not specific to them, but shared by various Member States.[28]

In this context, the question arises as to whether the usage of a particular language in EU law can be considered equivalent to the usage of the same language in interconnected (international and national) laws. EU law being an autonomous legal system, it produces and sustains its own legal terminology. The EU Court of Justice has in this sense emphasised that there are some terms that must imperatively be given an autonomous (EU) interpretation throughout Member States, different from the interpretation applicable to the same words in national law. The boundaries between sets of usages are however not always crystal-cut (Kjaer 2011, p. 332).[29]

The differences in meaning of words pertaining to a specific natural language when used in distinct legal contexts can be designated as 'intra-linguistic' issues. An illustration of the phenomenon could be the word 'privacy' in US law, compared with 'privacy' in the British legal system.[30] Any investigation of the functioning of EU law must in any case be aware of these possible intra-linguistic nuances, and discrepancies, which can imply that, for instance, the French expression *vie privée* as used in the ECHR might not be fully comparable to the same expression as operating in French or Belgian law, or that the German word *Datenschutz* might not have the same meaning as the same word in a German version of a EU legal instrument.

The multilingualism of EU law and of its related legal systems does not only generate intra-linguistic issues. Additionally, and perhaps even more frequently, it brings to the fore the question of translation.

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[27] Ibid.

[28] Ibid. 70.

[29] On the alien character of the language of ECtHR judgments: (Kjaer 2011, p. 328).

[30] Summarising such difference as a contrasting envisioning of 'privacy' as tort: (Glanert 2009, p. 280, 2011, p. 187).

1.4.2 Translation and EU Law

The significance of translation for the purposes of EU law has attracted the attention of different disciplines,[31] which in their turn tend to rely on very diverse conceptions of translation.

EU's multilingualism inevitably entails a significant amount of concrete translation acts. The working languages of EU institutions involved in the legislative process being essentially French and English, many EU legal instruments in other officially 'authentic' languages de facto constitute translations from an original in French, or in English (Derlén 2009, p. 5). Translation is also part of judicial practice, be it at the EU Court of Justice, or as national courts and judges are confronted with the interpretation and application of EU law (Kjaer 2011, p. 328). EU legal instruments being always inscribed in a framework where are enacted simultaneously different languages and multiple language combinations, EU's multilingualism generates specific practical challenges for all actors—not only for legal translators, but for anyone concerned with the reading and writing of EU law.

Prototypically, a certain idea of translation might be described as the transfer of meaning from one language (the 'source language') into another (the 'target language') (Kjaer 2011, p. 328). From this perspective, phenomena such as mistranslations can be acknowledged: they would constitute transfers of meaning that can be regarded as inaccurate. In this sense, one of the major sources of difficulty when translating is the problem known as of 'non-equivalence', allegedly taking place when a legal term in one (source) language does not appear to correspond clearly to any existing term in another (target) language (Cao 2009, p. 21), rendering difficult the search for a word ensuring accurate transfer of meaning.

To avoid mistranslations despite the perceived lack of an equivalent word in the target language, a possible strategy is to incorporate a word from the source language directly into the target language, with the purpose of attributing to it exactly the same original meaning (or at least one of its meanings). This procedure, labelled as 'direct translation', can take different forms (Munday 2008, p. 56). One is 'borrowing', which occurs when a word is transferred as such into the target language; this is what has seemingly happened for instance in some European languages such as Dutch, or Italian, which have adopted the English word 'privacy'. Another common procedure is commonly referred to as 'calque', and amounts to mirroring the original structure in the most literal way possible (Munday 2008, p. 56); this is how the German *Datenschutz* was integrated into English as 'data protection'.

The notion of borrowing, in the sense of terminology imports from one language into another, has outstandingly been put to use in the area of comparative law. Rethought as 'legal borrowing',[32] it has been envisaged basically as the relocation of

[31] And inter-disciplines, such as translation studies; see, for instance: (Munday 2008)). The concept of translation has also been notably used in the context of Science, Technology and Society (STS) studies; see, for instance: (Akrich et al. 2006).

