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**TITLE**

**Balancing the right to Data Protection and the right to Freedom  
of Expression: Europe and Armenia**

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## **LIST OF ABBREVIATIONS**

CoE	Council of Europe
CJEU	Court of Justice of European Union
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GDPR	General Data Protection Regulation
RA	Republic of Armenia
TFEU	Treaty on Functioning of the European Union

*“If you exchange information internationally, you must strengthen data protection.  
Those are two sides of the same coin.”*

*Gijs de Vries  
American-Dutch politician*

## **INTRODUCTION**

Year by year our societies become more digitized following the rapid technological developments. Consequently, the personal data of individuals becomes more vulnerable and for this reason during last few decades various international and national legal documents have been adopted in order to ensure the protection of personal data of people.

The right to protection of personal data is a fundamental human right enshrined in the Charter of Fundamental Rights of the European Union and in various European Union legal documents such as the Council of Europe Convention on Data Protection, General data protection Regulation (GDPR) and etc. The Charter of the EU not only explicitly mentions the right to data protection in Article 8(1), but also makes a reference to data protection principles in Article 8 (2).<sup>1</sup> The adoption of the Lisbon treaty is a landmark in the development of data protection law as it not only granted the Charter the status of a binding legal document at the level of primary law, but also provided the right to personal data protection.<sup>2</sup>

The right to data protection goes hand in hand with the right to freedom of expression. Freedom of expression is as well a fundamental right of every human being. The right to

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<sup>1</sup> *Charter of the Fundamental Rights of the European Union, Article 8*

<sup>2</sup> *Handbook on European data protection Law, 2018 Edition*

freedom of expression constitutes essential foundation for democracy, rule of law, peace, sustainable development and participation in public affairs. Moreover, free and independent media are essential in any society in order to promote and protect the freedom of expression and other human rights. Independent media is one of the cornerstones of a democratic society by facilitating the free flow of information on matter of general interest and by ensuring accountability and transparency in our societies.

Both the right to data protection and the right to freedom of expression are not absolute rights and at some point, these two rights intersect.

The **subject matter** of the present thesis paper is the examination of development of the right to data protection and the right to freedom of expression through various legal documents in Europe and Armenia. Moreover, the examination of how the balancing and reconciliation of these two fundamental rights is being done.

The practical **significance** and the choice of the subject matter of the thesis is **justified** by the fact that due to rapid development of digital world more attention is put on the protection of individuals' personal data but at the same it is necessary to strike a fair balance with the freedom of expression, hence the reconciliation of these two important rights becomes crucial for every society.

The present thesis paper **aims** to examine the right to data protection and the right to freedom of expression in various legal documents, the development of these two rights and their reconciliation by examining the journalistic exception clause. Moreover, based on the current research to give recommendations regarding the balancing of the two rights in both EU's General Data Protection Law and Law on Personal Data Protection of the Republic of Armenia. The core question that lies within our present research is how these two fundamental rights are being reconciled and balanced in Europe and Armenia.

The thesis paper **literature** is based on different Laws, scholarly papers, research articles, legal documents., cases, handbooks on both data protection and freedom of expression. The paper makes references to Universal Declaration of Human Rights, EU Charter of Human Rights, General Data Protection Regulation, which is the core data protection instrument in EU, as well as Republic of Armenia's Laws on Data Protection and freedom of expression and information.

The following **methods** of analysis has been used for conducting the present research paper: the comparative method, content analysis, interviews and etc.

The present thesis paper shall consist of an Introduction, three chapters, a conclusion, bibliography and two annexes. The **Introduction** gives an overview of the topic of the paper, subject matter, the significance of the topic chosen, as well as highlights the main question lied upon the paper. **Chapter 1** will be touching upon the development of the right to data protection in Europe and Armenia, legal documents where this right is enshrined, also cases, which show how the right to privacy and the right to data protection was developed. **Chapter 2** is designed to study the development of the right to expression and information through various legal instruments and case-laws. **Chapter 3** refers to the balancing of the right to data protection and the right to freedom of expression bringing the journalistic exemption clause in the data protection laws. Moreover, 2 recommendations are presented for the GDPR in EU and Republic of Armenia's Law on Data Protection in order to strike a fair balance between the two fundamental rights. The **Conclusion** will succinctly highlight main findings of the research. At the end bibliography and 2 annexes will follow.

# CHAPTER I

## Development of the right to data protection in Europe and Armenia

Justice Brandeis has said that the right to privacy is “the right most valued by civilized men”. It was after the Second World War that the concept of a “right to privacy” developed in international law.<sup>3</sup> The right to privacy became a fundamental right enshrined in many international and national legal instruments. Article 12 of the Universal Declaration of Human Rights stipulates: “*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks*”.<sup>4</sup>

In the European level the right to privacy is protected under Article 8 of the European Convention of Human Rights. First paragraph of the Article stipulates that “*Everyone has the right to respect for his private and family life, his home and correspondence.*” Afterwards, the second paragraph of the same Article states that there should be no interference of this right by a public body, unless it is in accordance with law, necessary in a democratic society etc.

