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**In search of the concept of essence of EU
fundamental rights
through the prism of data privacy**

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In search of the concept of essence of EU fundamental rights through the prism of data privacy

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Abstract

This article aims to shed light on the notion of essence of fundamental rights that has been relied upon by the Court of Justice of the EU (CJEU) in the *Schrems* and *Digital Rights Ireland* cases. This article places the notion of essence into the framework of multi-level protection of fundamental rights in Europe, arguing that this concept has its origins not only in case law of the CJEU concerning the ‘very substance’ of fundamental rights, but also in the national constitutional traditions of Member States and the case law of the European Court of Human Rights. This article further elaborates on the constitutive elements of this notion and proposes a classification of the different types of breaches of the essence of fundamental rights. Finally, while elaborating on the relationship between the notion of essence and the principle of proportionality, this article proposes an EU methodology for determining a breach of the essence of a fundamental right.

1. Introduction

Establishing a breach of a fundamental right in EU law can be compared to peeling an onion: the outer layer is the fundamental right as a whole, without its value being diminished in any way; the next layer comprises a justified impairment of this right,² followed by an unjustified breach.³ Even closer to the inside of the onion is a particularly serious breach of a fundamental right⁴ and the heart of the onion constitutes the core – or the essence – of a fundamental right.⁵ It seems necessary to unravel all previous layers in order to touch upon and determine the essence of a fundamental right. The essence –

¹ Assistant Professor, Faculty of Law, Maastricht University. The author would like to thank Bartosz Marciniak, Giovanni Sartor, Marijn van der Sluis, Christoph Sobotta and Bruno de Witte for discussions and comments on an earlier draft of this paper and to Mirjam Abner, Matej Accetto, Andrei Florea, Martin Husovec, Jan Komárek, Bartosz Marciniak and Alicja Sikora for helping the author with commentaries of national constitutional provisions. The usual disclaimer applies.

² See for example case C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114, para 20.

³ See for example case C-92/09, *Volker und Markus Schecke and Eifert*, ECLI:EU:C:2010:662, para 43 et seq.

⁴ See for example joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*, ECLI:EU:C:2014:238, paras 37, 39.

⁵ See for example case C-362/14, *Schrems*, ECLI:EU:C:2015:650, para 94, 95.

sometimes referred to as the minimum,⁶ essential⁷ or absolute⁸ core of a right – represents the untouchable core or inner circle of a fundamental right that cannot be diminished, restricted or breached upon save for the right to lose its value either for the right holder or for society as a whole. At first glance, it might be easy to imagine such an inner circle of a fundamental right that should under no circumstances be affected. However, a closer look into the concept reveals its complexity, ranging from difficulties in defining the concept, including the lack of appropriate tools for such a definition and difficulties of delimitation with the ordinary or particularly serious breach.

The notion of essence appears not only in the Charter of Fundamental Rights of the EU (Charter), but also in the constitutions of several EU Member States⁹ and third countries,¹⁰ as well as in the case law of the ECtHR¹¹ and also (implicitly) in the International Covenant on Civil and Political Rights,¹² which has been subject to contentious interpretation.¹³ To separate the breach of essence from an ordinary (or serious) breach of a fundamental right, the former has sometimes been described as an

⁶ Young, “The Minimum Core of Economic and Social Rights: A Concept in Search of Content” (2008) 33 *Yale J. Int'l L.*, 113; Lehmann, “In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core (2006-2007) 22 *Am. U. Int'l L. Rev.*, 163; Bilchitz, “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence” (2003) 19 *S. Afr. J. on Hum. Rts.*, 1.

⁷ Rivers, “Proportionality and Variable Intensity of Review” 65(1) *The Cambridge Law Journal* (2006), p. 180.

⁸ Rivers, p. 184.

⁹ See constitutions of Estonia (Article 17(2)), Germany (Article 19(2)), Hungary (Article I(3)), Poland (Article 31(3)), Portugal (Article 18), Romania (Article 53(2)), Slovakia (Article 13(4)), Spain (Article 53(1)).

¹⁰ For example, Turkey (Article 13), Argentina (Article 28), Namibia (Article 22(a)), Switzerland (Article 36). The South African Constitution contains a concept of ‘minimum core’; in theory see Lehmann, “In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core (2006-2007) 22 *Am. U. Int'l L. Rev.*, 163.