[32] A notion which has also lead to related ideas such as 'constitutional borrowing' (Robertson 2004, p. 54).

legal terms from one legal system to another, typically involving simultaneously an inter-lingual move. These relocations where initially commonly referred to as 'legal transplants' (Watson 1995),[33] and later increasingly as 'legal transfers' (Graziadei 2008, p. 443). This research area has illustrated that the transfer of a legal term into a new legal system triggers complex patterns of change (Graziadei 2008, p. 442), and, more generally, that the translation operations taking place whenever different legal systems interact can have important effects and consequences on the evolution of each system (Cao 2009, p. 4). A notion surfaced in this context is the idea of 'productive misreading(s)' (Mattei 2008, p. 827), which aims to emphasise that translation operations can sometimes be based on misinterpretations of a word's original meaning, but that they will, nevertheless, still generate meaning.[34]

Strictly speaking, however, there is in principle no such a thing in law as a mistranslation. If a EU legal instrument uses the word x in one of its language versions as synonym for the word y of another language version, for the purposes of EU law the two words shall have the same meaning, and this regardless of any linguistic consideration on the possible difference or even incompatibility of meanings between x and y.[35] This derives from the principle of equality of meaning of different language versions of the same text, one of the legal fictions sustaining the functioning of EU law.[36]

Hence, when a EU legal instrument uses the word x in one of its language versions as a synonym for the word y in another language version, EU law is configuring and endorsing them as synonym. Similarly, when a EU legal instrument asserts that an international instrument external to EU law enshrines a right under a certain label, it renames it for the purposes of EU law: for instance, when Directive 95/46/EC[37] declares that Article 8 of the ECHR recognises a right 'to privacy', it establishes that, for the purposes of the Directive, this is so even if Article 8 of the ECHR does not allude to any right 'to privacy', mentioning instead a right 'to respect for private life'.

[33] See also, on the notion of legal transplants and its reception: (Choudry 2006, p. 17).

[34] This idea is also at the core of the metaphor of 'legal irritants': (Teubner 1998, p. 12).

[35] If their equivalence in meaning is disputed, the judiciary might be required to intervene to explain how to reconcile in practice their apparent different meaning with the necessity of their equivalent interpretation (as far as the EU Court of Justice is concerned, reconciliation will be typically sought after through teleological interpretation; see, for instance: (Fennelly 1996). See also: C-29/69 Stauder v Stadt Ulm [1969] ECR 419, Judgment of the Court of 12 November 1969; C-30/77 Régina v Bouchereau [1977] ECR 1999, Judgment of the Court of 27 October 1977. If the interpretation of some linguistic versions of EU provisions is legally disputed on the grounds of the ambiguity of the provisions' wording, the EU Court of Justice can also decide to impose their reading in the light of what it identifies as 'unequivocal language versions' (see: C-90/83 Paterson v Weddel [1984] ECR 1567, Judgment of the Court (First Chamber) of 22 March 1984, concerning the meaning of 'animal carcasses').

[36] On the fictional nature of this assumption, see for instance: (Bellos 2011, pp. 237–241). Equivalent considerations are applicable to translations substantiated and endorsed by case law (Kjaer 2011, p. 331).

[37] Recital 10 of Directive 95/46/EC of the European Parliament and Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

1.4.3 Translation, Untranslatability and Law

The pervasiveness of translation in EU law appears to run counter to the conception that some words, and especially some legal words, are particularly difficult or even impossible to translate. The truth is that any perception of a peculiar untranslatability of some legal terms is regularly put into question by the profusion of translation operations involving these terms, taking place not only in EU law, but more broadly in international law. In this sense, 'privacy' has sometimes been singled out as an untranslatable term (Anderman and Rogers 2003, p. 33, 73), but, actually, it is mentioned in the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations (UN) in 1948,[38] which has been identified by the Guinness Book of Records as the most translated document in the world. The allegedly untranslatable word has been repeatedly translated.

