B. Access to Justice

This study examines access to justice in the context of the interoperable Eurodac information system. The aim of this chapter is to provide a conceptual foundation that allows the reader to anchor the often highly technical details discussed in the later parts of the study. It is necessary to clarify the starting point of the study's reflections in order to demonstrate why questions of data protection and access to justice are of particular relevance. The analysis is grounded in a conception of human dignity as a universally valid value and right, derived from certain assumptions about the nature of human beings. However, this is not a study in legal philosophy, nor does it seek to provide a definitive answer to the complex question of what constitutes a human being or to establish a comprehensive definition of human dignity. Rather, this chapter seeks to summarise the conceptual starting point of the author's reflections and to outline the legal-theoretical background against which the analysis in the following chapters was conducted. It follows the guiding questions the author posed when laying the theoretical foundations for this research.

I. Human Dignity as the Basis of a Universal Understanding of Privacy and Data Protection

1. Human Dignity, Privacy and Data Protection in Europe

Human Dignity is at the core of the European human rights framework. The EU has, with the Charter of Fundamental Rights (CFR),[76] following the Universal Declaration of Human Rights (UDHR)[77] and the European Convention of Human Rights (ECHR),[78] taken as its starting point the inviolability of human dignity. The dignity of the human person is not only a fundamental right in itself but also a foundation for subsequent freedoms

76 Charter of Fundamental Rights of the European Union [2000] OJ C364/1 (CFR).
77 Universal Declaration of Human Rights [1948] (UDHR).
78 European Convention on Human Rights [1950] (ECHR).

and rights.[79] Art. 2 Treaty of the European Union (TEU),[80] as amended by the Lisbon Treaty, enshrines human dignity as the first of its foundational values (together with 'freedom, democracy, the rule of law and respect for human rights').[81] Legal definitions of human dignity are also considered to be a 'general principle of law'.[82] Human dignity thus pervades the entire human rights framework in Europe, including the rights to privacy and to the protection of personal data. It appears that human dignity is the fundamental concept that frames the interpretation of informational privacy as defined by the General Data Protection Regulation (GDPR) and, more broadly, by European culture and jurisprudence.[83]

The GDPR only mentions "dignity" once, in Art. 88, which indicates that rules "shall include suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity and monitoring systems at the workplace." The provision contains two assumptions: that the data subject must be a human person whose dignity is safeguarded (a legal person could not enjoy human dignity); that human dignity is different from "legitimate interests and fundamental rights".[84] So what then is human dignity?

The EDPS has stressed that "[…] better respect for, and the safeguarding of, human dignity could be the counterweight to the pervasive surveillance and asymmetry of power which now confronts the individual. It should be at the heart of a new digital ethics. […] Privacy is an integral part of

79 European Union, 'Explanations Relating to the Charter of Fundamental Rights' (2007) OJ C303/17, Article 1 - Human Dignity; European Commission, '2018 Annual Report on the Application of the EU Charter of Fundamental Rights' (Publications Office of the European Union 2019) 36; Catherine Dupré, 'Article 1 - Human Dignity' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights. A Commentary* (2nd edn, Bloomsbury Publishing 2021), para 01.22.

80 Treaty on European Union [1997] OJ C191/1 (TEU).

81 cf European Parliament, 'The Situation in Hungary: European Parliament Resolution of 12 September 2018 on a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on Which the Union Is Founded (2017/2131(INL)) - P8_TA(2018)0340' (2018) OJ C433/66.

82 Dupré, 'Article 1 - Human Dignity' (n 79), para 01.22.

83 Luciano Floridi, 'On Human Dignity as a Foundation for the Right to Privacy' (2016) 29 Philosophy and Technology 307; cf also Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press 2015).

84 Floridi, 'On Human Dignity as a Foundation for the Right to Privacy' (n 83) 307.

human dignity, and the right to data protection was originally conceived in the 1970s and 80s as a way of compensating the potential for the erosion of privacy and dignity through large scale personal data processing."[85] Referencing Martha Nussbaum, the EDPS further writes that a violation of dignity may include objectification, where a person is treated as a tool serving someone else's purposes.[86]

The EDPS's arguments in favour of data protection based on human dignity stem from a well-known thought tradition, which is often credited to the philosopher Immanuel Kant. It is Kant's celebrated 'categorical imperative' which requires that people "[a]ct in such a way that you treat humanity, both in your person and in the person of each other individual, always at the same time as an end, never as a mere means".[87] According to Kant, human beings are regarded as 'Selbstzwecke', as ends-in-themselves.[88] As Matthias Mahlmann points out, the normative consequence of this status is the protection of the subject status of human beings, the ability to become authors of their lives and thus of their autonomy.[89] The negative counterpart of this is the prohibition of instrumentalisation and objectification. This denies the status of a subject to human beings by making them the instruments for the realisation of ends beyond themselves.[90] As Mahlmann rightly points out, Kant framed a version of this thought and is not its originator, given other traditions.[91] As we will see below, concepts of dignity

85 European Data Protection Supervisor (EDPS), 'Opinion 4/2015 Towards a New Digital Ethics - Data, Dignity and Technology' (2018) 12.

86 Martha Nussbaum, 'Objectification' (1995) 24 Philosophy and Public Affairs; EDPS 'Opinion 4/2015 Towards a New Digital Ethics - Data, Dignity and Technology' (n 85) 12.

87 cf Immanuel Kant, *Grundlegung zur Metaphysik der Sitten,* in: ibid. Gesammelte Schriften, Akademie Ausgabe, Bd IV (De Gruyter 1963) 434 and *passim*; Immanuel Kant, *Kritik der Praktischen Vernunft* (Akademie Ausgabe Bd V, 1971) 87 and 131; Immanuel Kant, *Kritik der Urteilskraft* (Akademie Textausgabe Bd V, 1971) 435; for the translation in English see Immanuel Kant, *Grounding for the Metaphysics of Morals* (James Ellington tr, Indianapolis 1988).

88 Kant, *Grundlegung zur Metaphysik der Sitten* (n 87); Kant, *Kritik der Praktischen Vernunft* (n 87); Kant, *Kritik der Urteilskraft* (n 87).

89 Matthias Mahlmann, 'Human Dignity and Autonomy in Modern Constitutional Orders' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 377.

90 ibid 377.

91 cf Thomas Aquinas, *Summa Theologica, Part II-II (Secunda Secundae)* (The Project Gutenberg eBook 2006), q 64: a human being or, as Aquinas puts it a "men [...] exists for himself" (the Latin version states 'propter se ipsum existens' which also translates to 'existing for its own sake'); John Locke'Second Treatise of Government', Two

stem from different traditions of thought around the world, and the idea of dignity as a core principle in human rights frameworks has found its way into almost all international human rights codifications. Nevertheless, justifications for the concept of dignity, particularly in Europe, often rely on ideas that were formulated during the European Enlightenment and its aftermath by European authors. This has led to the question of whether the cultural background of these authors has influenced, or better, compromised the concept of human dignity, thereby preventing it from claiming universal validity. As we will see below, however, this study argues that the idea of autonomy and humans as ends-in-themselves can be defended as universal components of a conception of human rights. In the following chapter, I will address why it seems important to establish a universal concept of human dignity and how such a concept could be shaped and defended as the foundation for this study.

2. Human Dignity in a Globalised World

a) *Why a Universal Concept of Human Dignity Is Important*

In a globalised world characterised by interconnected data flows, it appears essential to develop a concept of human dignity that ensures privacy protection for all individuals, regardless of their background or status. Some scholars have criticised the understanding of human dignity as a prohibition against the objectification of individuals and as an imperative to treat them as ends in themselves, arguing that this reflects a specifically 'Western' perspective on the nature and value of human beings.[92] Against this position, this study argues that the geographical location from which an idea originates provides no indication of its persuasiveness. Labelling an idea as 'Western' or 'Eastern' also carries the risk of cultural essentialism and underestimates the complexities of the history of certain ideas.[93] With that in mind, it nevertheless seems important to critically examine the value

Treatises of Government (Project Gutenberg eBook 2003), s 6: 'and being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any such subordination among us, that may Authorize us to destroy one another, as if we were made for one another's uses […]'.

92 cf e.g. fn 93, but also fn 100.

93 How complex and surprising intercultural relationships and the history of some ideas are, is e.g. impressively illustrated by: David Graeber and David Wengrow, *The Dawn of Everything: A New History of Humanity* (Farrar, Straus and Giroux 2021).

of the concept itself, the interests it serves, and the alternative concepts that seek to explain the same or similar phenomena, as these may offer more compelling arguments or provide insights that are otherwise lacking.

Of course, European data protection law can and may, in principle, be based on European philosophical and legal traditions. However, a concept of human dignity that serves a specific European understanding of privacy may harbour the danger of not protecting precisely the people it should – the "foreign" data subjects whose data are stored and processed in large-scale migration databases. If European countries (or any other country for that matter) think that their conception of human dignity is intrinsically 'Western' and therefore privacy, as provided by the GDPR, is a 'Western' idea, they may well exclude any non-European data subject from its protection. They may claim that for a refugee from Asia or Africa, privacy does not have the same value and does not have to be protected the same way.

On the other hand, a human dignity conception that claims to be universal but is firmly rooted in a very narrow, cultural tradition, whether it be 'Western' or any other, might force an idea upon people with which they do not identify and is not in line with their felt or experienced understanding of dignity or privacy, thus violating it. As Susanne Baer puts it: "I urge that we resist the siren call of dignity, which offers a tempting instance of seemingly global consensus – a unifying common ground – but which also invites rather problematic notions of what it means to be dignified, or noble, in the arena of fundamental rights."[94] It thus seems important for the context of this study to ask whether the human dignity concept on which European data protection laws are based seems to serve interests and reflects an understanding of humans that can be shared by individuals around the world.

b) *A Universal Core to Human Dignity*

Some prominent scholars of human dignity argue that there is no universal concept or core definition of human dignity; rather, different legal traditions and cultures interpret it in various ways. Christopher McCrudden posits that the concept of human dignity encompasses three key claims: the ontological claim, which defines the intrinsic worth of the individual; the

94 Susanne Baer, 'Dignity, Liberty, Equality: Fundamental Rights Triangle of Constitutionalism' (2009) 59 University of Toronto Law Journal 417, 420.

relational claim, which identifies forms of treatment that undermine this worth; and the limited state claim, which outlines the implications of the ontological and relational claims for the role of the state in relation to the individual, emphasising that individuals do not exist for the state. Globally, there are different ways in the understanding of each of these claims.[95] He writes that "by its very openness and non-specificity, by its manipulability, by its appearance of universality disguising the extent to which cultural context is determining its meaning, dignity has enabled East and West, capitalist and non-capitalist, religious and anti-religious to agree (at least superficially) on a common concept. But this success should not blind us to the fact that where dignity is used either as an interpretive principle or as the basis for specific norms, the appearance of commonality and universality dissolves on closer scrutiny, and significantly different conceptions of dignity emerge."[96]

Looking at modern concepts of dignity, it becomes possible to find some evidence of this. A famous thought tradition,[97] which developed an understanding of human dignity, is Confucianism. Confucianism understands the core of personhood in reference to social relationships, in which one

95 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 European Journal of International Law 655, 679ff; cf also Christopher McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates' in Christopher McCrudden (ed), *Understanding Human Dignity* (British Academy 2013).