¹¹ ECtHR, *Ashingdane v. the United Kingdom*, Appl. No. 8225/78, judgment of 28 May 1985, paras 57, 59; *Philis v. Greece*, Appl. No. 12750/87; 13780/88; 14003/88, judgment of 27 August 1991, paras 59, 65; ECtHR, *Baka v. Hungary*, Appl. No. 20261/12, judgment of 23 June 2016, para 121; ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, Appl. No. 5809/08, judgment of 21 June 2016, para 151; ECtHR, *Heaney and McGuinness v. Ireland*, Appl. No. 34720/97, para 55, 58; ECtHR, *Christine Goodwin v. the United Kingdom*, Appl. No. 28957/95, judgment of 11 July 2002, paras 99-101.

¹² The text of the Covenant does not specifically contain the notion of ‘essence’, but it came to existence through the interpretation of Covenant’s Article 5(1) prohibiting – similarly as the ECHR – destruction of rights and their limitation to a greater extent than provided by Covenant. See Von Bernstorff, “Kerngehaltsschutz durch den UN-Menschenrechtsausschuss und den EGMR: Vom Wert kategorialer Argumentationsformen” 50 *Der Staat* (2011), 170; Nowak, “U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd ed. (Engel, 2005), 115.

¹³ Hofmann, in Schmidt-Bleibtreu, Klein, *Kommentar zum Grundgesetz* (Luchterhand, 2004), p. 613.

“extreme infringement”¹⁴ of a fundamental right. There have even been claims challenging its existence,¹⁵ notably with regard to the principle of proportionality, which views essence as a non-viable alternative to proportionality.¹⁶ It has been asserted that its existence can be justified only if it is “definable independently of proportionality and perform[s] a distinct role in preventing certain forms of state action”.¹⁷ Others are in favour of an opposite thesis, claiming that “a core only becomes clear when viewed against its background”,¹⁸ thereby taking a position that the essence exists in symbiosis with proportionality and that its existence should not be denied.

From the beginning of the drafting of the Charter, there was consent in the Convention to include the concept of essence into its text,¹⁹ although many delegates were uncertain as to the meaning of this notion,²⁰ presumably those who were not familiar with it from their national constitutional orders. It seems that this uncertainty led to this notion being changed several times. Initially, the wording required the limitations of rights not to infringe ‘the *essential content (contenu essentiel)* of the rights in question’,²¹ which was later modified into the requirement to respect the ‘*actual substance (substance même)* of those rights and freedoms’.²² For a short while the concept disappeared from the text of the Charter,²³ but it was eventually inserted back into its text.

While the notion of essence contained in Article 52(1) of the Charter is a novelty in the EU legal order and it can therefore legitimately be questioned whether it should appear in the Charter at all – not least because when it emerged in the text of the Charter, the reference to it seemed to have been largely overlooked in the doctrine –, this paper does not dispute the practical value of essence for two reasons. First, the notion is clearly present in the body of the Charter and omitting its use in practice would be tantamount to deleting it from the text of the Charter into which it was purposefully inserted by its drafters. According to Article 52(1) of the Charter, “[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the *essence* of those rights and freedoms.”²⁴ Secondly, the Court of Justice of the

¹⁴ Rivers, 184.

¹⁵ Alexy, *A Theory of Constitutional Rights* (Oxford, 2004), p. 196.

¹⁶ Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge Books Online, 2016).

¹⁷ Rivers, 184.

¹⁸ Van der Schyff, “Cutting to the Core of Conflicting Rights: The Question of Inalienable Cores in Comparative Perspective” in Brems (ed.), *Conflicts Between Fundamental Rights* (Intersentia, 2008), p. 134.

¹⁹ Meyer, p. 670; Grote, Maruhn (Eds), “EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz (Mohr Siebeck, 2006), 370.

²⁰ Meyer, p. 681.

²¹ Article Y (Limitations) of Draft Charter of Fundamental Rights of the European Union, CHARTE 4123/1/00 REV 1, 15 February 2000. Emphasis added.

²² Article 47 (Limitation of guaranteed rights) of Draft Charter of Fundamental Rights of the European Union, CHARTE 4316/00, 16 May 2000. Emphasis added.

²³ Article 50 (Scope of guaranteed rights) of Draft Charter of Fundamental Rights of the European Union, CHARTE 4422/00, 28 July 2000.

²⁴ Emphasis added.

EU (CJEU) which, without giving an explanation on the concept's meaning and importance, has used the notion of essence in its case law²⁵ thereby turning attention towards the practical value of this concept. The interest in the concept of the 'essence' of fundamental rights has thus increased after the judgments in *Digital Rights Ireland*²⁶ and, even more importantly, *Schrems*.²⁷ The latter was the first case in which the CJEU recognised that there was a breach of both the essence of the fundamental right to privacy and of the fundamental right to effective judicial protection. Furthermore, in the recent judgment in *Tele2 Sverige*, the CJEU again referred to this concept, albeit it did not bind a breach of essence.²⁸ The right to privacy was therefore an important trigger to enliven a discussion on a broader constitutional issue: what is the 'essence' of a fundamental right?