The European Court of Human Rights in its cases has numerously highlighted the importance of the right to privacy. For instance, in *S. and Marper v. the United Kingdom* case,

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<sup>3</sup> Peter Hustinx, “EU Data Protection Law: The Review of Directive 95/46 and the Proposed General Data Protection Regulation”

<sup>4</sup> *Article 12, Universal Declaration of Human Rights*

the applicant complained under Article 8 of the Convention that the authorities continued to retain their fingerprints and cellular sample and DNA profiles after the criminal proceedings against them had ended. The European Court ruled that “*the mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8 of the Convention, which guarantees the right to respect for private and family life, home and correspondence...*” The Court further added that in determining whether the personal information gained by the authorities involves any private -life, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the way in which these records are used, processed and the results that may be obtained.<sup>5</sup>

The privacy of individuals is impacted by several intersecting factors, including the necessity of processing personal information for social and economic reasons, technological developments and trends such as globalization and the popularity of the Internet.<sup>6</sup> A core aspect of the right to privacy is the protection of individual’s personal data.<sup>7</sup>

The right to protection of personal data is protected under many European legal documents, such as the European Convention of Human Rights (Article 8), European Charter of Fundamental Rights (Article 7), Treaty on the Functioning of the European Union (Article 16) and etc.

Article 16 of the TFEU stipulates that every person has the right to protection of personal data concerning them. It specifies that Parliament and the Council apply the rules relating to the protection of individuals regarding the processing of personal data by EU Institutions, bodies and agencies, and by Member State whenever carrying out activities that fall within the scope of the EU law and rule on the free movement of such data.<sup>8</sup>

Within the European Union, the right to protection of personal data is recognized as a fundamental human right. Article 8 of the European Charter of Fundamental Rights sets forward the protection of personal data as follows:

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<sup>5</sup> *S. and Marper v. the United Kingdom*, App Nos. 30562/04 and 30566/04, 4 December 2008, *European Court of Human Rights*

<sup>6</sup> *Review of the European Data Protection Directive*, Neil Robinson, Hans Graux, Maarten Botterman, Lorenzo Valeri. Published 2009 by the RAND Corporation

<sup>7</sup> *Privacy International, A Guide for Policy Engagement on Data Protection, The Keys to Data Protection*, August 2018

<sup>8</sup> *Treaty on the Functioning of the European Union, Article 16, 2008 O.J., C 115/47*



- (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”.

During the 1970s, with the emergence of technology, computers started to be used with the aim of processing and transferring personal data. At that time reflections on what impact the automated processing techniques might have on the privacy of individuals became a topic of discussions in Europe. Consequently, national data protection laws emerged as a way of protecting individuals from potential abuses regarding the processing of their personal data. These laws contained various procedural safeguards aimed to protect the fundamental rights and freedoms of individuals, particularly their right to privacy regarding to such processing.<sup>9</sup>

The Council of Europe was the first international organization to adopt a normative stance on the processing of personal data in 1973.<sup>10</sup> Afterwards, in 1980 the Committee of Ministers of the Organization for Economic Cooperation and Development (OECD) issued *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*. However, these guidelines had no binding force and had broad variation in national implementation.

One year after the issuance of OECD guidelines, the Council of Europe promulgated a Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108). The Convention shared many similarities with the OECD guidelines, although its focus was more on the importance of data protection to protect personal privacy. The Convention specifies that data must be obtained and processed fairly, used and stored only for legal purposes, be accurate and up-to-date and stored no longer than necessary.<sup>11</sup>

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<sup>9</sup> *Computer Law and Security Review, Allocating responsibility among controllers, processors, and “everything in between”: the definition of actors and roles in Directive 95/46/EC, Interdisciplinary Centre for Law and ICT (ICRI), K.U. Leuven, Leuven, Belgium. 2012 Brendan Van Alsenoy. Published by Elsevier Ltd. p. 27*

<sup>10</sup> *Council of Europe Resolution (73)22 on the protection of the privacy of individuals vis-à-vis electronic data banks in the private sector. Adopted by the Committee of Ministers on 26 September 1973 at the 224<sup>th</sup> meeting of the Minister’s Deputies.*

<sup>11</sup> *Fred H. Cate, Privacy in the Information Age, Brookings Institution Press Washington, D.C. 1997*

Each Party has to incorporate into its domestic law the basic data protection principles of this Convention. This means that the Convention only sets out minimum requirements and the Parties are free to adopt a wider protection for data subjects in their national laws. The activities of Council of Europe are not exclusive to its Convention. There are as well two resolutions regarding *the protection of individuals vis-à-vis electronic data banks in the public and private sectors*. The aim of these resolutions is to interpret and explain the main data protection principles set out in Convention 108.<sup>12</sup> At the same time the European countries, were adopting laws on data protection at the national level (1978 Act regarding informatics, files and liberties, Data Protection Act 1984 UK etc.).