96 McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 95) 710.

97 This study uses the word 'thought traditions' to reflect that some thought traditions, especially Asian or African traditions, do not make a strict distinction between religion or spirituality and philosophy or science. Also, the body/mind dichotomy that has been a widespread understanding in Europe since Descartes also gives way to a more holistic understanding in other cultures and traditions in- and outside of Europe. These differences should be kept in mind in the following discussion. For more on this cf e.g., Sonia Sikka and Ashwani Peetush (eds), *Asian Philosophies and the Idea of Religion: Beyond Faith and Reason* (Routledge 2021); Edward Slingerland, *Mind and Body in Early China: Beyond Orientalism and the Myth of Holism* (Oxford University Press 2019) 385; Shigenori Nagatomo and Gerald Leisman, 'An East Asian Perspective of Mind-Body' (1996) 21 The Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine 439; Ibigbolade Aderibigbe and Toyin Falola (eds), *The Palgrave Handbook of African Traditional Religion* (Palgrave Macmillan Cham 2022); John Mbiti, *African Religions and Philosophy* (Doubleday 1970); Andrea Cassatella, *Beyond the Secular: Jacques Derrida and the Theological Political Complex* (SUNY Press 2023).

is embedded and the social roles that one plays.[98] In that sense, it seems close to other thought traditions, such as the African *Ubuntu*, which will be discussed below, and in opposition to the individual-centred understanding discussed above. However, Sungmoon Kim identifies two contending accounts of human dignity within the Confucian tradition, namely meritocratic dignity and egalitarian dignity. The former understands human dignity as a moral achievement, attainable only through a long process of moral self-cultivation. In this view, the dignity that one deserves is proportional to the virtue one has cultivated. Though not completely rejecting the importance of virtue to dignified personhood, the egalitarian dignity concept disagrees with the 'strong' virtue-based account of human dignity and shifts attention to universal moral potentiality. Inspired by Mencius (*Mengzi* 孟子), these scholars believe that human nature is good and is based on universal, heaven-endowed moral potential.[99] This moral potential seems in line with a concept of human dignity that understands self-determination as one of its core parts.[100] The former interpretation of Confucianism emphasises people's social relationships and interconnectedness.

Another thought tradition, Buddhism, also doesn't see an inherent dignity in humans when claiming that the liberation of oneself from suffering could lead to inner dignity.[101] Different streaks of Buddhist philosophy point to the moral freedom from egoistic desire.[102] However, within Buddhism too, an idea of humans wanting and having the right to control their own destiny also exists. In his 1989 Nobel Prize acceptance speech, the 14th Dalai Lama said that "[n]o matter what part of the world we come from, we are all basically the same human beings [...] [a]ll of us human beings

98 Sungmoon Kim, 'Virtue, Dignity, and Constitutional Democracy - A Confucian Perspective' in Jimmy Chia-Shin Hsu (ed), *Human Dignity in Asia: Dialogue between Law and Culture* (Cambridge University Press 2022) 243ff says that and Confucianism thus stresses virtues such as caring, ritual propriety, humility, and deference that are often believed to sit uneasily with equal freedom and/or rational autonomy.

99 ibid 244.

100 It should be noted here that this translation of 'non-Western' into 'Western' concepts, according to some scholars, is not unproblematic from a decolonial perspective, because it weaves the latter concept into a narrative that can ultimately also be considered Western (cf Andrea Cassatella, 'Secularism and the Politics of Translation' (2019) 18 Contemporary Political Theory 65).

101 Anton Sevilla-Liu, 'Buddhist Philosophical Approaches to Human Dignity' in Jimmy Chia-Shin Hsu (ed), *Human Dignity in Asia: Dialogue between Law and Culture* (Cambridge University Press 2022) 275.

102 ibid 282.

want freedom and the right to determine our own destiny as individuals and as peoples".[103] One could furthermore argue that even if a higher sense of dignity can only be attained through moral self-cultivation or liberation from suffering, the potential for this growth is inherent in every individual. This moral potential signifies, first and foremost, the capability for self-determination and implies a form of human dignity. However, this interpretation may be somewhat tenuous. Martha Nussbaum has argued that the Buddhists can accept the appropriateness of any approach which is aimed at relieving the suffering of bodies one by one, even if they believe that, on some level, individual bodies are an illusion and do not exist as separate.[104] According to her, it is fair to assume that a "political focus on the individual is not insulting or unfair even to Buddhists, since it is meant to supply a basis for politics in the daily world, not in the world of enlightened meditation and reflection".[105]

Other examples of value or thought tradition show a more obvious closeness to an understanding of human dignity as self-determination, at least as part of it. In South Africa, human dignity was claimed for the post-apartheid normative re-orientation as an intrinsic part of the African normative tradition and the value of *Ubuntu*. In that context, a connection between the prohibition of instrumentalisation and *Ubuntu* was made.[106] Although post-apartheid South Africa popularised the concept, its roots and essence run deep in the cultural fabric of many African societies.[107] *Ubuntu* is often ascribed to Bantu people using different names for it;[108]

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103 'The 14th Dalai Lama Acceptance Speech' The Nobel Peace Prize 1989, (*The Nobel Prize*, 10 December 1989) <https://www.nobelprize.org/prizes/peace/1989/lama/acceptance-speech/>.

104 Martha C Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2000) 58.

105 ibid.

106 *S v Makwanyane and Another* [1995] Constitutional Court of the Republic of South Africa CCT/3/94, paras 131, 223ff, 263 and 300 ff, at 313 with the explicit connection of the prohibition of instrumentalisation with the discussed indigenous African tradition and Ubuntu; ibid, paras 358ff and 374ff.

107 Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press 2020) 139, referring to several African philosophers who had written about Ubuntu prior to 1994, e.g. Mbiti (n 97); Lucius Outlaw, 'African "Philosophy": Deconstructive and Reconstructive Challenges' in Guttorm Fløistad (ed) (Martinus Nijhoff 1987).

108 including *bomoto* (Congo); *gimuntu* (Angola); *umunthu* (Malawi); *vumutu* (Mozambique); *vumuntu, vhutu* (South Africa); *humhunu/ubuthosi* (Zimbabwe); *bumuntu* (Tanzania); *umuntu* (Uganda), according to: Rodreck Mupedziswa, Morena Rankopo and Lengwe-Katembula Mwansa, 'Ubuntu as a Pan-African

authors like James Ogude, Unifier Dyer, or Sylvia Tamale, point out that many more African societies know and cultivate this concept.[109] *Ubuntu* is characterised not primarily by an idea of human dignity in the sense of individual worth – although this is, at least in the South African context, part of it – but by an understanding of the interconnectedness of all things and beings and an emphasis on the value of interpersonal relationships.[110] An English translation provided for the Zulu proverb that describes *Ubuntu* goes: "to be a human being is to affirm one's humanity by recognising the humanity of others and, on that basis, establish humane relations with them".[111] *Ubuntu* does not deny the importance of individuality; but it more strongly values community and solidarity.[112]

There are also African concepts of human dignity that emerge from a distinctive religious perspective.[113] For example, there is an Igbo belief that every human being is the work of *Chukwu* (God). Human beings, according to this belief, are more valuable than any other creature because of their possession of *chi* (soul), which is an imprint of God's nature.[114]

Philosophical Framework for Social Work in Africa' in Janestic Mwende Twikirize and Helmut Spitzer (eds), *Social work practice in Africa: Indigenous and innovative approaches* (Fountain Publishers 2019) 9; cf also Nkiruka Ahiauzu, 'Ubuntu' in Deen K Chatterjee (ed), *Encyclopedia of Global Justice* (Springer Netherlands 2011) 1101ff.

109 cf James Ogude and Unifier Dyer, 'Utu/Ubuntu and Community Restoration: Narratives of Survivors in Kenya's 2007 Postelection Violence' in James Ogude (ed), *Ubuntu and the reconstitution of community* (Indiana University Press 2019); Tamale, *Decolonization and Afro-Feminism* (n 107) 139ff.

110 Ahiauzu, 'Ubuntu' (n 86) 1101ff; cf also Wilson Zvomuya, 'Ubuntuism as an International Turning Point for Social Work Profession: New Lenses from the African Pot of Knowledge' (2020) 10(1) African Journal of Social Work; Ndungi Mungai, 'Afrocentric Social Work: Implications for Practice Issues' in Venkat Pulla and Bharath Mamidi (eds), *Some Aspects of Community Empowerment and Resilience* (Allied Publishers Pvt Ltd 2015); Tamale, *Decolonization and Afro-Feminism* (n 107) 139.

111 Ogude and Dyer, 'Utu/Ubuntu and Community Restoration: Narratives of Survivors in Kenya's 2007 Postelection Violence' (n 109) 49.

112 Rianna Oelofsen, 'Women and Ubuntu: Does Ubuntu Condone the Subordination of Women?' in Jonathan Chimakonam and Loiuse du Toits (eds), *African Philosophy and the Epistemic Marginalisation of Women* (Routledge 2018) 45; Tamale, *Decolonization and Afro-Feminism* (n 107) 141.

113 As mentioned above in fn 97 however, many African thought traditions do not make a distinct difference between religion and philosophy.

114 Tsega Andualem Gelaye, 'The Role of Human Dignity in the Jurisprudence of the African Commission on Human and Peoples' Rights' (2021) 5 African Human Rights Yearbook 116.

This brief examination suggests that McCrudden is correct in that there are differences in concepts of dignity around the world. The question, however, remains whether they are incompatible. Are there common elements that they all share? Human dignity seems to be more than the individual's autonomy. This can be understood either in the context of *Ubuntu*, which emphasises the bonds between people, or in terms of value-oriented self-cultivation within society, through which one's own dignity is affirmed. This element of interconnectedness between people – in whatever form – should be kept in mind. Still, the idea that each human being has value and is not to be instrumentalised seems not incompatible with most human dignity concepts just mentioned.

McCrudden is well aware of arguments against his position, citing Ronald Dworkin, who argues that the cases he uses to illustrate the divergence thesis are all 'hard cases', in which one might expect to find significant divergence.[115] Martha Nussbaum, to whom we turn later, might say they would lie outside of a Rawlsian 'overlapping consensus'.[116] Divergent results in hard cases may not necessarily mean that a universal conception of dignity does not exist, Dworkin argues. He suggests only that a universal understanding of dignity does not exist at the margins.[117] What Dworkin argues, very simply, is that there are core moral values that transcend peoples or cultures and are evident in legal reasoning. Therefore, in most (or according to Dworkin in all) cases, there is ultimately one 'right' answer. It is of course important to ask who defines what the margins are and what the core is. It should not be overlooked that power structures play a role in this, and that questions that may actually belong to the core have been, are, and will even in the future be declared to be questions at the margins.[118] Still, the idea of at least some basic universal moral values – which is reflected in a universal conception of human dignity – is held by many famous philosophers. For example, Jürgen Habermas seems to suggest this when he writes that "universalistic moral notions have long since gained

115 Ronald Dworkin, *Taking Rights Seriously* (2nd edn, Harvard University Press 2007), at chap 5.

116 cf John Rawls, *A Theory of Justice* (Harvard University Press 1999).

117 Dworkin (n 93), chap 4; McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 95) 711.

118 For example, a cis-person, may find that the question of whether a third gender should be introduced as an official legal status e.g., in a passport, is a question at the margins, while for a trans-person, this might belong to the core of human dignity questions. For a critique of Dworkin see Robin West, *Normative Jurisprudence: An Introduction* (Cambridge University Press 2011).

entry into the human and civil rights of democratic constitutions through the [...] idea of human dignity".[119] He claims that 'dignity' may provide the language in which empathy is conceptualised.

One should not forget that in most African,[120] Asian[121] as well as American[122] and European[123] countries, human dignity is enshrined in their national constitutions and/or regional human rights frameworks. Jurisprudence has developed that recognises not only the worth of human beings but also, to some degree, the individual's ability and necessity for self-determination. Jimmy Chia-Shin Hsu suggests that "[w]hen one attempts to make room in a culture for a modern notion of universal human dignity, it is not enough to search for an 'indigenous' analogue on which to anchor it and to deploy against nonegalitarian status norms. One must also come to terms with the capacity of dissonant ethical norms to persist in tension. Promoting human dignity then becomes a matter of expanding the range of contexts wherein human dignity is accepted as the proper standard to apply."[124] Martha Nussbaum puts it more succinctly, when she writes that if someone denies that the ideas of political liberty, sex equality, and non-discrimination are Indian ideas, such a person would simply deny that India should have the Constitution it has – one that was adopted, ultimately, by overwhelming consensus despite the sharp political divisions that existed and continue to exist.[125] One could argue that the Indian consti-

119 Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 Metaphilosophy 464, 479.