The overarching goal of this article is to provide an in-depth analysis of the notion of essence of fundamental rights and, more specifically, to address the question of the content and particularities of this notion within the EU legal order, as well as to establish an EU methodology for determining when a breach of essence takes place. The more detailed structure of this article is therefore as follows. First, in order to put the notion of essence into a broader perspective, the article explores the constitutional origins of essence on both the national and on the European level (Part 2). Such an approach is necessary in order to understand the first conceptualisations of essence on the level of national constitutions and the gradual constitutional cross-fertilisation into other legal orders, both national and European. Understanding of origins of essence has a normative value as it contributes to gradually build up the concept of essence. This analysis is therefore a logical predisposition for conceptualising the notion of essence. Therefore, Part 3 of the article seeks, through analysing the current approaches to the notion of essence in EU law, to establish constitutive elements of the concept of essence. Drawing upon these constitutive elements, we finally (in Part 4) explain the relationship between essence and proportionality, further suggesting an EU approach to establishing a breach of essence.²⁹

2. Constitutional origins of 'essence' in a multi-level fundamental rights system

The protection of fundamental rights in Europe is embedded in a complex multi-level system, operating on the level of national constitutional law, EU law and the ECHR. As Fabbrini rightly points out, fundamental rights in Europe 'are conceived ... in a plurality

²⁵ Case C-362/14, *Schrems*, ECLI:EU:C:2015:650, para 94, 95; Case C-293/12, *Digital Rights Ireland and Seitlinger and Others*, ECLI:EU:C:2014:238, para 38-40.

²⁶ Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*, ECLI:EU:C:2014:238.

²⁷ Case C-362/14 *Schrems*, ECLI:EU:C:2015:650.

²⁸ Case C-203/15 *Tele2 Sverige*, ECLI:EU:C:2016:970, para 101.

²⁹ Differently from the existing doctrine on the matter of 'essence', the present paper analyses the notion of 'essence' from the perspective of Article 52(1) of the Charter itself, its characteristics, constitutive traits and difficulties related to its conceptualisation. Comp. Von Bogdandy et al., "Reverse Solange—Protecting the essence of fundamental rights against EU Member States" 49 *CML Rev.* (2012), pp. 489–519.

of legal sources and a multiplicity of legal frameworks which intertwine and overlap'.³⁰ Consequently, identifying the correct contours of the notion of 'essence' is, from this pluralist fundamental rights perspective, impossible without taking into account the two other layers of fundamental rights protection: national constitutions and the ECHR. In this part of the paper, we discuss the constitutional origins of the concept of the 'essence' of fundamental rights. In order to conceptualise this notion within the EU legal order, a prior understanding of its roots and the rationale behind it is necessary. Exploring the roots and rationale does not only have an explanatory purpose, but rather a normative one as the origins of essence also determine its content and interpretation. Because the EU's use of essence derives from different sources, its meaning is largely, although not entirely, determined through these sources. Even though there may be no explicit common understanding as to the sources of the concept of 'essence' in the Charter, it is submitted that codifying this notion in EU law has a triple origin: it constitutes a general principle stemming from constitutional traditions common to the Member States; it has its basis in the ECHR and ECtHR case law; and the CJEU has, in its case law, already used a similar notion of 'very substance'.

2.1. Essence as a general principle common to Member States

First, we argue that the adoption of the concept of essence from constitutional legal orders of several EU Member States makes the protection of essence a general principle stemming from constitutional traditions common to the Member States, and that this general principle was one of the sources for the codification of this notion into Article 52(1) of the Charter. It matters not that the CJEU did not expressly refer to these common traditions when relying on the notion of very substance, a predecessor of essence. What is relevant is that several Member States protect the essence of fundamental rights in their national constitution or jurisprudence. Therefore, in order to construct a normative value of the notion of essence within the EU legal order, it is necessary to go back to its roots which are found in the national constitutional legal orders of EU Member States.

In a multi-level fundamental rights system, the adoption of the concept of essence of fundamental rights in constitutions of certain EU Member States and other countries is a salient example of constitutional cross-fertilisation. Even though the idea of constitutional cross-fertilisation mainly refers to judges importing ideas from the highest courts of other countries, using them as persuasive authorities,³¹ this theory can also be used to encompass the influence of a constitutional text or doctrine of one country on one or more other countries. It is submitted that the cross-fertilisation regarding the notion of essence is, on the one hand, horizontal, since it seems to manifest itself between different national constitutions and, on the other hand, vertical, since the national constitutional orders have an impact on the EU legal order.