Following the Convention 108, in 1995 the EU adopted the Data Protection Directive 95/46/EC (hereinafter referred to as “the Directive”) and its major goals included to create a single set of data protection regulations.<sup>13</sup> The Directive had a crucial impact in the EU, creating a binding and harmonized framework for data protection principles across Member States. There are two main objectives included in the Directive:

- a) Requires all Member States to protect the fundamental rights and freedoms of individuals, especially the right to privacy regarding the processing of personal data.
- b) Requires all Member States neither restrict, nor to forbid the free flow of personal data between the countries.<sup>14</sup>

One of the vital characteristics of the Directive is that it is closely tied to the concept of personal data and to privacy. The Directive puts forward several purposes and privacy protection is only one of them. The provisions of the Directive include data quality, special categories of processing, the rights of data subjects, liability and sanctions, supervisory authorities etc. Despite the fact that the main purpose of the Directive is the protection of individual’s personal data, it is worth to mention that a particular attention is also given to other fundamental rights and freedoms that intersect with the right to data protection. Article 9 of the Directive reconciles the right to privacy with the right to freedom of expression:

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<sup>12</sup> Nina Gumzej, *The Council of Europe and the right to personal data protection: Embracing postmodernity*, University of Zagreb Faculty of Law, Croatia, *Conference of the International Journal of Arts & Sciences*

<sup>13</sup>

Annamarie Giblin, *GDPR: European Regulation with Global Reach*, June 2018

<sup>14</sup> Peter Hustinx, “*EU Data Protection Law: The Review of Directive 95/46 and the Proposed General Data Protection Regulation*”

*“Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression”.*

The Directive, however, leaves up to each Member State to decide how to legislate for specific exemptions for journalism.<sup>15</sup>

Based on the Directive 95/46, in 2018 EU Institutions came to an agreement on adopting the General Data Protection Regulation (hereinafter referred to as GDPR). The aim of GDPR is to create a uniform data protection standard within the European Union, which is directly applicable in the member-states of the EU as opposed to the Directive for the implementation of which member-states had to adopt and act.<sup>16</sup> The GDRP modernized the EU data protection legislation, making it more fit for the continuous challenges of digital age.

The Regulation applies only to “the processing of personal data” in the EU and the personal data of data subjects who are within the Union, regardless of whether or not the processing is undertaken there. Personal data is defined as “any information relating to an identified or identifiable natural person” (data subject).

The GDPR puts forward a number of data protection principles similar to those found in the Directive 95/46 with better developed concepts such as: a) Lawfulness, fairness and transparency, b) Purpose limitation, c) Data minimization, d) Accuracy, e) Storage limitation, f) Integrity and confidentiality, g) Accountability. These principles make the fundament of the GDPR and the processing of personal data should be in compliance with these 7 principles. Following the Directive 95/46, the GDPR as well sets forward the relationship between the protection of personal data and freedom of expression, which is governed by Article 85, entitled “Processing and freedom of expression and information”.

1. *“Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information,*

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<sup>15</sup> *European Data Protection Directive 95/46/EC*

<sup>16</sup> *European Data Protection Regulation, Information Sheet, Privacy Europe.*

<https://www.privacy-europe.com/blog/wp-content/uploads/2016/03/European-Data-Protection-Regulation-Information-Sheet.pdf>

*including processing for journalistic purposes and the purposes of academic, artistic or literary expression”.*

2. *“For processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, Member States shall provide for exemptions or derogations from... if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information”.*<sup>17</sup>

According to this Article Member States shall reconcile the right to personal data protection with the right to freedom of expression. Particularly, exemptions and derogations from specific chapters of the GDPR have to be made for journalistic purposes or the purpose of academic, artistic or literary expression, as far as they are necessary for reconciliation of the right to personal data protection with the freedom of expression and information.<sup>18</sup>

If we take a look on Data Protection Law on national level within EU, for instance the UK Data Protection Act, we can see that the same journalistic exception regarding the reconciliation of the right to data protection and protection of freedom of expression is also present there:

*“Good practice in the processing of personal data for the purposes of journalism” means such practice in the processing of personal data for those purposes as appears to the Commissioner to be desirable having regard to—*

1. *(a) the interests of data subjects and others, including compliance with the requirements of the data protection legislation, and*
2. *(b) the special importance of the public interest in the freedom of expression and information*<sup>19</sup>

Besides the European States, over 100 countries across the world have adopted comprehensive data protection legislation and about 40 countries are in the process of adopting such regulations.<sup>20</sup>

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<sup>17</sup> GDPR Article 85

<sup>18</sup> Handbook on European data protection law, 2018 Edition, Publications Office of the European Union

<sup>19</sup> Data Protection Act 2018, [http://www.legislation.gov.uk/ukpga/2018/12/pdfs/ukpga\\_20180012\\_en.pdf](http://www.legislation.gov.uk/ukpga/2018/12/pdfs/ukpga_20180012_en.pdf)

<sup>20</sup> The keys to data protection, August 2018,

<https://privacyinternational.org/sites/default/files/201809/Data%20Protection%20COMPLETE.pdf>

The right to data protection is a constitutional right enshrined in the Constitution of the Republic of Armenia. Article 34 (1) of the Constitution stipulates: “*Everyone shall have the right to protection of data concerning him or her*”. Afterwards, the Article specifies that the processing of personal data shall be carried out in good faith, the consent of the concerned person needs to be acquired etc.<sup>21</sup>

Armenia being a Member of the Council of Europe has ratified the Council of Europe Convention for the Protection of Individuals Personal Data. The Law of the Republic of Armenia on protection of Personal Data (hereinafter referred to as the Law) was adopted in 2015. It sets forward legal framework of processing personal data by public and private organizations. Moreover, the Law defines several procedures such as notification about processing of personal data, getting the permission for transferring the data to third countries and etc. Currently, Armenia’s comprehensive legislation on personal data protection covers the primary requirements set by the Council of Europe’s Data Protection Convention. In 2015 a Personal Data Protection Agency (hereinafter referred to as the Agency) was created which constitutes as a separate subdivision of the Ministry of Justice.<sup>22</sup> The aim of the Agency is to provide “*services in the sphere of protection of personal data in cases prescribed by law and in certain cases – also by the legislation of the Republic of Armenia, acting on behalf of the Republic of Armenia*”.<sup>23</sup>

On the basis of abovementioned, starting from 20<sup>th</sup> century, with the rapid technological evolvement the protection of persons’ data became essential. The right to data protection became enshrined in International as well as national legal documents, in order to ensure that personal data of an individual is safe and secure.