120 Berihun Adugna Gebeye, *A Theory of African Constitutionalism* (Oxford University Press 2021); Gelaye, 'The Role of Human Dignity in the Jurisprudence of the African Commission on Human and Peoples' Rights' (n 114).

121 cf Jimmy Chia-Shin Hsu, 'Introduction: Human Dignity, Human Rights, and Cultural Change in Asia' in Jimmy Chia-Shin Hsu (ed), *Human Dignity in Asia: Dialogue between Law and Culture* (Cambridge University Press 2022).

122 Claudia Lima Marques and Lucas Lixinski, 'Human Dignity in South American Law' in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2022); Aharon Barak, 'Human Dignity in Canadian Constitutional Law', *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015); Aharon Barak, 'Human Dignity in American Constitutional Law', *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015).

123 As mentioned, cf CFR, Art 1 or ECHR.

124 Timonthy Lubin, 'Dignity and Status in Ancient and Medieval India' in Jimmy Chia-Shin Hsu (ed), *Human Dignity in Asia: Dialogue between Law and Culture* (Cambridge University Press 2022) 305.

125 Nussbaum, *Women and Human Development* (n 104) 58.

tution was adopted after colonialism, and that at this time there was already a deeply rooted view in Indian society, fostered by the coloniser, about which ideas (from an English perspective) are worthy of legal protection – and that its Constitution thus does not reflect Indian values. It would be highly problematic, though, to deny Indian society – or any individual who voted at that time – the autonomy to decide which of its traditional ideas and which potentially new concepts (even if introduced, popularised, or reframed by foreign influences) it chooses to accept and be persuaded by. In this context, it is important to emphasise that no political vote occurs in a vacuum. An essentialist perspective that categorises ideas as purely Indian or non-Indian is not persuasive. Cultures, thus moral and legal ideas, have influenced each other in complex and sometimes surprising ways for thousands of years.[126] A focus on how Europe influenced colonised countries during the period of colonialism and afterwards is important, but by no means sufficient – if only because this influence was not one-sided but also because a lot of history happened before and after this period. However, there is no doubt that power structures – complex as they may be – play a crucial role in determining whose ideas prevail. It is important to acknowledge that the ideas of those in positions of power have rarely aligned with the principles of universal human dignity. Colonial powers, for example, were more often engaged in the suppression of human rights than in their promotion, and they certainly did not invent them. Jimmy Chia-Shin Hsu notes that it is not enough just to point out common traits in humanity, be it rationality, autonomy, etc. Rather, human dignity demands inclusive and egalitarian practices grounded on social imagination that obligates people to value commonality more than difference or tribal hostility.[127] Regardless of the specific influences on a given society, it is ultimately those practices and ideas that enable individuals to feel valued and included that will shape its understanding of dignity.

Even McCrudden thinks that dignity has a very central and important role in a judicial system. Dignity, McCrudden argues, surfaces all over the judicial globe, yet the concept seems to be functionalised rather than filled

126 See fn 93.

127 Hsu, 'Introduction: Human Dignity, Human Rights, and Cultural Change in Asia' (n 121) 18, where he is summarising Timothy Lubin, 'Dignity and Status in Ancient and Medieval India' in the same book.

with independent content.[128] Its role, in practice, is to enable local context to be incorporated under the appearance of using a universal principle. Dignity, in the judicial context, not only permits the incorporation of local contingencies in the interpretation of human rights norms; it requires it. Dignity allows each jurisdiction to develop its own practice of human rights, according to McCrudden.[129] Dignity has additionally functioned as a source from which new rights may be derived and existing rights extended.[130] The idea of human dignity as a legal function rather than a content is interesting, especially in the sense that it opens up the human rights framework for traditions or culture-sensitive jurisprudence. The author's own intuition is that Dworkin's critique/criticism seems correct. Divergent jurisprudence and role in a legal framework of human dignity does not exclude a common core. Looking at other well-known theories of justice and human rights, it seems that universalism is possible, even if some differences remain in the understanding of human rights.

It should be pointed out in connection with the concept of universalism that this is not understood as 'Western' by many authors. The sociologist Shmuel Eisenstadt, for example, assumes the existence of different modernities and denies the West not only the authorship of the concept of modernity but also the exclusive claim to the universalism that is expressed in this concept.[131] African, Islamic, Hindu, and Jewish civilisations all harbour the project of a universalism based on reason, according to Eisenstadt, some of which have an advantage over others in that they are not contaminated by imperialism.[132] One of the most famous universalist approaches that tries to establish a theory of justice and a basis for human rights grounded in the idea of human dignity, and which explicitly states that it takes a universal perspective, is Martha Nussbaum's capability approach. The Human Development Reports of the United Nations Development Programme since 1993 have adopted the model of assessing quality of life using the concept of

128 McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 95), 655 and 724; cf also McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates' (n 95) 13 ff.

129 McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 95), 716.

130 ibid 721.

131 Shmuel N Eisenstadt, *Comparative Civilizations and Multiple Modernities* (Brill 2003); cf also Fewline Sarr, *Afrotopia* (Drew S Burk and Sarah Jones-Boardman trs, University of Minnesota Press 2019).

132 Eisenstadt, *Comparative Civilizations and Multiple Modernities* (n 131), Part I, 281ff and Part II, 503 and 925ff.

people's capabilities.[133] As seen above, the EDPR also refers to Nussbaum's approach when giving its definition of human dignity.[134] As we will see in the next section, Nussbaum assumes that the differences described by McCrudden can and should exist without abandoning universality.

c) *Universalist Human Rights Theories*

The capabilities approach is not only advocated by Martha Nussbaum. It has also been developed by other philosophers, including in particular Amartya Sen. Some aspects of the capabilities approach can furthermore be traced back to, among others, Aristotle, Adam Smith, and Karl Marx.[135]
The capabilities approach is a theoretical framework that entails two normative claims: first, the claim that the freedom to achieve well-being is of primary moral importance and, second, that well-being should be understood in terms of people's capabilities and functionings. Capabilities are the doings and beings that people can achieve if they so choose – their opportunity to do or be such things as being well-nourished, getting married, being educated, and travelling; functionings are capabilities that have been realised.[136] Nussbaum lists, in her version of this theory, ten capabilities.[137] She justifies the list by arguing that each of these capabilities is needed in order for a human life to be "not so impoverished that it is not worthy of the dignity of a human being."[138] Nussbaum defends these capabilities as being the moral entitlements of every human being on earth. She formulates the list at an abstract level and advocates that the translation to implementation and policies should be done at a local level, taking into account local differences. This is how the approach avoids serving just one culture or tradition. Nussbaum argues that this list can be derived from a

133 Martha Nussbaum, 'Capabilities and Human Rights' (1997) 66 Fordham Law Review 273, 275.
134 EDPS 'Opinion 4/2015 Towards a New Digital Ethics - Data, Dignity and Technology' (n 85) 12.
135 'The Capability Approach' (*Stanford Encyclopedia of Philosophy*, 10 December 2020) <https://plato.stanford.edu/entries/capability-approach/>.
136 ibid.
137 Nussbaum, *Women and Human Development* (n 104) 79–80: 1. Life. 2. Bodily Health. 3. Bodily Integrity. 4. Senses, Imagination, and Thought. 5. Emotions. 6. Practical Reason. 7. Affiliation. 8. Other Species. 9. Play. 10. Control over One's Environment (A. Political and B. Material).
138 ibid 72 and for more cf also ibid 151.

Rawlsian 'overlapping consensus',[139] claiming that there is a minimum of core values that are shared among cultures and traditions. Additionally, she stresses that her list remains open-ended and always open for revision.[140] She deduces the capabilities from examples of women from different cultures and with different life circumstances. Nussbaum is convinced that "the human personality has a structure that is at least to some extent independent of culture, powerfully though culture shapes it at every stage".[141]

Other authors, like Nussbaum, have also pointed out the overlooked influence of many (especially non-European) cultures and thought traditions on the history of human rights. Matthias Mahlmann, referring to David Graeber and David Wengrow's deeply insightful study of the diversity of early human societies, critiquing traditional narratives of history's linear development from primitivism to civilization, states that "[i]ndigenous people seem to be something of a blind spot for many current human rights histories."[142] Graeber and Wengrow try to show that some expressions of indigenous thought even influenced the European Enlightenment's political philosophy of freedom and equality, which was stimulated by the indigenous critique of European civilization.[143] Moreover, the desire for liberty is well-documented in many ancient societies.[144] Mahlmann exemplifies this with, among other examples, the Herero's fight against their German aggressors. A report of the German General Staff about the military campaign against the Herero provides a glimpse into what was going on and, as Mahlmann points out, the report cannot be suspected of idealising the enemy. The main reason for the rebellion, the report concludes, thus ultimately is this "warlike and freedom-loving nature" of the Herero.[145] Mahlmann's point here is that such findings "are very useful in determining what exactly we are talking about when addressing the topic

139 Rawls, *A Theory of Justice* (n 116).

140 'The Capability Approach' (n 135); Nussbaum, *Women and Human Development* (n 104) 77.

141 Nussbaum, *Women and Human Development* (n 104) 155.

142 Matthias Mahlmann, *Mind and Rights: The History, Ethics, Law and Psychology of Human Rights* (Cambridge University Press 2023) 136.

143 ibid 137 referring to Graeber and Wengrow, *The Dawn of Everything: A New History of Humanity* (n 93) 17ff and 29ff.

144 Mahlmann, *Mind and Rights* (n 142) 137 referring to Graeber and Wengrow, *The Dawn of Everything: A New History of Humanity* (n 93) 41ff, 452, 473, 492 and 523.

145 Mahlmann, *Mind and Rights* (n 142) referring to Großer Generalstab, *Die Kämpfe Der deutschen Truppen in Südwestafrika: 1: Der Feldzug Gegen Die Hereros* (Mittler und Sohn 1906) 3ff.

of human rights. They illustrate that the idea of human rights was not formulated explicitly in all cultures since the beginning of time but is no creation ex nihilo of ingenious eighteenth-century thinking either, let alone an ephemeral partisan concept of the second half of the twentieth century, stemming from, say [referencing Samuel Moyns, *The Last Utopia*], Amnesty International (admirable as they are), the Carter administration or Catholic personalism. Rather, the building blocks of this idea have been long in the making. Casting these ideas as a recent invention of modern, perhaps even twentieth-century normative ingenuity misses important dimensions of the history of human rights and does not do justice to the great contributions of the past of more than one cultural tradition."[146] Nussbaum formulates similar arguments against critiques that claim her liberal approach to carry 'Western' thoughts and values. In response to those who label her political theory as inherently 'Western' or criticise women for seeking liberal protections as merely imitating Europe, Nussbaum argues that these criticisms are empirically incorrect and demonstrate a lack of awareness regarding the histories of indigenous resistance movements: "They are ignoring tremendous chunks of reality, including indigenous movements for women's education, for the end of *purdah*, for women's political participation, that gained strength straight through the nineteenth and early twentieth centuries in both Hindu and Muslim traditions, in some ways running ahead of British and U.S. feminist movements".[147] Furthermore, in response to those who argue that all values are culturally specific and that their group need not subscribe to a single set of universal norms, Nussbaum askes "whose interests are served by this nostalgic image of a happy harmonious culture, and whose resistance and misery are being effaced".[148] She further interrogates the conceptual coherence of any plea for toleration or respect for difference given that those concepts themselves require a commitment to universal values.[149] What's more, even if it could be established that feminism and the ideals of political liberalism have 'Western' roots, Nussbaum would not concede that matters of origin are even morally salient. That is, given the descriptive fact that "cultures are dynamic, and change is a very basic element in all of them", as well as the fact that "people are resourceful borrowers of ideas" (e.g., "the ideas of Marxism, which

146 Mahlmann, *Mind and Rights* (n 142) 190ff.
147 Nussbaum, *Women and Human Development* (n 104) 38.
148 ibid 38.
149 ibid 32.

originated in the British Library, have influenced conduct in Cuba, China, and Cambodia").[150] She adds the prescriptive fact that we should uphold the best ideas we can find whether local or foreign. Thus, the question of origins should not be treated as a matter of decisive ethical importance.[151] Mahlmann uses this defence, too. Even if human rights had been of purely European (or Indian or African) origin, we would still face the question of how convincing this idea of human rights is, after all (wherever it stems from). He asks: "Are there reasons that are relevant to all human beings or not? Are all humans able to comprehend these reasons?"[152]

Some authors may criticise that this identification of historical developments outside the 'West' as part of the history of human rights ultimately enforces a history of human rights demanded and desired by the 'West', i.e., that a 'Western' narrative attempts to explain many different developments as part of human rights history through culturally partial translation processes – which can be identified as the colonial moment.[153] Theories like the above attempt to break through an essentialist understanding of 'Western' and 'non-Western' narratives by admitting that, while the concept of human rights as it was coined in the 20th century was crafted mainly by 'Western' authors and powers, the history behind this concept is a highly complex and global one. For example, Graeber and Wengrow showcase

150 ibid 48.