The notion of untranslatability can actually also be understood differently: not as a (possible) characteristic of some specific terms, but as a condition inherent to all words. The fundamental condition of words as untranslatable is the conceptual corollary of a certain understanding of how meaning is set through words, or, rather, never set, but permanently sustained as unsettled.[39] This conception of the relation between words and meaning places at the core of meaning's generation the fact that meaning is in words forever unresolved (Derrida 1967, p. 102), and will only be resolved through reading. Words are perceived as characterised by estrangement. They are never fully present but marked, instead, by traces (Derrida 1967, p. 102) of (apparently) absent meaning that only reading and re-writing can reinstate. If meaning is ungraspable, a certain type of translation (envisaged as the replication of meaning from a language into another) becomes impossible (Legrand 2011, p. 616). Untranslatability arises thus as a resistance to adscription to meaning (Derrida 2008, p. 233), inherent to all words.

This concept of untranslatability has a number of consequences for the study of law. Notably, it invites to downplay the distinction between some words supposedly difficult to translate and the rest, emphasising that, ultimately, it is impossible to fully and completely accurately translate any word. This idea of untranslatability also hints at the relevance for the determination of words' meaning of the practice of reading and re-writing, which might even involve reading and re-writing in other languages: words might bear (invisible) traces and connections with other languages, and thus be regarded as quintessentially hybrid, polyglot (Derrida 1998, p. 33), multilingual.[40] From this standpoint, it becomes advisable not to envisage relations between legal systems as interactions between separate languages representing dis-

[38] Article 12 of the Universal Declaration of Human Rights establishes that '(n)o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation'.

[39] The unsettlement of meaning in words has notably been portrayed by French philosopher Jacques Derrida, who addressed the matter through the notion of différance (Derrida 1967).

[40] In reality, Derrida asserts the multilingualism of all words (Derrida 1996, p. 21). On the ubiquity of Babel, see: (Ost 2009, p. 24).

tinct and separate models or traditions (Derrida 1998, p. 35), but to recognise that models, traditions, and languages are profoundly interwoven. Acknowledging that words are marked internally by breaks and traces that can disrupt meaning is, in its turn, an invitation to investigate words historically,[41] and to analyse how have been articulated, through time, the entanglements between a word and the possible meanings it sustains as unresolved (Derrida 1967, p. 229).

Furthermore, embracing this foundational untranslatability of words can lead to a renewed appreciation of translation.[42] The reconstructed notion would not focus on the fact that translating a word is an attempt to reproduce a certain meaning imported from an original source into a target language, but rather revolve around the inevitable failure that this venture will encounter, and on the resulting instabilities and displacements of meaning(s) to occur (Legrand 2003, p. 291). All translations are, in this sense, mistranslations, and will result in a *décalage*, a shift, a (productive) gap (Legrand 2009). Translation is envisaged thus not as primarily playing a replicating role, but as having a re-creating function. It is an exercise of reading and re-writing, and thus of settlement and re-setting in motion of meaning. Thus, untranslatability and the pervasiveness of translation are therefore assumptions that can coexist.[43] The former underlines the struggle of trying to ascribe meaning to words, and the latter highlights how such struggle is ubiquitous and will, in any case, always allocate meaning.

The perception of meaning as always to come can be also applied to the functioning of law. In this sense, law is also always to come, always deferred, and will only take place as a singular differentiation (Derrida 1993, p. 37) that, once occurred, leaves law again open to multiple and unsettled differentiations. It is not merely words in general, but also the very words of law, that are permanently subject to review in the light of distinctions to come (Luhmann 2009, p. 242). In association to the untranslatability of words, springs up the notion of law's undecidability.