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<sup>21</sup> *Constitution of the Republic of Armenia, 2015, Article 34*

<sup>22</sup> *Open Society Foundations – Armenia, Personal Data Protection in Armenia Policy Analysis*

<sup>23</sup> *Statute of the Agency for Protection of Personal Data of the Ministry of Justice of the Republic of Armenia*  
<http://www.justice.am/en/structures/view/structure/32>

## CHAPTER II

### Development of the right to freedom of expression and information in Europe and Armenia

Liu Xiaobo, a Nobel laureate, during his imprisonment in China, wrote: “*Freedom of expression is the basis of human rights, the source of humanity and the mother of truth. To block freedom of speech is to trample on human rights, to strangle humanity and to suppress truth.*”<sup>24</sup> Indeed, freedom of expression is a fundamental right and forms a vital foundation for democracy and rule of law. Like the right to privacy, the right to freedom of expression is

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<sup>24</sup> Michael O’Flaherty; *Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No 34*; *Human Rights Law Review* 12:4, Published by Oxford University Press 12 December 2012,

a fundamental human right recognized in International and regional human rights law. Article 19 of the Universal Declaration of human rights stipulates:

*“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”*<sup>25</sup>

The right to freedom of expression is also guaranteed under Article 19 of the Covenant on Civil and Political Rights adopted by the United Nations General Assembly in 1966, which states that every human being is endowed with the right to freedom of expression. Freedom of opinion and expression constitute the foundation stone for every free and democratic society. Having these two rights is essential for the promotion and protection of human rights, rule of law and democracy.<sup>26</sup>

In the EU the right to freedom of expression is enshrined in the EU Charter of Fundamental Rights, stating that every individual has the right to freedom of expression and *“this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”*.<sup>27</sup> The right to freedom of expression and information is further guaranteed by European Convention for the protection of Human Rights and Fundamental Freedoms. The ECtHR has referred to the right to freedom of expression as *“one of the basic conditions for the progress of democratic societies and for the development of each individual”*.<sup>28</sup> Article 10 of the ECHR stipulates:

*“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

*2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or*

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<sup>25</sup> Article 19, Universal Declaration of human rights

<sup>26</sup> UN Human Rights Committee. (2011). General Comment No. 34, Article 19, Freedoms of opinion and expression. UN Doc. CCPR/C/GC/34

<sup>27</sup> Article 11, EU Charter of Fundamental Rights

<sup>28</sup> Freedom of expression in Europe, Case-law concerning Article 10 of the European Convention on Human Rights, Council of Europe Publishing Editions du Conseil de l’Europe, March 2007

*morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.*<sup>29</sup>

Accordingly, the first paragraph of the Article defines the freedoms protected under the Convention and the second paragraph stipulates under which circumstances a State can legitimately interfere with the exercise of the right to freedom of expression. The way Article 10 of the ECHR has been interpreted and applied in ECtHR’s cases has helped to improve and upgrade the level of freedom of expression and media freedom in Member States of the Council of Europe.

The right to freedom of information derives from the right to freedom of expression to “seek and receive information”, and is internationally recognized as a human right. The right of access to information held by government bodies provides that everyone has a basic right to demand information held by governmental bodies. Consequently, that body is legally required to respond and provide the information, unless there is a legally compelling reason to refuse the request. The ECtHR in its cases has many times referred to the right of access to information. For instance, in *Hungarian Civil Liberties Union v. Hungary* the Hungarian non-governmental organization had requested access to a complaint made by a Member of Parliament to the Constitutional Court. However, the Constitutional Court denied the request on that the complaint could not be accessed without having its author’s approval. Budapest Regional Court and the Court of Appeal ruled that the information could not be made public. However, the European Court held that Hungary violated Article 10 of the ECHR when it denied the access to documents of public interest. The ECtHR particularly stated “*the public has a right to receive information of a general interest*”. The European Court further added “*In view of the interest protected by Article 10, the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information.*” Further the Court added that the activity carried out by the Applicant is an essential preparatory step in journalism and is an inherent, protected part of press freedom.<sup>30</sup>

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<sup>29</sup> *European Convention on Human Rights, Article 10*

<sup>30</sup> *Repcevirág Szövetkezet v. Hungary, App. No. 70750/14, 30 April*



Article 19, paragraph 2 of the International Covenant on Civil and Political rights stipulates the right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which that information is stored and its source. In order to give effect to the right of access to information, States parties have to proactively put in the public domain Government information of public interest. Furthermore, should make effort to ensure easy and effective access to such information.<sup>31</sup>

The right to freedom of expression and information has been broadened and strengthened within EU countries, particularly regarding discussions on matter of public interest, in protecting journalistic sources and media pluralism.