151 ibid 34 ff.

152 Mahlmann, *Mind and Rights* (n 142) 132. Mahlmann argues for a theory of moral cognition, that is, the so-called mentalist approach to ethics and law. A mentalist model of moral cognition investigates the question of whether it is possible to identify generative principles of moral judgment specific to human moral cognition that are universal and uniform across the species – a universal moral grammar, if you will, to use a metaphor sometimes employed to capture the basic intuition of this approach (ibid 404; cf e.g., Noam Chomsky, *Language and Problems of Knowledge - The Managua Lectures* (MIT Press 1987) 152; Matthias Mahlmann and John Mikhail, 'Cognitive Science, Ethics and Law' in Zenon Bankowski (ed), *Epistemology and Ontology* (Franz Steiner Verlag 2003) 95ff; Gilbert Harman, 'Using a Linguistic Analogy to Study Morality' in Walter Sinnott-Armstrong and Christian Miller (eds), *Moral Psychology, Volume 1: The Evolution of Morality: Adaptations and Innateness* (MIT Press 2007) 345ff; Erica Roedder and Gilbert Harman, 'Linguistics and Moral Theory' in John M Doris (ed), *Moral Psychology Handbook* (Oxford University Press 2010) 273ff).

153 In this regard cf fn 100 and also Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (University of Illinois Press: Urbana 1988); Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton University Press 2011).

this with their notion of how indigenous thought influenced the European Enlightenment's political philosophy. They emphasise that such interconnection in thought traditions should and will continue to happen, as for example shown by the Indian or South African Supreme Courts, which nowadays crucially shape the global understanding of human rights.[154] It is therefore crucial to recognise and critically examine who has contributed, and continues to contribute, to the shaping of concepts like justice, human rights, and dignity. Equally important is being mindful of, and actively challenging, the power structures that persist, often hindering the advancement of justice, inclusion, rights, and dignity. Otherwise, valuable ideas, depending on who formulates them, will not prevail.

d) *Conclusions*

The purpose of this chapter is to clarify the position from which the author argues. The preceding discussion suggests that a universalist understanding of human dignity as a foundation for human rights is not only defensible but, in the author's view, compelling – precisely because, when taken seriously, it is rooted in the histories and struggles of women, indigenous peoples, LGBTQIA+ individuals, and diverse intellectual traditions from across the world. It can be concluded that concepts of human dignity have emerged in many different contexts globally, and that the further development of a contemporary theory of human dignity necessarily requires a global perspective. At present, at least when examining existing legal frameworks, it appears that a conception of human dignity has gained prominence which seeks to protect each individual's value as a subject and author of their own life. This understanding takes seriously both personal autonomy and the prohibition against the instrumentalisation of human beings, while affirming the inherent worth of each individual. The European human rights framework accepts these ideas at its core and the privacy and data protections discussed in this study are built on it.

154 In particular in the enforcement of socio-economic rights, cf e.g., Natasha Menell, 'Judicial Enforcement of Socioeconomic Rights: A Comparison between Transformative Projects in India and South Africa' (2016) 49 Cornell International Law Journal; Cass Sunstein, 'Social and Economic Rights? Lessons from South Africa Social and Economic Rights? Lessons from South Africa' (1999) 11 Constitutional Forum; Rehan Abeyratne, 'Socioeconomic Rights in the Indian Constitution: Toward A Broader Conception of Legitimacy' (2014) 39 Brooklyn Journal of International Law.

Not all conceptions of human dignity, it seems, share this exact understanding, but most appear to be at least compatible with it. When considering the sources of human value in other thought and cultural traditions, it has been suggested that dignity may be linked to intrinsic qualities, such as value-based self-cultivation embedded within societal contexts, through which one's dignity is affirmed. Alternatively, dignity may be understood as arising from the interconnectedness of all beings, with individual worth deriving from interdependent social relationships and structures. These ideas have also found expression in case law,[155] serving to broaden an overly narrow understanding of human dignity as solely grounded in self-determination. An illustrative example is the way in which the concept of *Ubuntu* has been invoked as a legal principle, as highlighted by Sylvia Tamale. *Ubuntu* means understanding that "when one diminishes another woman, one (no matter if man or woman) is also diminished as part of the greater whole".[156] This idea can inform a legal concept of equality but also of human dignity. It presupposes the intrinsic worth of both individuals, which seems to be a core aspect of *Ubuntu*. In addition, it calls for reflection on community and emphasises the interdependence of people. *Ubuntu* thus appears compatible with the understanding of dignity as an imperative to recognise each person's inherent worth and as a prohibition against instrumentalisation. It is also worth noting that, conversely, European thought traditions seem compatible with the notion of human interconnectedness, even if this idea is neither prominently emphasised nor regarded as the primary source of individual value. Nevertheless, the concept that human beings are ends-in-themselves does not preclude the recognition that society as a whole, and each individual within it, is affected by the oppression of others – a view that implicitly acknowledges the interconnectedness of human existence.

This study adopts the position that a concept of human dignity – one that requires individuals to be treated as authors of their own lives, prohibits their instrumentalisation, and acknowledges their interconnectedness – serves the interests of data subjects regardless of their origin. Such a

155 cf cases mentioned in e.g., Chuma Himonga, May Taylor and Anne Pope, 'Reflections on Judicial Views of Ubuntu' (2013) 16 Potchefstroom Electronic Law Journal 369; Jimmy Chia-Shin Hsu (ed), *Human Dignity in Asia: Dialogue between Law and Culture* (Cambridge University Press 2022).

156 Tamale, *Decolonization and Afro-Feminism* (n 107) 144; James Baldwin has always argued in a similar way when discussing how racism not only affects African Americans, but just as much their white counterparts (cf James Baldwin, *The Fire Next Time* (Dial Press 1963)).

concept must be applied equally to every person whose data are registered in an EU information system. The following section will examine why privacy and data protection are to be understood as personal rights and how they can be derived from the principle of human dignity.

3. Privacy as a Personal Right

The philosopher Luciano Floridi has introduced a very brief theory of human dignity, which explicitly focuses on establishing a robust right to privacy. The theory primarily draws on the above presented idea of human dignity as protection of the ability of humans to become authors of their lives and thus of their autonomy.[157] It suggests, however, an anthropo-eccentric standpoint that allows for an emphasis on interpersonal relationships and community, similar to other human dignity concepts discussed. With that, it provides an explanation of why privacy and data protection have to be understood as personal rights[158] rather than, for example, as a protection of property rights.[159]

Advocates of property rights for personal data come from the perspective of economics of law,[160] but also, in some cases, from a philosophical one.[161] As initially observed and further developed in this study, the European data protection framework conceptualises privacy as a fundamental personal right.[162] This study refrains from engaging with 'data-as-property' theories. Instead, drawing on Floridi's conception of human dignity and his philosophical anthropology, it explores why the assumption that privacy constitutes a personal right is particularly compelling.

157 Matthias Mahlmann, 'Human Dignity and Autonomy in Modern Constitutional Orders' (n 89) 377.

158 Floridi, 'On Human Dignity as a Foundation for the Right to Privacy' (n 83) 308.

159 See e.g., Patrik Hummel, Matthias Braun and Peter Dabrock, 'Own Data? Ethical Reflections on Data Ownership' (2021) 34 Philosophy and Technology 545; Francis Cheneval, 'Property rights of personal data and the financing of pensions' (2018) 24(2) Critical Review of International Social and Political Philosophy 253.

160 cf Joshua A.T. Fairfield 'Virtual property' (2005) 85 Boston University Law Review, 1047–1102; Kenneth C. Laudon, 'Markets and privacy' (1996) Communications of The Acm, 92-104.

161 Cheneval 253 (n 159).

162 Eventhough property rights may play a role in the context of data, especially in connection with copyright questions, cf Case C-70/10 *Scarlet Extended* [2011] ECR 2011-00000; Case C-275/06 *Promusicae* [2008] ECR 2008 I-00271.

Floridi criticises philosophical anthropologies that provide an interpretation of human dignity by relying on the defence of some kind of human exceptionalism.[163] An example of this may be Hans Joas, for whom the connecting thread in the history of human rights is in the 'sacralization of the person'.[164] Other traditions provide similar concepts, as shown above with the example of the Igbo idea of *chi*. Floridi claims that Copernicus, Darwin, Freud, and Turing have each undermined once and for all such an anthropocentric approach to human exceptionalism.[165] "If human exceptionalism is still defensible, it is probably only in an 'eccentric' version, one that places our special role in the universe at the periphery", he states.[166] His "anthropo-eccentric" perspective thus means that "special" will have to mean "strange" (extraneous to the normal course of nature), rather than "superior".[167] An anthropology that does not view humans as inherently superior (to other beings) but rather as particular creatures with particular traits seems convincing, although not as exceptional as Floridi portrays his theory to be.[168]

Floridi's philosophical anthropology furthermore describes humans as unfinished travelling entities whose lives consist of ever-changing information. Human dignity, according to Floridi, consists in humans being a work-in-progress, an open software, we may say today, or an unwritten text, in less contemporary language. His "anti-heroic interpretation of human exceptionalism" is best described, says Floridi, with the Greek word used by Homer to describe Odysseus in the very first line of the Odyssey: *polytro-*

163 He refers to four main philosophical anthropologies that have contributed to the debate on human exceptionalism in Western philosophy (Mette Lebech, 'What Is Human Dignity?' (2003) 2 Maynooth Philosophical Papers 59), which originate from Aristotle and Cicero in Greek and Roman philosophy, Thomas Aquinas in Christian philosophy, Immanuel Kant in modern philosophy and in post-modern theory, human's social recognition of each other's value.

164 Hans Joas, *The Sacredness of the Person: A New Genealogy of Human Rights* (Georgetown University Press 2013) 5.

165 Luciano Floridi, *The Fourth Revolution: How the Infosphere Is Reshaping Human Reality* (Oxford University Press 2014).

166 Floridi, 'On Human Dignity as a Foundation for the Right to Privacy' (n 83) 309.

167 ibid.

