



UiO : **Faculty of Law**
University of Oslo

The Right to Cybersecurity: An Emerging Fundamental Right?

Luca Tosoni
PhD Candidate
Department of Private Law
luca.tosoni@jus.uio.no



Agenda

- Introduction to fundamental rights
 - What are they and how do they emerge?
- A new fundamental right to cybersecurity?
 - Inception, sources and context
- Main consequences of the emergence of a new fundamental right to cybersecurity

Fundamental Rights: What's in A Name?

- Warrant a high degree of protection
- Fundamental rights ~ human rights
- Not a strictly homogeneous group of rights
- Not static and immutable

How Do New Fundamental Rights Emerge?

1. Intellectual or political conceptualization
2. Consolidation into soft law
3. Full formal recognition

The Fundamental Right to Cybersecurity: Inception, Sources and Context

Academic Literature

- Growing but scarce
 - Mainly technical or focused on the legal challenges posed by cybersecurity
- Some scholars have started to advance arguments for the recognition of a human right to cybersecurity
 - Shackelford, ‘Should Cybersecurity be a Human Right: Exploring the Shared Responsibility of Cyber Peace’ (2019) *55 Stanford Journal of International Law*
 - Kilovaty, ‘An Extraterritorial Human Right to Cybersecurity’ (2020) *10(1) Notre Dame Journal of International & Comparative Law*
 - ...

Civil Society, Business and Government Initiatives

- Starting from the mid-1990s, numerous private and public initiatives have advocated for the recognition of new digital fundamental rights
- Some of these demand that cybersecurity, or at least some of its components or manifestations, be made a fundamental right
 - Charter of Human Rights and Principles for the Internet
 - Charter of Digital Fundamental Rights of the European Union
 - Italian Declaration of Internet Rights
 - Spanish Charter of Digital Rights
 - ...

A Fundamental Right in the *Penumbra*?

- International human rights law
 - ‘the same rights that people have offline must also be protected online’ (A/HRC/RES/20/8), including the rights to security, privacy, freedom of expression, etc.
 - ‘in the digital age, technical solutions to secure and protect the confidentiality of digital communications, including measures for encryption and anonymity, are important to ensure the enjoyment of *all* human rights offline and online’ (A/HRC/47/L.22)
- EU law
 - Evolution of cybersecurity under EU law: from technical requirement to core normative principle
 - More extensive – but fluctuating – interpretation of the EU Charter
 - Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*
 - Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net*

National Law Approaches

- Germany
 - BVerfG recognized a new ‘fundamental right to the confidentiality and integrity of information systems’ (judgment of 27 February 2008, 1 BvR 370/07)
- Finland
 - A collective and individual right to (cyber)security in the Constitution (Art. 7(1))
- Costa Rica
 - Cybersecurity as a necessary element of the fundamental right to internet access
- Brazil
 - Cybersecurity within the *Marco Civil da Internet*

So What?

The (Main) Consequences of the Emergence of a Fundamental Right to Cybersecurity

- Parameter of interpretation
- Different balance between fundamental rights
- Positive and negative obligations
 - Horizontal effect?
- Due diligence obligations
- Security by design

Thank you for your attention!

Any questions?

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