### **Freedom of expression and media**

Democracy depends on people having the ability to shape the society they live in and for doing so they need to express themselves freely. Public platforms are required in order to effectively exercise the freedom of expression. It can only be an effective pillar of democracy and human rights if it can be exercised publicly, if information and ideas can be freely exchanged between citizens without fear. Consequently, for any society a free, independent and uncensored press or other media is essential in order to ensure the freedom of opinion and expression.<sup>32</sup>

Although Article 10 of the ECHR does not explicitly mention the freedom of the press, the Court, in its case law, developed a range of principles and rules that grant the press a special status regarding the enjoyment of the freedoms enshrined in Article 10.

For the first time to the role of the press as a “public watchdog” was referred in *Lingens v. Austria* case by the ECtHR. Journalist had criticized the Austrian Federal Chancellor in some articles for a specific political move. One journalist called the behavior of the Chancellor as “immoral” and “undignified”. The Austrian courts found that these statements made by the journalist are defamatory and the latter was fined. However, the ECtHR highlighted the importance of the freedom of the press in political debate stating, that “*Whilst the press must not overstep the bounds set, inter alia, for the “protection of the reputation of others”, it is nevertheless incumbent on it to impart information and ideas on political issues just as on*

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<sup>31</sup> *International Covenant on Civil and Political Rights, General comment No.34, 12 September 2011*

<sup>32</sup> *EU Human Rights Guidelines on Freedom of Expression Online and Offline, Foreign Affairs Council meeting Brussels, 12 May 2014*

*those in other areas of public interest... ”. The Court then added that not only the press should impart such information and ideas but the public as well has the right to receive them.*<sup>33</sup>

The Court has highlighted the special role of the press in political debate in *Castells v. Spain* case as well. The ECtHR has ruled that “*Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society*”.<sup>34</sup>

Journalistic sources are also protected under Article 10 of the Convention. The Court has stated that the protection of journalistic sources is one of the basic conditions of freedom of press. The *Goodwin v. the United Kingdom* case is important for the balance between the interests of justice and rights of others on the one hand and the interest regarding the protection of sources on the other. The Court states that for the press freedom the protection of journalistic sources plays a vital role and that is reflected in range of international instruments on journalistic freedoms. The Court further added that “*Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected*”.<sup>35</sup>

The freedom of press forms an integral part of the freedom of expression, as free communication of information and ideas on public and political issues is essential for any democratic society. After the Independence, Armenia, a post-Soviet country, strives towards building a modern and democratic state. In the Republic of Armenia, the right to freedom of expression is recognized as a Constitutional right. Article 42 of the Constitution reads, “*Everyone shall have the right to freely express his or her opinion. This right shall include freedom to hold own opinion, as well as to seek, receive and disseminate information and ideas through any media, without the interference of state or local self-government bodies and regardless of state frontiers*”.<sup>36</sup>

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<sup>33</sup> *Lingens v. Austria*, App no. 9815/82, 8 July 1986, *European Court of Human Rights*

<sup>34</sup> *Castells v. Spain*, App. No. 11798/85, 23 April 1992, *European Court of Human Rights*

<sup>35</sup> *Goodwin v. United Kingdom*, App no. 17488/90, 27 March 1996, *European Court of Human Rights*

<sup>36</sup> *Constitution of the Republic of Armenia; Article 42; 2015*

In 2003 Armenia adopted the Law “On mass media” the main aim of which is to protect the freedom of media. Article 4 of the Law puts forward 3 major points for ensuring the right to freedom of speech and expression by journalists:

- a) *“Implementers of media activity and journalists shall operate freely in compliance with the principles of equality, legitimacy, freedom of speech (expression) and pluralism.*
- b) *Conducting his/her legitimate professional activities a journalist, as a person performing a social duty shall be protected by the RA legislation.*
- c) *Media products are produced and disseminated without prior or current state registration, licensing, declaration or notice to any state body.”<sup>37</sup>*

At the same year, another major step for Armenia on protection of freedom of expression was the adoption of the Law on Freedom of Information. The Law regulates the relations connected with freedom of information, defines the powers of persons holding information, as well as the ways and conditions of getting information.

After the peaceful velvet revolution in 2018, Armenia is believed to go through major developments on freedom of expression and press freedom. The positive changes can already be seen, as according to the 2019 World Press Freedom Index compiled by the Reporters Without Borders, Armenia has jumped 19 spots and currently is 61<sup>st</sup> among 180 countries. <sup>38</sup> To sum up abovementioned we can state that freedom of expression is a fundamental human right stipulated in many International and European legal documents. The right to freedom of expression and information is an essential aspect for every democratic State. Moreover, the freedom of press forms an important part of the freedom of expression as it enables conversations and ideas on issues of public concern and pivotal for democracy.

## **CHAPTER III**

### **Balancing of the right to data protection and the right to freedom of expression giving the example of the journalistic exemption: Europe and Armenia**

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<sup>37</sup> *The Law of the Republic of Armenia on Mass media; Article 4; 2003*

<sup>38</sup> *2019 World Press Index*

As regards to the above-mentioned, both the right to data protection and the right to freedom of expression are fundamental human rights stipulated in various International and national legal documents.