168 Animal rights philosophy has contributed to this discussion, e.g. Peter Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals* (HarperCollins 1975); Christine M. Korsgaard 'The Case against Human Superiority' in: Christine M. Korsgaard: *Fellow Creatures: Our Obligations to Other Animals* (Oxford University Press 2018); other thought traditions such as Buddhism have also developed such arguments, cf 'The 14th Dalai Lama Acceptance Speech' (n 103).

pon, "a man of twists and turns", in Robert Fagles' translation.[169] Floridi adds, that "[n]one of us is ever at the centre, we endlessly travel from centre to centre. And so, we should enjoy the right to protection and hospitality that welcomes guests. Each of us, as a beautiful glitch, is a fragile and very pliable entity, whose life is essentially made of information."[170]

Floridi's anthropology is brief and not exhaustive. Human life consists of more than just information; it is, at a minimum, also composed of the complex material from which we are made, which only partially can be translated into information. Still, biological aspects of our being, such as our irises, fingerprints, or even our DNA, can be captured as information and to some extent be reproduced. Biometric data have, in some ways, transformed former concepts of our physical boundaries. More and more aspects of who we are can be quantified informationally: our appearance, where we travel, what we buy and when we buy it, what we read, with whom we communicate, what we communicate, etc. But information does not fully encompass who we are. An e-mail or a WhatsApp chat history with our friends and family, like biometric data, captures parts, but by far not all of our relationship with these people. Undoubtedly, however, data and information represent a significant portion of our selves and are constitutive of our identity. Whoever has access to our biometric data, health information, social media activity, travel and purchasing behaviours, or communication with family and friends, holds a lot of what constitutes us and may have the power to violate our dignity. Floridi's finding that "life is essentially made of information" may be an overstatement, but it does capture an important point: that information is a constitutive part of our lives – especially in today's world. And as Floridi correctly notes, this information is in a constant state of flux. We do not remain static; we move through the world, both mentally and physically. We evolve, and so too do the data which constitute parts of us.

Floridi argues that breaches of privacy have an ontological impact only within a philosophy of information that views human nature as constituted by informational patterns. If human exceptionalism is based on the unique "status of humans as informational organisms" – constantly evolving and never in a state of permanent equilibrium – then "a complete lack of

169 Robert Fagles (tr), *Homer - The Odyssey, with an Introduction and Notes by Bernard Knox* (1999).

170 ibid 310ff.

privacy is indeed dehumanising".[171] "Our dignity rests in being able to be the masters of our own journeys, and keep our identities and our choices open. Any technology or policy that tends to fix and mould such openness risks dehumanising us […]."[172] This aspect seems crucial when considering privacy as a part of human dignity. Information is a constitutive element of individuals and their identity. Theories that argue data should be regarded as property, therefore, are not convincing.[173] Or as Floridi puts it: "my" as in "my data" is not the same "my" as in "my car", it is the same "my" as in "my hand".[174] This distinction underscores the deeply personal nature of data, which is integrally tied to our being, rather than something that can simply be owned or commodified like material objects.

This view is not only shared in philosophy[175] but also in legal doctrine. As will be demonstrated in this study, the European data protection framework is based on the idea that data are protected as part of the right to privacy – rather than as property.[176] There is extensive case law supporting this perspective. One well-known case is Schrems I,[177] which is frequently cited throughout this study. It addresses the potential violation of the data

171 Floridi claims that only an anthropo-eccentric approach can provide an interpretation of human
exceptionalism that is sufficiently robust to justify the protection of privacy via the concept of human dignity, ibid. 'On Human Dignity as a Foundation for the Right to Privacy' (n 83) 311: "In Greek and Roman philosophy, [a privacy violation] would have to be equivalent to some kind of harm to humanity's natural and unique ability to exercise virtuous control over itself and its environment. This seems to be hardly the case. In Christian philosophy, it would have to be equivalent to some kind of harm to humanity's divine creation and existence in the image and likeness of God. This is clearly irrelevant. […] In modern philosophy, it would have to be equivalent to some kind of harm to humanity's rational autonomy and the ability of self-determination. This comes much closer to being convincing, insofar as a perceived lack of privacy may shape choices and behaviours and hence constrain autonomy. But it says nothing about undisclosed (and hence unperceived) breaches of privacy."

172 ibid 310ff.

173 See fn 159.

174 Floridi, 'On Human Dignity as a Foundation for the Right to Privacy' (n 83) 308.

175 Case C-362/14 *Maximillian Schrems v Data Protection Commissioner* [2015] OJ C 398/5.

176 cf the remarks on the right to privacy pursuant to Art. 7 and 8 CFR and Art. 10 ECHR at the beginning of the chapters: The Right to Information; The Right to Access Personal Data and Information; and The Right to Right to Rectification, Completion, Erasure, and Restriction of Processing of Personal Data and Information; also: Recital 1 ff. and Art. 88 (2) GDPR.

177 *Schrems v Data Protection Commissioner* (n 175).

rights of an Austrian data protection activist by United States intelligence services, such as the National Security Agency (NSA), which may have had access to his personal data via Facebook's servers in the United States. The case gives insight into and legally qualifies what it means when a foreign authority can monitor what we share from our personal lives with friends and family. The case also illustrates that putting a property value on personal data, i.e., openly telling people that the NSA is monitoring their behaviours and thus compensating Facebook users for their data, would quite certainly change people's behaviour and the meaning of the platform. To repeat the obvious: we have a fundamentally different relationship with our property than we have with our friends and families.

Finally, Floridi argues that when looking at a person as an open project, it is not the human itself but the relationships between humans that become the centre. "The de-centralization of the agents may fruitfully lead to the centralisation of their relation. It is not one of the friends at the centre, but their friendship. Not one party, but politics. Not any of us, but our society."[178] He concludes that this is a good point for privacy, because the respect for each other's personal information does not have to lead to a world of solipsistic lives. It can be the basis of a society that promotes the value of relations.

Contrary to Floridi, this study argues that the individual (or in some cases a group of individuals), at least from a legal perspective, should remain at the centre of our concern. A human rights framework that does not place human beings – which includes the information that constitutes them – at its core, seems unconvincing for many reasons that cannot fully be elaborated here. Two thoughts shall be mentioned: A legal framework that protects a friendship rather than the individuals involved might prove quite challenging. After all, it is easier to define and categorise a person than a friendship. In addition, a friendship as part of a person's identity might be worth protecting even if the friendship itself has vanished. However, it is important to recognise that the connections between people, their relationships with one another, are worthy of protection – as discussed earlier in relation to concepts of human dignity. This is particularly crucial in the digital age, where significant aspects of our relationships – whether private, public, business, personal, or parasocial – are increasingly mediated by trackable and storable information. In this context, the protection of the individual's embeddedness in a community and their connection to

178 ibid 312.

others, as integral parts of the self, must be safeguarded. This ensures that the relational dimensions of identity – shaped and influenced by digital interactions – are preserved and protected in an increasingly data-driven world.

4. Conclusions

What conclusions can be drawn from these considerations for the present study? As outlined above, concepts of human dignity can be traced to diverse intellectual traditions and cultural contexts. Moreover, there are compelling reasons to affirm that a robust concept of human dignity encompasses certain universally defensible and applicable elements, while remaining open to acknowledging and respecting cultural and regional particularities. One such universal element appears to be the understanding of individuals as authors of their own lives, endowed with rights to autonomy and self-determination – and, correspondingly, the prohibition against the instrumentalisation of human beings. Another universal element is the recognition of human interconnectedness. From this it follows that the informational relationships individuals maintain with one another should be acknowledged as integral to their personality and dignity. Accordingly, privacy ought to be understood as a personal right firmly anchored in a universal concept of human dignity.

II. Access to Justice

The collection, storage, and processing of (personal) data cannot be permitted without certain rights of the data subjects. At the heart of this is the right to know what data are collected and stored, as well as what it is used for. Anyone who does not know what their data are being used for becomes a pawn in the hands of the institutions responsible for data processing and loses their position as a subject, their ability to write part of their own history. This ability to understand and know is contained in the right to information and the right to access personal data. Additionally, the right to be heard, and the ability to challenge unjustified or inaccurate data collection, storage, or processing, is crucial for a data subject to retain their agency, allowing them to shape their own narrative and maintain meaningful connections with others. These abilities are reflected in the right to rectification and erasure of data and a right to an effective remedy.

The first three of these rights – information, access and rectification and erasure – seem to be understood as substantive rights, as they are primarily anchored in the right to privacy and protection of personal data (and correspondingly human dignity).[179] The right to an effective remedy, on the other hand, is understood as a procedural right. Within the European human rights framework, procedural rights are also perceived to be rooted in the right to human dignity.[180] The right to an effective remedy is arguably a *conditio sine qua non* for an effective guarantee of human dignity.[181] The subject status substantive rights guarantee is secured through procedural safeguards that give persons the possibility actively and effectively to pursue their rights and interests.[182] In its ruling, Cimade,[183] the European Court of Justice (ECJ) confirmed the welfare dimension generally attributed to human dignity in Member States,[184] and more widely recognised in academic scholarship,[185] which may open the possibility for claims to free legal support in certain situations, based on human dignity. The ECJ further opened up the possibility for building a bridge between the right to an effective remedy and the human dignity in its LM ruling.[186]

179 See chapters: The Right to Information; The Right to Access Personal Data and Information; The Right to Rectification, Completion, Erasure and Restriction of Processing of Personal Data.

180 DJ Galligan and Trevor RS Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18 Oxford Journal of Legal Studies 479ff.

181 Dupré, 'Article 1 - Human Dignity' (n 79), para 01.06.

182 Mahlmann, 'Human Dignity and Autonomy in Modern Constitutional Orders' (n 89) 385.

183 Case C-179/11 *CIMADE and GISTI v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration* [2012] OJ C 366/12.

184 Dupré, 'Article 1 - Human Dignity' (n 79) 17–18; Mark Simpson, '"Designed to Reduce People… to Complete Destitution": Human Dignity in the Active Welfare State' (2015) 1 European Human Rights Law Review 66.

185 Berma Klein Goldewijk, Adalid Baspineiro and Paulo Cabonari, *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (2002); cf also Agustín José Menéndez, '"Rights to Solidarity" - Balancing Solidarity and Economic Freedoms' in Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez (eds), *The Chartering of Europe* (Nomos 2003); cf also Manfred Nowak, *Human Rights or Global Capitalism - The Limits of Privatization* (University of Pennsylvania Press 2016).

186 Case C-216/18 PPU *Minister for Justice and Equality v LM* [2018] OJ C 328/22; cf also Dupré, 'Article 1 - Human Dignity' (n 79), para 01.06.

The distinction between substantive and procedural rights is not always simple or clear.[187] The right to information, access to data and especially rectification all have procedural aspects, as these rights serve the right to privacy to prevail.[188] These rights, irrespective of their qualification as procedural or substantive rights, can be derived from the concept of access to justice. The concept is linked to the ideal of the rule of law. Although it is sometimes located in the realm of procedural law, it does not fit into a substantive and procedural law dichotomy.

1. What Is Access to Justice?

Access to justice is not a clearly defined legal concept; different scholars understand it in different ways. If one translates the term 'access to justice' into German, an ambiguity emerges that reflects the different views. Access to justice can mean access to the court system (*Zugang zur Justiz*) or be understood as access to fairness and equity (*Zugang zur Gerechtigkeit*). The term is also often translated as access to the law (*Zugang zum Recht*), which is yet another dimension of this multifaceted term.

Historically, access to justice can be seen as part of or emerging from the rule of law ideal.[189] The concept first received explicit attention in the legal doctrine of Mauro Cappelletti in the 1970s–1980s.[190] His research mainly focused on the accessibility of the court system.[191] He nevertheless identified, as part of access to justice, the question of whether outcomes of court cases are individually and socially just.[192] While some studies later examined

187 Theodore Konstadinides and Noreen O'Meara, 'Protection of Procedural and Substantive Rights in the EU and the ECHR: Introduction' in Kanstantsin Dzehtsiarou and others (eds), *Human Rights Law in Europe: The influence, overlaps and contradictions of the EU and the ECHR* (Routledge 2014); Larry Alexander, 'Are Procedural Rights Derivative Substantive Rights?' (1998) 17 Law and Philosophy 19; Thomas Main, 'The Procedural Foundation of Substantive Law' (2009) 87 Washington University Law Review.

188 cf Access Rights under the Interoperable Eurodac System.

189 cf Eva Storskrubb and Jacques Ziller, 'Access to Justice in European Comparative Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press 2007) 179.

190 cf Mauro Cappelletti and Bryant Garth (eds), *Access to Justice. Vol 1. A World Survey*, vol 1 (Sijthoff and Noordhoff).