1.4.4 Undecidability and Change in Law

Law's undecidability refers to the tension between the idea that law must always be determined, resolved, settled (in this sense, it is imperative for courts to decide on the meaning of law) and the fact that, for law to be meaningfully decided, it has to be previously (profoundly, genuinely) undecided (Derrida 2005, p. 53). Paradoxically, courts must always decide, but can only decide because the undecidability of law is given as a matter of principle (Luhmann 2009, p. 282). And, despite systemically deciding on the meaning of law, courts never resolve its undecided nature. Just as meaning is permanently unresolved in words, only punctually settled in reading

[41] For instance, apprehending them as a hauntology (Legrand 2006, p. 524). See also: (Legrand 2008, p. 373). On hauntology, see: (Derrida 1993, p. 31).

[42] In this sense: (Davis 2011, p. 74).

[43] Also in this sense: (Derrida 2008, p. 238).

and invariably re-destabilised through writing, configuring a continuous process of meaning condensation and amplification (Luhmann 2009, p. 240), meaning in law is transformed as a consequence of the multiple singular occurrences of law (through continually renewed distinctions and in-distinctions), but never fixed.

The notion of law's undecidability has fruitful repercussions in the understanding of how law evolves. It was notably employed by German sociologist Niklas Luhmann,[44] who emphasised law's work as a text in the sense that, through its operations, law constantly (re)organises references to meaning (Luhmann 2009, p. 242).[45] Luhmann's conception of law as text should not be interpreted as restricting law to written legislation, as it definitely includes decision-making by courts, which are in point of fact regarded as the paradigmatic location in which the problem of unfolding the undecibidability of law has to be solved (Luhmann 2009, p. 291).[46] Law as text also integrates, nevertheless, a variety of other premises that can take effect as law (Pottage 2012, p. 176).

This conception of law as text stresses that the connections between occurrences of law do not lead only to repetition and reinstatement, but also to recreation (García Amado 1989, p. 27). From this perspective, legal evolution surfaces as an outcome of the reading and re-writing of law by law. This reading and re-writing always involves a degree of interpretation (Luhmann 2009, p. 243), and thus of contingency, but requires simultaneously requires a degree of consistency that will guarantee the connection among the multiplicity of decisions (Luhmann 2009, p. 318). The needed consistency can be described as 'redundancy', or the faculty of a legal occurrence to reduce its element of surprise (Luhmann 1994, p. 61).[47] The tensions between variation and uniformity are played out through the unresolved status of meaning in words.

Hence, to study how law changes, as well as changes in law, it is necessary to track down traces waiting for unfolding, and to engage in a recollection of what has come to constitute (the text of) law (Legrand 2011, p. 609). A complete unearthing of relevant traces might be unachievable (Legrand 2011, p. 613), but the exercise can possibly be regarded as accomplished if it helps to explain a particular movement—in this case, the emergence of the protection of personal data as EU fundamental right.

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[44] On the relation between Derrida and Luhmann, See: (Teubner 2001, p. 30). On the importance of distinction for Niklas Luhmann, see: (Guibentif 2010, p. 124).

[45] Luhmann envisages law as made of communications referring recursively to other communications, ensuring through such referencing their connectivity as elements of the system, and constructing through at the same time their meaning (something which, in his own terminology, constitutes a 'social system') (Luhmann 2009, p. 98). His conception has been criticised by some theorists, notably French sociologist and anthropologist Bruno Latour (Latour 2004). Despite this explicit rejection, others have emphasised that many of Latour's insights about law are actually fully consistent with Luhmann's theory (Pottage 2012, p. 175).

[46] This idea can be interpreted as echoing the identification of case law as the place where law is created (Deleuze 2003, p. 209).

[47] Describing judges as the masters of the art of camouflage of the innovative dimensions of their constructions: (Ost 1998, p. 94). On the opportunistically alleged links with the ancient of US privacy constructs, for instance: (Posner 2001, p. 153).

1.5 Outline

The book is structured in two parts. Part I is composed of Chaps. 2, 3 and 4, and is primarily concerned with developments external to the EU that historically influenced the appearance of personal data protection provisions in EU law. Many of these developments are also directly relevant for the interpretation of existing EU data protection law, and of the EU fundamental right to the protection of personal data, through their various connections to the EU legal system.