The essence of Data protection law, in general and of GDPR, in particular, developed from concerns in protecting individual's right to privacy. However, it was also about safeguarding the socio-economic progress and the freedom of expression. The aim of GDPR is to protect the privacy of people at all costs, but at the same time to strike a fair balance between individual privacy and broad interests of general public.<sup>39</sup> In GDPR the balance with freedom of information is explicitly recognized in Article 85, which states that Member States should reconcile the right to protection of personal data with the right to freedom of expression and information, including the processing for such purposes as journalistic and academic as well as for artistic or literary expression.<sup>40</sup>

Particularly exemptions and derogations from specific chapter of the GDPR shall be made for journalistic purposes or the purpose of academic, artistic or literary expression, as far as they are necessary to reconcile the right to personal data protection with the freedom of expression and information. The journalistic purposes derogation, where relevant, applies to most of the provision of the GDPR, including the principles, the rights of data subjects and transfers of personal data to countries outside of the EU. National Governments of Member States will have to put legislative measure in place for implementing this exemption and which should be enforced by local regulatory authorities.<sup>41</sup>

The derogation from data protection rules for journalistic purposes is intended to allow journalists to access, collect and process data in order to perform their journalistic activities. Journalism is one of those professions, which mainly depends on the use of individual's personal data. In order to safeguard the importance of freedom of information and speech the Court of Justice of the European Union has held that "journalist activities" has to be

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<sup>39</sup> *Data protection and journalism: A guide for the media, Draft for consultation, Information Commissioner's Office, 23 January 2014*  
<https://ico.org.uk/media/about-the-ico/consultations/2045/data-protection-and-journalism-a-guide-for-the-media-draft.pdf>

<sup>40</sup> *Article 85, General Data Protection Regulation*

<sup>41</sup> *An overview of the EU General Data Protection Regulation (GDPR) for media organizations, Taylor Wessing, 2 October, 2017*

interpreted in a broader manner and to cover the disclosure of information and opinions to the public by any means.

The Recital 153 of GDPR gives clarification regarding the Article 85 of the Law, stating that *“In order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, such as journalism, broadly”*.<sup>42</sup>

The right to data protection goes hand in hand with the right to freedom of expression. Nonetheless, balancing these two rights is quite hard and complex. Courts are often referred to define the relationship between the right to data protection and the right to freedom of expression and information. The Court of Justice of the European Union is one of the core EU institutions. National judges in the EU can, and in some cases have to ask the Court for a preliminary judgment regarding the interpretation of EU Law. For instance, The Court of Justice of the European Union was asked to define the correlation between data protection and freedom of the press in *TietosuojaValtuutettuu v. Satakunnan Markkinapörssi Oy and Satamedia Oy* case. The Court had to examine a company’s dissemination of tax data on around 1.2 million natural persons that was lawfully obtained from the Finnish tax authorities. The Finnish data protection supervisory authority required the company to stop spreading these data. The company challenged this decision in a national court, which asked clarification from the CJEU.

The Court firstly stated how important the right to freedom of expression is in every democratic society and noted that any view concerning that right, such as journalism, has to be interpreted in a broader way. The Court then noted that in order to reconcile the two fundamental rights, the Member States have to provide for a number of derogations and limitations in relation to the protection of data, regarding the fundamental right to privacy. Afterwards, the EU Court stated that *“Those derogations must be made solely for journalistic purposes or the purpose of artistic or literary expression, which fall within the scope of the fundamental right to freedom of expression, in so far as it is apparent that they are necessary in order to reconcile the right to privacy with the rules governing freedom of expression”*.<sup>43</sup>

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<sup>42</sup> Recital 153, General Data Protection Regulation

<sup>43</sup> *TietosuojaValtuutettuu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, 16 December 2008, C73/07 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=76075&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=6283596>

Under the circumstances of the Case, the CJEU held that activities as those fulfilled by the companies concerning data from documents that are under the domain of public within national legislation may be classified as “journalistic activities”, if their aim is the disclosure to the public of information, opinions or ideas, regardless of the way used to transmit them.

The right to data protection, in relation to the right to freedom of information, prevails, when the person is not a public figure, there is no public interest included and the information contained about the person is sensitive. For instance, in *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González* case Google was required to delete the outdated information concerning the applicant’s financial difficulties from the search list results. Whenever the applicant’s name was searched, the results of the search on articles stating his connection with bankruptcy proceedings was provided. The applicant argued that his rights for private life and for the protection of personal data were violated. The CJEU ruled that the nature of the information in question is a particularly important factor. If the data is sensitive to the private life of the person and when there is no public interest included in the availability of the information, then data protection would override the right to freedom of information. However, on the other hand, the Court also stated that if the data subject is famous and a public figure, or that the information is of such nature to justify granting the general public access to such information, in this case the interference with the fundamental rights to data protection and privacy is justified.<sup>44</sup> This means that a crucial criterion that has to be taken account whenever there is a question regarding balancing the right to data protection and freedom of information is whether or not the expression in question contributes to the debate of general public interest.