191 ibid.

192 Bryant Garth and Mauro Cappelletti, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buffalo Law Review 182.

access to justice merely as a right to a lawyer or legal assistance,[193] other studies followed a more comprehensive approach. Some included research from specific fields, including environmental justice,[194] or technology and artificial intelligence.[195] Others see access to justice not simply as access to lawyers and courts but rather as access to the legal information and both formal as well as informal mechanisms necessary to solve legal problems, including but not limited to courts and tribunals.[196] In that sense, access to justice relates not just to how problems are solved but also, importantly, to how they may be recognised, understood, avoided, and resolved. This broader understanding of access to justice is more recent. It has established itself as the overarching notion of access to justice in European law. Today, the emphasis is on obstacles to achieving redress, whether these obstacles are of a personal or generic nature, due to economic or cultural reasons, or perhaps resulting from the complexities of procedural rules.[197]

Storskrubb and Ziller have made out three parts of access to justice that reflect the understanding this study has of access to justice.[198] The first category is 'access to legal justice', which encompasses the enforcement of rights and the hurdles within legal recourse mechanisms. The second

193 Deborah L Rhode, *Access to Justice* (2004); James P George, 'Access to Justice, Costs, and Legal Aid' (2006) 54 American Journal of Comparative Law.

194 cf Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press 2007) (including, among others, a study by Catherine Redgwell: 'Access to Environmental Justice').

195 cf Nicolas Kyriakides, Anna Plevri and Yomna Zentani, 'AI and Access to Justice: An Expansion of Adrian Zuckermans Findings' in Xandra Kramer, Jos Hoevenaars and Erlis Themeli (eds), *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation* (Edward Elgar Publishing 2022); Siddharth Peter de Souza and Maximilian Spohr (eds), *Technoloy, Innovation and Access to Justice - Dialogues on the Future of Law* (Edinburgh University Press 2021); Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2021); 'AI & Access to Justice Initiative' (*Justice Innovation - Stanford Legal Design Lab*), available at <https://justiceinnovation.law.stanford.edu/projects/ai-access-to-justice/>.

196 Lorne Sossin and Darin Thompson, 'Digitalisation and Administrative Justice: An Access to Justice Perspective' in Marc Hertogh and others (eds), *The Oxford Handbook of Administrative Justice* (1st edn, Oxford University Press 2021) 504; Roderick Macdonald, 'Access to Justice in Canada Today: Scope, Scale, Ambitions' in Julia Bass, WA Bogart and Frederick Zemans (eds), in *Access to Justice for a New Century: The Way Forward* (Law Society of Upper Canada 2005); Lorne Sossin and Kent Roach, 'Access to Justice and Beyond' (2010) 60 University of Toronto Law Journal 373.

197 Storskrubb and Ziller, 'Access to Justice in European Comparative Law' (n 189) 185.

198 ibid 185 ff.

category is 'access to the machinery of justice of the welfare state'. This may include the right to free legal advice or representation. The final category is access to 'Justice with capital J', which can be expressed in German as *Gerechtigkeit* rather than *Justiz*. In other words, we are not only dealing with the law administered and enforced by the courts but with a broader view of the realisation of fairness and equity in society.[199]

This study is primarily concerned with the first category but also intends to shed light on the third. The following chapters will examine what rights data subjects under the Eurodac and Interoperability Regulations have, how comprehensive these rights are, and whether they can actually be exercised in practice. It is also important to consider who the analysed laws are intended to address. What language do the data subjects concerned speak, in which legal system did they grow up, what are their intellectual and financial resources, and what scope for action do the rights discussed give them? The study will also address issues of equality, fairness, and justice. It will examine the value accorded to the privacy of data subjects whose data are stored in Eurodac, and will consider whether their privacy is afforded the same level of protection as that of EU citizens.

It should be added here that the third aspect of access to justice mentioned above, 'access to the machinery of justice and the welfare state', is also recognised as important in this study. However, this study is largely concerned with EU and international law. The third part of access to justice would have to be analysed mainly at the national level. Such an analysis would go beyond the scope of this study. The right to free legal representation, for example, is not analysed in detail – even though this is an important aspect of access to justice.

It has been emphasised in legal literature that the question of transparency and availability of information has become more topical and the solutions more difficult to find, due to ever-increasing complexity and volume of legal rules and procedures.[200] This is certainly true for the areas of law dealt with in this study. Data processing is highly complex and equally difficult to understand for those subject to the law and civil servants working with systems, including large-scale databases and information systems. Transparency and information are essential. In addition, data protection provisions in the EU are – even after the adoption of the GDPR – still scattered, at times complicated to understand, and procedurally complex to

199 ibid 187.

200 ibid 191; Helen Darbishire, 'Proactive Transparency: The Future of the Right to Information?' (World Bank Institute 2010).

exercise. An access to justice perspective must bear in mind these special requirements for information and transparency today, especially in the areas of law analysed in this study.

The above outlines how access to justice is understood in this study and the objectives it seeks to pursue. In the following, I will consider the specific rights that arise from this concept for an individual or data subject, and identify which of these rights are examined in detail in this study.

2. Access to Justice in International Law

Access to justice is safeguarded in UN instruments, such as the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters[201] or the 2006 Convention on the Rights of Persons with Disabilities (CRPD).[202] Access rights are also provided for in international instruments, e.g., Art. 2(3) and Art. 14 of the United Nations (UN) International Covenant on Civil and Political Rights (ICCPR)[203] and the non-binding Art. 8 and 10 UDHR. Core elements of these rights include effective access to a dispute resolution body, the right to fair proceedings and the timely resolution of disputes, the right to adequate redress, as well as the general application of the principles of efficiency and effectiveness to the delivery of justice.[204]

3. Access to Justice in European Law

In the European legal framework, we find explicit mention of the right to access to justice in Art. 47 CFR, which stipulates that legal aid has to be granted to ensure effective access to justice, seemingly tying in with the narrow definition already mentioned. The term 'access to justice' also concludes the article as a whole. In this way, the article summarises all

201 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [1998] No 37770 (Aarhus Convention).
202 Convention on the Rights of Persons with Disabilities [2008] (CRPD).
203 International Covenant on Civil and Political Rights [1967] (ICCPR).
204 FRA, European Court of Human Rights and Council of Europe, *Handbook on European Law Relating to Access to Justice* (Publications Office of the European Union 2016) 16.

the particular rights enshrined in the concept of access to justice.[205] The European Union Agency for Fundamental Rights (FRA) states that the terms 'effective remedy' and 'access to justice' appear to be used interchangeably.[206] In the Explanations relating to the CFR, the relevant case law of the ECtHR[207] is referred to and the term effective remedy is used to explain access to justice.[208] Additionally, the Treaty of Lisbon stipulates in Art. 67(4) that "the Union shall facilitate access to justice in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters".[209] This definition, in turn, seems to be based on a broader understanding of access to justice as the actual realisation of certain rights.

The handbook on access to justice in Europe jointly prepared by FRA and the Council of Europe together with the Registry of the ECtHR ties access to justice to the rights in Art. 47, 51 and 52(3) CFR, Art. 4(3) and 19 TEU, as well as Art. 6, 13, 35 and 46 ECHR. The handbook affirms that "the notion of access to justice obliges states to guarantee each individual's right to go to court – or, in some circumstances, an alternative dispute resolution body – to obtain a remedy if it is found that the individual's rights have been violated. It is thus also an enabling right that helps individuals enforce other rights".[210]

Advocate General of the CJEU Ruiz-Jarabo Colomer has stated that "[a]ccess to justice is a fundamental pillar of western legal culture […]. Therefore, the right to effective legal protection is one of the general principles of Community law, in accordance with which access to justice is organised […]. Access to justice entails not only the commencement of legal proceedings but also the requirement that the competent court must be seized of those proceedings".[211] In other words, access to justice must be much more than a mere formal possibility. It must also be feasible in

205 FRA, 'Access to Justice in Europe: An Overview of Challenges and Opportunities' (Publications Office of the European Union 2010) 15.

206 ibid 15, fn 16.

207 *Airey v Ireland* (1979) Series A no 32.

208 EU, 'Explanations Relating to the Charter of Fundamental Rights' (n 79).

209 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1 (Treaty of Lisbon).

210 FRA et al., *Handbook on European Law Relating to Access to Justice* (n 204) 16.

211 Case C-14/08 *Roda Golf & Beach Resort SL* [2009], Opinion of Advocate General (AG) Ruiz-Jarabo Colomer. The CJEU delivered its judgment in this case on 25 June 2009 (note that the judgment does not include any discussion on the issue of access to justice raised by the AG).

practical terms.[212] According to established case law of the CJEU, access to justice is a core element of a Union based on the rule of law.[213]

The European Commission for Democracy through Law – better known as the Venice Commission, since it meets in Venice – which is the Council of Europe's advisory body on constitutional matters, sees access to justice as one part of the rule of law. In its rule of law checklist, which identifies common features of the rule of law, *Rechtsstaat*, and *État de droit*, it emphasises access to justice, particularly highlighting the importance of independence and impartiality. This includes the independence and impartiality of the judiciary and the bar, the autonomy of individual judges, and the control over prosecution services.[214] Secondly, the Commission lists fair trial guarantees, which are access to courts, presumption of innocence, effectiveness of judicial decisions, and further aspects.[215] Thirdly and finally, the Commission names constitutional justice as part of access to justice.[216] This is a narrower understanding than what the handbook on access to justice in Europe provides, even though the Council of Europe co-wrote it.

Looking at access to justice law in Europe, FRA concluded that access to justice is related to a number of terms that at times are used interchangeably or to cover particular elements, such as access to a court, effective remedies,

212 FRA, 'Access to Justice in Europe: An Overview of Challenges and Opportunities' (n 205) 17. The EU has as an instrument to measures access to justice in its Member States the EU Justice Scoreboard, that presents an annual overview of indicators on the efficiency, quality and independence of justice systems (European Commission, EU Justice Scoreboard, at: 'EU Justice Scoreboard' (*European Commission*) <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en>). This draws mainly on data from CEPEJ, a Council of Europe expert body, and forms part of the European Commission's Annual Growth Survey; the latter informs the deliberations of the EU's annual policy cycle – the European Semester – which has a significant impact on national finances (FRA, 'Fundamental Rights: Challenges and Achievements in 2014' (Publications Office of the European Union 2015) 14.

213 cf Gianluigi Palombella, 'Access to Justice: Dynamic, Foundational, and Generative' (2021) 31 Ratio Juris 121, referring to Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-5357; Nasiya Daminova, '"Access to Justice" and the Development of the Van Gend En Loos Doctrine: The Role of Courts and of the Individual in EU Law' (2017) 10 Baltic Journal of Law and Politics 133, with references.

214 Venice Commission, 'Rule of Law Checklist, Adopted by the Venice Commission at Its 106th Plenary Session (Venice, 11-12 March 2016)' (2016) CDL-AD(2016)007, 20ff.

215 ibid.

216 ibid.

or fair trial.[217] This author agrees with this description. As the above shows, there is no clear definition of what access to justice entails. Access to justice can be part of rule of law principles or vice versa; it includes rights that are also subsumed under notions of fair trial or effective remedy. Furthermore, access to justice can be interpreted narrowly as the right to a court or legal representation, or more broadly as a collection of procedural rights intended to enable individuals to pursue legal claims and achieve fairness or justice. Before we conclude what rights access to justice entails for the present study, this study shall briefly look at some specific issues that arise in the context of digitalisation.