Chapter 2's main objective is to explore the usages of the term 'privacy' prior to (and contemporary with) the advent of 'data protection' laws in Europe. After an introductory overview of the multiplicity of meanings commonly ascribed to privacy, it focuses on examining the redefinition of the notion as it unfolded in the US at the end of the 1960s, and on how this redesign attempted to make 'privacy' immediately relevant for the protection of individuals against the automated processing of information about them. Having described the historical linkage between the issue of computers and (a redefined) privacy, as well as the inscription of privacy in US law, the chapter accounts for a number of efforts that surfaced internationally, and particularly in Europe, to address through a 'privacy' lens (some of the) challenges posed by technological developments—be it by using or looking for the very word privacy, or words envisioned as synonymous in other languages.

Chapter 3 is devoted to the surfacing in European countries of provisions aimed at regulating the processing of data about individuals since the beginning of the 1970s, and up to the end of that decade. It contains two main sections: one on the first European legal instruments that specifically targeted the processing of data about individuals, and another on countries where, since the very first moment, the choice was made to circumscribe the limits of (automated) personal data processing through constitutional provisions. As prime examples of the first category are described the cases of the federal state of Hesse, Germany, Sweden and France. And, as instances of the second approach, constitutional recognition in Austria, Portugal and Spain is studied and discussed.

Chapter 4 centres on pioneering international 'data protection' instruments. Its major objective is to analyse the design of Council of Europe's 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ('Convention 108'), which had a major influence on the drafting of EU legislation, as well as on national legal systems, with the view to understand better how it affected the legal construction of the words 'privacy' and 'data protection' in Europe. The elaboration of Convention 108 ran in parallel with work on the Guidelines on the Protection of Privacy and Transborder Flows of Personal Data of the Organisation for Economic Co-operation and Development (OECD), adopted in 1980, which is also examined. The chapter also inquiries into the initial impact of Convention 108 on the development of national instruments in European countries, as well as on the evolution of ECtHR case law on the right to respect for private life as enshrined by Article 8 of the ECHR.

Part II focuses more concretely on EU law. It also comprises three chapters. The first, Chap. 5, considers EU involvement in the regulation of personal data

processing, from its initial steps until the year 2000. First, it examines early inter-institutional discussions on the subject. Second, it scans the development of EU law, granting particular attention to Directive 95/46/EC, but considering also Directive 97/66/EC and other developments both in primary and secondary EU law. The chapter additionally explores the impact of these developments on national laws regulating the processing of personal data.

Chapter 6 investigates the inscription of personal data protection among EU fundamental rights. It studies the changing EU approach to fundamental rights, including historical turns in case law, and early attempts to write down a EU-specific fundamental rights catalogue. To determine the plausibility of considering the protection of personal data as a common constitutional tradition of EU Member States, it reviews the framing in national legal systems of the fundamental rights' dimension of data protection laws. The chapter concludes with an account of the drafting of the EU Charter, and an analysis of its relation with the protection of personal data, both through Article 7 and Article 8 of the 2000 instrument.

Chapter 7 is dedicated to the materialisation of the EU right to the protection of personal data in EU law following the proclamation of the EU Charter. It has two main sections: one examining the status of the right before the entry into force of the Treaty of Lisbon in 2009, and another on the evolution afterwards. The first examines the integration of the right to the protection of personal data in EU secondary law, and in the case law of the EU Court of Justice, until 2009. The second addresses the main relevant changes brought about the Lisbon Treaty, explores the post-Lisbon case law of the EU Court of Justice, and scrutinises the legislative package presented by the European Commission in January 2012 for the future of EU personal data protection.

Chapter 8, on the basis of the findings of the previous chapters, puts forward concluding remarks, and discusses them in the wider perspective of existing knowledge in the area.

1.6 Sources

This study is based on information from publicly accessible sources including international, national and EU legislation and relevant case law, as well as legal and non-legal publications. The law is dated as at September 2013.

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