The European Court of Human Rights also has some landmark judgments regarding the reconciliation of the right to data protection with the right to freedom of expression. In *Axel Springer AG v. Germany* case, the ECtHR held that an injunction that restrains the applicant company from publishing an article regarding the arrest and conviction of a famous actor violated Article 10 of the ECHR. The Court also referred to the criteria that has to be considered when balancing the two fundamental rights, as established in the case law:

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<sup>44</sup> *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD) Mario Costeja González*, 13 May 2014, C – 131-12

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131>

- Whether the event that the published article concerned was of general interest
- Whether the person concerned was a public figure
- How the information was obtained and whether it was reliable

This means if the information published is of a general interest, the person is a public figure and the information was reliable and obtained legally the right to freedom of information overrides the right to data protection.<sup>45</sup>

For instance, in another case, *Bohlen v. Germany*, a company launched a humorous advertising campaign using the applicant's first name without his consent. The applicant failed to seek damages from the company, alleging a violation of his right of privacy under Article 8 of the European Convention. The Court stated the criteria which guides the balancing between the right to respect for private life and the right to freedom of expression, ruling that there has been no violation of Article 8. The Court further added that the applicant was a public figure and the advertisement company did not refer to the details of his private life, but to a public event, which has already been covered by media.<sup>46</sup>

Following the research above, both the right to data protection and the right to freedom of expression are fundamental human rights and at one point these two rights intersect. Hence, it is of a great importance for every democratic society to reconcile and balance these two fundamental rights. In EU law, the relationship of data protection and freedom of expression is governed by Article 85 of GDPR entitled "Processing and freedom of expression", which gives journalists exemption from main rules of the Law if it is necessary to reconcile the two fundamental rights. However, there is no any law, which stipulates how this balancing of the right to data protection and freedom of expression should be done, consequently it is decided on case by case basis. EU Member States regularly refer to the Court of Justice of the EU for the interpretation of relationship between the right to data protection and freedom of expression in a specific case. The European Court of Human

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<sup>45</sup> *Axel Springer AG v. Germany*, 7 February 2012, App. No. 39954/08, *European Court of Human Rights* [https://hudoc.echr.coe.int/eng#{"fulltext":\["Axel%20Springer%20AG%20v.%20Germany"\],"documentcollection\\_id2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-109034"\]}](https://hudoc.echr.coe.int/eng#{)

<sup>46</sup> *Bohlen v. Germany*; 19 February 2015; App. No. 53495/09, *European Court of Human Rights*



Rights in its landmark judgments has as well referred to this relationship and has defined criteria for reconciliation of the two rights. The ECtHR finds that whenever there is a reference to the balancing between the right to data protection and freedom of expression the general public interest is at stake. Therefore, we recommend to make the following addition in Article 85 (2) of GDPR under journalistic exemption: “...and the controller (journalist) reasonably believes that publication of the personal data would be in the public interest”. In this manner journalists will be exempted from main provisions of GDPR if a) there is the necessity to reconcile the data protection with the freedom of expression and b) if publications made by journalists, which contain personal information, are of a public interest. Also, to add a legal definition of “public interest” clause in GDPR Recitals. The definition of the public interest depends on a successful social and political debate in which actors can reach a consensus on values and actions and enter in agreement on the basis of enlightened consent.<sup>47</sup> Taking this into account we can state that European Union can reach a consensus on giving a legal definition of public interest, hence including it in GDPR, so that there will not be difficulties when interpreting public interest when reconciling the right to data protection and the right to freedom of expression.

The Republic of Armenia being a Member of the Council of Europe has ratified the Data Protection Convention and in 2015 the Parliament of the Republic of Armenia has adopted the Law on Personal Data Protection, which sets up legal framework of processing personal data. Upon the adoption Article 1 (3) of the Law stipulated:

*“The restrictions of processing of personal data prescribed by this Law shall not cover the personal data being processed exclusively for journalism, literary and artistic purposes.”*<sup>48</sup>

However, in 2017 the Parliament adopted a new law annulling this journalistic exception clause in the Law on Personal Data Protection. Within the framework of the present research paper, a question was posed to the head of the Agency for the Protection of Personal Data of Armenia, Gevorg Hayrapetyan, whether the annulment of the journalistic clause will not cause barriers for journalists while carrying out their journalistic activities. The answer of the head of Agency was that the annulment of the clause does not impose any issues on

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<sup>47</sup>Jean-François Méthot: *Collège dominicain de philosophie et de théologie; Ottawa ON Canada, given at the EPAC Round-Table held at Saint Paul University; January 29, 2003*

<sup>48</sup> Article 1(3) of the Law on Personal Data Protection



journalistic activities and that journalistic freedom is governed by other laws, particularly by Article 7 of the Law on the Mass Media regarding restrictions of the freedom of speech in the sphere of the media<sup>49</sup>.

However, based on our research we bring the following arguments on our position:

- Having journalistic exception clause in the Data Protection Law is necessary for any democratic society, as it helps to strike a fair balance between two fundamental rights the right to data protection and the right to freedom of expression.
- The Republic of Armenia has ratified the European Convention on Protection of Personal Data and the annulment of Article 1(3) of the RA Law on Data Protection makes the Law less in compliance with the Convention and European standards.
- Currently, according to our Law on protection of personal data if for instance a public official does not give his/her consent regarding the processing of his/her personal data, the journalists have the obligation to respect that right and refrain from collecting, storing and processing the data on them. This contradicts to the main activity of journalists and media freedom, which is the cornerstone of democracy. Taking into account that after the 2018 peaceful velvet Revolution, Armenia is believed and already makes a progress in transferring into a democratic state, and considering that the media, particularly journalistic freedom, is essential for any democratic society, the journalistic exception clause should be added back to the RA Law on Personal Data Protection.