4. Access to Justice in the Digital Age

In recent years, much has been published on questions of access to justice in an increasingly digitalised world.[218] It has been suggested that the digital age is similar to previous eras of technological change, at least with respect to its transformational nature and impact.[219] Brynjolfsson and McAfee argue that humanity has entered a 'second machine age', where machines transform human lives through massively new computing power in the same way the first industrial age saw machines change the world through breakthroughs in mechanical power.[220] This new age, they suggest, has many up- but also downsides. It enables society to overcome a host of human and analogue limitations, including limitations of geography. The internet allows networks to connect huge portions of humanity. This also brings constraints, such as the risk of mass surveillance and potential hu-

217 FRA 'Access to Justice in Europe: An Overview of Challenges and Opportunities' (n 205) 15.

218 E.g. Dorottya Papp, Bernadett Krausz and Franciska Zsófia Gyuranecz, 'The AI Is Now in Session – The Impact of Digitalisation on Courts' (2022) 7 Cybersecurity and Law 272; Sergio Carrera, Valsamis Mitsilegas and Marco Stefan, 'Criminal Justice, Fundamental Rights and the Rule of Law in the Digital Age' (Centre for European Policy Studies 2021) Report of a CEPS and QMUL Task Force; Lucía Salgado and Hanne Beirens, 'What Role Could Digital Technologies Play in the New EU Pact on Migration and Asylum?' (Migration Policy Institute Europe 2023).

219 Sossin and Thompson, 'Digitalisation and Administrative Justice: An Access to Justice Perspective' (n 196) 505.

220 cf Erik Brynjolfsson and Andrew McAfee, *The Second Machine Age: Work, Progress, and Prosperity in a Time of Brilliant Technologies* (W. W. Norton).

man rights violations arising from the use of algorithms in administration and automated decision-making.[221]

The EU has emphasised the advantages of digitalisation when it comes to access to justice. On 13 October 2020, the Council adopted conclusions on digitalisation in order to improve access to justice. The conclusions state that further digitalisation of the Member States' judicial systems has enormous potential to facilitate and improve access to justice for citizens throughout the EU.[222] This is certainly correct in principle. The digitalisation of files, for example, makes access to them much easier and more transparent. The possibility of making information and, for example, templates for simple requests or claims available online makes access to justice more feasible. Online access to judgments makes judicial systems more transparent. The flip side of this is that the ever-increasing possibilities for storing (personal) data are fuelling some authorities' collecting spree. As will be shown in this study, a whole range of data on migrants coming to Europe is stored today, which critics doubt is necessary for the relevant migration procedures.[223] In the case of Eurodac, much of the data collected today was previously not stored. Highly sensitive personal data, such as facial images, are generally not used in the asylum procedure but still collected and stored.[224] It therefore seems all the more important to guarantee robust rights that provide access to justice. The Council's conclusions stress that the digital development of the justice sector should be human-centred[225] and not undermine procedural rights, like the right to a fair hearing, the right to equality of arms, and the right to adversarial proceedings. They also emphasise the right to a public hearing, which includes, in certain cases, the right to an oral hearing in the physical presence of the affected party,

221 ibid; cf also Frank Pasquale, 'A Rule of Persons, Not Machines: The Limits of Legal Automation' (2019) 87 George Washington Law Review; Jamie Lee Williams, 'Privacy in the Age of the Internet of Things' (2016) 41 Human Rights 14.

222 11599/20 from Presidency, Council of the European Union, 'Council Conclusions "Access to Justice – Seizing the Opportunities of Digitalisation"' (8 October 2020), no 13.

223 See chapters: Eurodac and Interoperability; cf also Vavoula, *Immigration and Privacy in the Law of the European Union* (n 4).

224 Regulation (EU) 2024/1358 of the European Parliament and of the Council of 14 May 2024 on the Establishment of 'Eurodac' for the Comparison of Biometric Data [2024] 2024/1358 (Eurodac Regulation 2024), Art 13(2), 17(1)(b), Art. 28.

225 11599/20, 'Council Conclusions "Access to Justice – Seizing the Opportunities of Digitalisation"' (n 222), no 5.

as well as the right to appeal.[226] As we will see, this promise is not held in every case.

In connection with data, certain rights that previously did not have the same significance for access to justice are moving centre stage. Knowledge and information are essential for individuals to protect their data, making the issue of transparency and the availability of information increasingly relevant, as previously noted.[227]

In its 'Rule of Law Checklist', the Venice Commission has highlighted two challenges to the rule of law that Europe faces. One is corruption, the other collection of data and surveillance.[228] As explained above, the rule of law and access to justice are closely intertwined. It is therefore particularly relevant to see what the Venice Commission considers necessary to guarantee the rule of law in connection with data collections. The Venice Commission lists a whole bunch of different questions to test whether data are sufficiently safeguarded under the rule of law principle. These questions and the requirements placed on data collections coincide to some degree with the data protection rights arising from the GDPR. This is the case when the Venice Commission requires that personal data that are undergoing automatic processing are sufficiently protected regarding their collection, storing and processing by the state as well as by private actors – or, when it requires that data protection principles (contained in Art. 5 GDPR) are ensured (lawfulness, fairness and transparency; purpose limitation; data minimisation; accuracy; storage limitation; integrity and confidentiality). The same applies when the Commission requires that data subjects receive the minimum information outlined in Art. 13 and Art. 14 GDPR; that an independent authority is tasked with ensuring compliance with legal conditions under domestic law, which enforces international principles and standards for the protection of individuals and personal data; and that effective remedies are available for alleged violations of individual rights related to data collection.

However, the Venice Commission questionnaire emphasises strategic surveillance, which is not directly reflected by the GDPR. Strategic surveillance, as opposed to targeted surveillance, is a form of police or intelligence surveillance that does not target a suspect for a specific crime but collects data before an investigation is initiated. The aim of strategic surveillance is

226 ibid, no 17.
227 Storskrubb and Ziller, 'Access to Justice in European Comparative Law' (n 189) 191.
228 Venice Commission 'Rule of Law Checklist' (n 214) 31ff.

to find indications and evidence of specific offences or perpetrators against whom an investigation is then opened.[229] Part of the strategic surveillance is the collection of conversations by technical means (bugging), covert collection of the content of telecommunications, and covert collection of metadata. Simply put, metadata is 'data on data'. In the context of telecommunications, it is usually seen as all data that are not part of the content of the communication (although the boundaries between the two are not always clear). It designates such things as numbers called, duration of call, location of the caller and the recipient, etc.[230]

What Eurodac and the interoperability systems do is not strategic surveillance in the strict sense. Still, it comes very close. Instead of telecommunication data, biographic and biometric data of all persons entering or wishing to enter the Schengen Area are collected and analysed beyond what is necessary for the specific applications or requests of the person, such as an asylum application. For example, statistics are compiled to illustrate migration movements, combat irregular migration and terrorism, as well as support law enforcement in the EU.[231] For the latter purposes, data can be made available to police and other law enforcement authorities.[232] The questions posed by the Venice Commission's questionnaire are therefore also instructive in this context: What legal provisions exist regarding strategic surveillance to safeguard against abuse? Are the key elements of strategic surveillance codified in law, including the identification of authorised agencies, the specific purposes for which intelligence may be collected, and the limitations – such as the principle of proportionality – governing the collection, retention, and dissemination of the data obtained? Does the legislation extend data protection/privacy to non-citizens/non-residents? Is strategic surveillance submitted to preventive judicial or independent authorisation? Are there independent review and oversight mechanisms in place? Are effective remedies provided for alleged violations of individ-

229 Venice Commission, 'Report on the Democratic Oversight of Signals Intelligence Agencies Adopted by the Venice Commission at Its 102nd Plenary Session (Venice, 20-21 March 2015)' (2015) CDL-AD(2016)007, 8ff.

230 ibid 8, no 37.

231 Eurodac Regulation 2024, Art 12; Interoperability Regulation - Judicial Cooperation, Art 62 and ibid, Art 39, which implements Central repository for reporting and statistics supporting the objectives of the SIS, Eurodac and ECRIS-TCN, which are broad migration, policy and security objectives; for more see Jones Chris, Lanneau Romain, 'Automating Authority: Artificial intelligence in European police and border regimes' (Statewatch April 2025).

232 Eurodac Regulation 2024, Art 33 and 34; Interoperability Regulation - Judicial Cooperation, Art 20.

ual rights by strategic surveillance? These questions are, at least in part, analysed in this study for the data collection and processing activities under the Eurodac and the Interoperability Regulations.

In summary, it can be said that the legal literature as well as the EU recognise that digitalisation is a great opportunity but simultaneously a great challenge for the right to access to justice. This realisation has led to rights being strengthened and guarantees being enshrined in various legal areas. The legal area analysed in this study poses a particular challenge, in that the data subjects are not EU or Schengen Area citizens but asylum seekers, irregular migrants and stateless persons. There is a tendency in the Schengen Area states and at EU level to categorise "foreign" persons as a potential threat to internal security, which is very visible in the Eurodac and Interoperability Regulations. This fear may be taken as a basis for denying these data subjects the same rights as EU citizens. What access to justice means in a specific context must therefore be defined and analysed.

5. Access to Justice in the Context of the Interoperable Eurodac Information System

So, what exactly are we looking at when we conduct an access to justice study regarding the interoperable Eurodac? As explained in the first part on human dignity, this study argues that an interoperable Eurodac information system would not be permissible without specific rights for data subjects to understand what happens to their data and, where necessary, to intervene in this process, or, in other words, without some sort of access to justice.

This study examines what access to justice rights the Eurodac and Interoperability Regulations provide for the data subjects who are subject to them. In essence, the Member States and eu-LISA control what happens to the data of data subjects. This approach is very different from other systems that deal with EU citizens' data, such as the EU's Digital Identity Wallet.[233] Instead of a right to control their own data, European data protection law provides data subjects with micro-rights that allow them some control at different stages.[234] The Eurodac Regulation offers data subjects four

233 cf European Commission, 'A Digital ID and Personal Digital Wallet for EU Citizens, Residents and Businesses' (*EU Digital Identity Wallet*) <https://ec.europa.eu/digital-building-blocks/sites/display/EUDIGITALIDENTITYWALLET/EU+Digital+Identity+Wallet+Home>.

234 cf Lynskey, *The Foundations of EU Data Protection Law* (n 83) 180.

individual rights: the right to information, access to personal data, along with the right to rectification and erasure.[235] So do the Interoperability Regulations.[236] A fifth right examined in this study, the right to an effective remedy, is expressed in different ways in the Eurodac and Interoperability Regulations. There are other rights that may be enforceable in certain circumstances, including the right to standards and procedures that ensure data quality, although these are not conceived as individual rights.[237] Such rights are only dealt with peripherally in this study, in connection with one of the five individual rights mentioned. The individual rights arise not only from the Eurodac and Interoperability Regulations themselves; they are rooted in international human rights law and in the GDPR. This study therefore examines whether the minimum standards set out in international human rights law and the scope envisaged in the GDPR for these rights are also met in the Eurodac and Interoperability Regulations. It further seeks to determine whether these rights can be enforced by the data subjects to whom they are addressed.

The access to justice perspective in this context implies that this study not only explores the scope and practical enforceability of these rights, but also considers whether the data subject's personal data are acknowledged and respected as an essential part of their self-constitution – viewed more like "my hand" than "my car". The study asks whether enough has been done for the enforcement of rights and against hurdles within the legal recourse mechanisms. Another question posed is whether the system as a whole seems to lead to fair and just outcomes. As a guideline, questions are drawn from the insights gained above and, in particular, from the Venice Commission's questionnaire on the challenges posed by digitalisation. These questions accompany the following study; they show what obstacles and problems data subjects may face in accessing justice.