Consequently, based on our conducted research and arguments, our recommendation would be to make an amendment to RA Law on protection of personal data, bringing back the journalistic exception clause with the following formulation:

*“For processing of personal data carried out for journalistic purposes or the purpose of academic, artistic or literary expression, exemptions or derogations from the Law shall be provided if they are necessary to reconcile the right to the protection of personal data with the freedom of expression”*

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<sup>49</sup> Article 7, Law on Mass Media of the Republic of Armenia

To conclude the chapter, it is necessary to reconcile the right to data protection and the right to freedom of expression. Even though the journalistic exemption clause governs the relationship between these two rights, still EU Courts are often referred to interpret the correlation of the right to data protection and the right to freedom of expression.

## CONCLUSION

Summarizing the observations of the present thesis paper, it can be concluded that both the right to data protection and the right to freedom of expression are fundamental human rights enshrined in International and regional human rights law and the reconciliation of these two rights is essential and important for any democratic society.

To sum up our thesis research the following points should be highlighted:

- Both the right to data protection and the right to freedom of expression are fundamental human rights and at some point, these two rights intersect and conflict, particularly in the context of developing communication technologies. Therefore, it is of a great importance to find a fair balance between these two rights.
- In the EU level the relationship between the right to data protection and freedom of expression is governed by Article 85 of GDPR, which grants journalists exemption from main provisions of the law, whenever it is necessary to reconcile the protection of personal data with freedom of expression.
- Nonetheless, the journalistic exemption clause is quite broad and there is no single unified law within European level, which would define how the balancing of the two fundamental rights should be done, hence it is decided on case by case basis. National judges often refer to European judges in order to define the relationship of the two rights in a specific case.

- Regarding the balancing of the right to data protection and freedom of expression the ECtHR has several landmark cases and in one of its cases has defined a criteria which should be taken into account, whenever there is a conflict between the two rights. The criteria defined by the Court consists in the following, if the information published is of a general interest, the person is a public figure and the information was reliable and obtained legally then the right to freedom of information overrides the right to data protection.
- In order to facilitate the balancing of the two important rights, based on our examinations of the present thesis, we recommend to add public interest clause under journalistic exemption in Article 85 (2) of GDPR with the following formulation: “...and the controller (journalist) reasonably believes that publication of the personal data would be in the public interest”. Also, to give the legal definition of “public interest” in the Recitals of GDPR. This means that journalists will be exempted from main provisions of GDPR if it is necessary for the reconciliation of data protection with the freedom of expression and if publications made by journalists, that contain personal information, are of a public interest.
- Republic of Armenia has recently adopted the Law on Personal Data Protection and the legal sphere on data protection is still under development. It is worth to note that upon adoption of the law the journalistic exemption clause was present under Article 1(3) of the Law, which gave opportunity to reconcile the right to data protection and the right to freedom of expression. However, in 2017 that clause was taken out from the Law, without any proper justification. Based on our examination we recommend to bring back the journalistic exemption clause into the RA Law on Personal Data Protection considering the facts that a) it will make our Law more in compliance with European standards, b) it will help to reconcile the right to data protection and freedom of expression, which is necessary for any democratic state c) Republic of Armenia after the 2018 peaceful, velvet Revolution is on its way of shaping a democratic state and press freedom is essential for it. Moreover, having the journalistic exemption clause in the Law will help carrying out of investigative journalism without any barriers.

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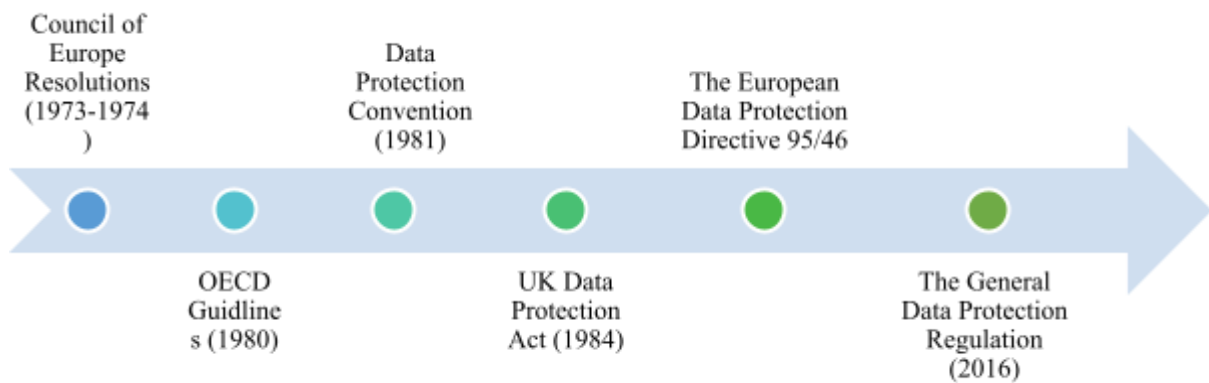
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## Annex 1



Annex 1 shows the development of the right to data protection in Europe through core legal documents.

## Annex 2





Annex 2 shows the major International and European Legal documents that stipulate the right to freedom of expression