This view naturally ignores some important aspects that are part of access to justice. As already mentioned, the right to legal aid and representation, for example, does not arise from the Eurodac and the Interoperability Regulations; it is therefore not examined here. The same applies to the right to an independent and impartial court. Only aspects of this right are touched upon when analysing the right to an effective legal remedy. In this respect, this study is not conclusive but sheds light on a larger issue, and

235 Eurodac Regulation 2024, Art 42, 43.
236 Interoperability Regulation - Judicial Cooperation, Art 47, 48; Interoperability Regulation - Borders, Art 47, 48.
237 E.g., Eurodac Regulation 2024, Art 48.

further research in this field would be desirable. However, as mentioned above, this study will examine the rights to information, the right to access data and information, the right to rectification and erasure of data, as well as the right to an effective remedy. Within this analysis, core aspects of the following access to justice features will be discussed.

a) *Access to Information*

Data subjects must be able to comprehend what happens to their data, understand the rights they have concerning it, and know how to exercise those rights effectively. An access to justice perspective must keep the following questions in mind: Are data subjects provided with the information they need? Is this information clear and understandable? Can they access information that is not handed to them? Are there measures in place for data subjects who have visual, hearing, or other impairments? Are measures in place for minors to make sense of the procedures and laws they are subject to?

b) *Legal Certainty*

Data subjects have to be able to understand what they are subject to. Especially in a technical field, e.g., the realm of interoperability, this is not a given, per se. Foreseeability means not only that the law must, where possible, be proclaimed in advance of implementation and be foreseeable as to its effects. It must also be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it.[238] They must additionally be able to understand what rights they possess and how they can enforce them. The questions this study has to ask are therefore: Are the laws written in an intelligible manner? Can data subjects understand the laws and gather what they ought to do and what rights they have?

Furthermore, part of legal certainty is also that it must be possible for legal subjects to find the relevant laws and make sense of them. As seen above, scholars have criticised the fragmentation of the European data

238 Venice Commission 'Rule of Law Checklist' (n 214), no 58.

protection framework, which makes access to the law difficult.[239] The Interoperability Regulations add another layer of data processing and data protection rules. The following questions arise: Are data subjects able to find the relevant laws and provisions relating to their case? Do they understand how and when these laws apply? Do they understand, when reading the laws, what the relevant (technical) procedures and consequences in real life are?

c) *Compliance with the Law and Prevention of Abuse*

Another area that is related to the intelligibility of laws is the question of compliance with laws by the authorities. This can only be guaranteed if it is understood which authority has which competences and is responsible for what. This can be complex and unwieldy, especially with multi-level competences and supervisory models, as in the case of the EU's large-scale databases, where Member States and EU agencies have different competences within the same systems. These questions must be posed: Is the delineation of powers between different authorities clear? Do public authorities comply with their positive obligations by ensuring implementation and effective protection of human rights?[240]

Additionally, there is the question of accountability of the authorities. This question becomes especially relevant in the current context when data are processed for purposes other than those for which it was originally collected, or when it is disclosed to third parties or law enforcement authorities. The questions that have to be kept in mind are: Are public authorities required to provide adequate reasons for their decisions, in particular when they affect the rights of individuals? Is the failure to state reasons a valid ground for challenging such decisions in courts?[241] These questions also arise in connection with decisions based on contested data. For example, must a decision based on an automated comparison of data be justified and, if so, how?

239 Hartmut, 'Interoperability Between EU Policing and Migration Databases: Risks for Privacy' (n 73) 94ff and 101ff; Storskrubb and Ziller, 'Access to Justice in European Comparative Law' (n 189) 191.
240 Venice Commission 'Rule of Law Checklist' (n 214), no 45.
241 ibid, no 64ff.

d) *Independence of the Judiciary*

The question of the independence of the judiciary arises above all in this context, in connection with the access of law enforcement authorities to Eurodac data. In EU Member States, the assessment of whether the requirements for access to Eurodac data by law enforcement authorities are met is also carried out by a law enforcement authority, not by a judge.[242] This raises the question of whether a law enforcement authority is sufficiently independent to scrutinise its own authority. Is it permissible and sensible not to engage a court for such reviews?

e) *Equality and Non-Discrimination*

Regarding the question of equality and non-discrimination, it becomes relevant to ask: Are there individuals or groups with special legal privileges? Are these exceptions and/or privileges based on a legitimate aim and in conformity with the principle of proportionality?[243] These questions must be reversed in the present context: Are there certain groups that are disadvantaged? Is this discrimination justified? As Curtin and Bastos have put it: "The clear distinction between citizens and non-citizens is one of the most striking features of the new interoperability framework. This is not a purely technological nor neutral matter, but rather a profound question about how the EU intends to treat its own citizens and how differently it intends to treat outsiders, such as third-country nationals. The answers to such questions are of course nothing short of a reflection about the sort of

242 This is laid down in Eurodac Regulation 2024, Art 6, which together with ibid, Art 33 and 34 thereof regulates how law enforcement authorities can obtain access to Eurodac data. ibid, Art 6(1) states that "for law enforcement purposes, each Member State shall designate a single national authority or a unit of such an authority to act as its verifying authority. The verifying authority shall be an authority of the Member State which is responsible for the prevention, detection or investigation of terrorist offences or of other serious criminal offences", i.e. the authority verifying access is itself a law enforcement authority and may even "be part of the same organisation" as the authority responsible for the access request. Which authorities will be authorised to request access, and which will function as verifying authority will, according to ibid, Art 61, have to be notified to the Commission by 12 September 2024.

243 Venice Commission 'Rule of Law Checklist' (n 214), no 70ff.

polity the EU aspires to be."[244] The Eurodac and Interoperability systems are based on the fundamental assumption that migration must be regarded as a danger and that it increases crime.[245] Whether this assumption rightly serves as a reason for unequal treatment must be denied from an empirical point of view.[246] The question thus arises as to whether there are alternative and sufficient justifications for the expansive EU information systems and their interoperability. The answer to this question must fulfil the aforementioned requirements of a right to human dignity and equal value of people.

As part of a non-discrimination approach, the question must also be asked: Are positive measures expressly provided for the benefit of particular groups, including national minorities, in order to address structural inequalities?[247] For example, is information given to data subjects available in different languages? Asylum seekers and stateless persons often do not speak the language of the country they are residing in, and therefore represent a group of particularly vulnerable people. Another question is: Are there special provisions adopted for vulnerable groups, such as children and persons with disabilities?

f) *Effective Remedies and Fair Trial*

As set out above, most issues regarding access to justice lie in the area of fair trial considerations. These considerations begin with access to a remedy and a court. Do data subjects have effective access to courts? Does an individual have an easily accessible and effective opportunity to

244 Curtin and Bastos, 'Interoperable Information Sharing and the Five Novel Frontiers of EU Governance: A Special Issue' (n 55) 69.

245 Both regulations entail law enforcement purposes, cf Eurodac Regulation 2024, Art 1; Interoperability Regulation - Judicial Cooperation, Art 2.

246 Research funded by the EU as part of the Rights, Equality and Citizenship programme (REC 2014-2020) found that European societies have not become less safe as the foreign share of the population – particularly, asylum seekers, structurally more exposed to irregularity – increased (openpolis, 'Hate Speech: The Alleged Relationship between Immigration and Criminality' (2022)). Already in 2013, an EU funded report, reviewing 17 research projects, has concluded that there is no evidence of immigration leading to an increase in crime and unemployment ('EU Research Results: EU Research Disproves Link between Immigration and Increased Crime' (*European Commission - CORDIS*, 7 October 2013) <https://cordis.europa.eu/article/id/20635-eu-research-disproves-link-between-immigration-and-increased-crime>).

247 Venice Commission 'Rule of Law Checklist' (n 214), no 70 and 72.

challenge a private or public act that interferes with their rights? Are formal requirements, time limits, and court fees reasonable? Is access to justice easy in practice? What measures are taken to make it easy? Is suitable information on the functioning of the judiciary available?[248] These issues are particularly important in the context of data subjects who have to navigate a legal system that they do not know and that operates in a language other than their native one.

Further, more procedural questions and questions regarding the time of the proceedings arise, once a legal remedy has been obtained: Is equality of arms guaranteed by law? Is it ensured in practice? Is the right to be heard guaranteed? Are there rules excluding unlawfully obtained evidence? Is the right to timely access to court documents and files ensured for litigants? Are proceedings started and judicial decisions made without undue delay? Is there a remedy against undue lengths of proceedings? Are judgments well-reasoned? Are court notifications delivered properly and promptly?[249] Many of these questions are not easy to answer in the present context. A procedure to obtain access to personal data, for example, is a purely administrative procedure and obeys different rules than a civil or a criminal procedure. At the same time, the above-mentioned general suspicion of "foreign" persons as a danger also moves certain administrative procedures closer to something resembling a criminal proceeding, and appropriate procedural rights should be granted.

In connection with administrative law proceedings, special challenges also arise in other respects. The rise of the watchdog agency sees courts, the parliament, and government being increasingly supplemented by numerous statutory bodies that legitimate administrative decision-making without themselves having democratic sanction.[250] The question arises as to whether such institutions, notably the EDPS and the European Union Agency for the Operational Management of Large-Scale IT Systems (eu-LISA), can make a positive contribution to access to justice; or whether they complicate, prolong or even limit which rights and claims can be raised.

248 ibid, no 105ff.

249 ibid, no 105ff.

250 Anita Stuhmcke, 'Government Watchdog Agencies and Administrative Justice' in Marc Hertogh and others (eds), *The Oxford Handbook of Administrative Justice* (1st edn, Oxford University Press 2021) 118.

g) *Effectiveness of Judicial Decisions*

Another important question that can only be dealt with partially in the present study is: Are judgments effectively and promptly executed? In connection with data law issues, the time component can be decisive. Often, the question of the consequences of a decision arises. These questions must be viewed in light of the above-mentioned question of fairness and justice of procedures and decisions. What influence does the rectification of data have on an ongoing procedure? If, for example, it is established that a person's data were recorded incorrectly, and they were sent back to another country as a result, can they return after the rectification decision? Does finding that certain data security standards have not been complied with have an impact on an ongoing procedure? Such questions are important in determining whether a data subject perceives the entire procedure or the legal system as fair and just, which form part of access to justice considerations.

III. Conclusions

The examination of human dignity and access to justice as foundational elements for addressing the context of the interoperable Eurodac information system highlights the necessity for a universal concept of human dignity, along with robust and accessible rights, to effectively confront modern data protection challenges. Human dignity is a core value deeply embedded in European human rights law, which forms the foundation for the rights to privacy and data protection in Europe. In a globalised world, the concept of human dignity must transcend cultural and philosophical boundaries to ensure universal privacy and data protection. A conception of human dignity that excludes, e.g., non-European individuals from its protections would not be suitable. This chapter has shown that a concept of human dignity grounded in the idea of self-determination and the possibility of authorship of each individual, a prohibition of instrumentalisation and respect for the interconnectedness of human beings, seems to be able to find some universal acceptance – and is compatible with most concepts of human dignity. Regional and cultural differences can still be accommodated and may find their way into national or regional jurisprudence. Robust data protection laws have to be grounded in a concept of privacy that is understood as a personal right. Personal data in that sense are an extension of oneself,

thereby requiring stringent standards for data collection and processing to safeguard individual autonomy and a person's interconnectedness with the world and others.

As part of a robust legal framework that allows for the realisation of privacy and data protection rights, access to justice must be guaranteed. Access to justice is a multifaceted and evolving concept with significant implications for human dignity and the enforcement of substantive rights. Historically rooted in the rule of law, *l'état de droit* or *der Rechtsstaat*, access to justice encompasses not only the accessibility of court systems but also (procedural) fairness and equity in legal outcomes. Contemporary interpretations extend to include the accessibility of legal information and support, legal certainty and compliance with the law, equality, independence and impartiality, effectiveness of remedies and decisions, as well as the societal implications of legal processes. This study underscores the importance of overcoming economic, cultural, and procedural barriers to ensure effective access to justice, particularly in the digital age. It recognises that while digitalisation offers potential benefits for improving access to justice, it also necessitates a careful balance between technological advancements and the protection of fundamental rights.

Overall, the comprehensive protection of human dignity and access to justice in the context of the interoperable Eurodac requires an inclusive, multi-faceted approach. It necessitates integrating diverse philosophical traditions, ensuring clear and enforceable rights for data subjects, as well as maintaining stringent oversight of public authorities and judicial review procedures. As data protection evolves, it is essential to uphold these principles to create a fair and just legal framework that respects the dignity of all individuals in the digital age.