³⁰ Fabbrini, *Fundamental rights in Europe: challenges and transformations in comparative perspective* (Oxford, 2014), 20.

³¹ Slaughter, *A New World Order* (Princeton, 2004), p. 70; Slaughter, "Judicial Globalization" 40 *Virginia Journal of International Law* (2000), 1104 *et seq.*

Looking closer into horizontal cross-fertilisation, it can be established that the initial source of the concept of essence (*Wesensgehalt*) comes from the German constitution from which this idea was gradually exported into the texts of constitutions of certain other EU Member States³² and third countries.³³ The origins of the concept of essence coincide with the first codifications of fundamental rights in Europe, even before the existence of the EU (or EEC).³⁴ Even though in Germany the constitutional doctrine interpreting this notion does not agree on whether it should be ascribed much practical value,³⁵ the notion of essence is nevertheless somewhat humorously described as the most successful export good of the 1949 Constitution.³⁶ The initial goal of the prohibition of impairing of essence – preventing a repeat of the atrocities of the Second World War – was gradually surpassed by its reception into other constitutional texts which partially took over the concept and its theoretical background almost unchanged and partially developed further or moderately modified the idea.

Amongst the legal orders that closely follow the German tradition are the Spanish and Portuguese constitutional orders which both protect the ‘essential content’ (*contenido esencial*,³⁷ *conteúdo essencial*³⁸) of fundamental rights. The constitutional doctrine of both legal orders discusses the absolute and relative theories with regard to essence, the absolute theory meaning that the essence can, as a matter of impossibility, never be balanced with another competing right or interest, and the relative theory allowing the balancing with other rights and interests and hence defining the essence in terms of proportionality balancing.³⁹ While the Portuguese doctrine shows awareness of absolute and relative theory with regard to essence of fundamental rights, staying rather neutral on this point;⁴⁰ the Spanish doctrine – similar to the German doctrine⁴¹ – prefers the

³² Von Bernstorff, “Kerngehaltsschutz durch den UN-Menschenrechtsausschuss und den EGMR: Vom Wert kategorialer Argumentationsformen” 50 *Der Staat* (2011), 171; Von Bogdandy et al., “Reverse Solange—Protecting the essence of fundamental rights against EU Member States” 49 *CML Rev.* (2012), 510.

³³ For example, Turkey (Article 13), Argentina (Article 28), Namibia (Article 22(a)), Switzerland (Article 36). The South African Constitution contains a concept of ‘minimum core’; in theory see Lehmann, “In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core (2006-2007) 22 *Am. U. Int’l L. Rev.*, 163.

³⁴ On first codifications of fundamental rights in Europe see Fabbrini, *Fundamental rights in Europe: challenges and transformations in comparative perspective* (Oxford, 2014), 7.

³⁵ Hofmann, in Schmidt-Bleibtreu, Klein (eds.), *Kommentar zu Grundgesetz* (Luchterhand, 2004), p. 613; Sachs, in *Grundgesetz: Kommentar* (Beck, 2009), p. 742.

³⁶ Häberle, “Wechselwirkungen zwischen deutschen und ausländischen Verfassungen”, para 41, as cited in Kokott, “Grundrechtliche Schranken un Schrankenschranken” in Merten/Papier (Eds.), *Handbuch der Grundrechte in Deutschland und Europa* (Müller, 2004), p. 887.

³⁷ See Article 53(1) of the Spanish Constitution.

³⁸ See Article 18 of the Portuguese Constitution.

³⁹ Sachs, *Grundgesetz: Kommentar* (Beck, 2009), p. 743.

⁴⁰ Canotilho, Moreira, *Constituição da República Portuguesa Anotada. Volume I*, 4th ed (Coimbra Editora, 2007), p. 395.

absolute theory over the relative theory of the *contenido esencial*, leading to the result that the notion of essence provides for an absolute protection that can never be (out)weighted by other competing interests.⁴²

In comparison, the relative theory, which permits balancing the essence of a right and other interests and thus bringing the concept of essence fairly close to proportionality,⁴³ is accepted in the Austrian legal order whereby the notion of essence was recognised through the case law of the Constitutional Court.⁴⁴ Similarly, the Hungarian constitution⁴⁵ and the Hungarian Constitutional Court,⁴⁶ having adopted the notion of essential content,⁴⁷ build upon a relative rather than absolute understanding of this notion.⁴⁸ It is to be noted that the controversial Hungarian constitutional amendments in 2013,⁴⁹ which were partially challenged before the CJEU,⁵⁰ did not change the constitutional provision guaranteeing the ‘essential content’ of fundamental rights. As we will see later in Part 4 of this article, the absolute and relative theory, developed in

⁴¹ Kokott, p. 891. This is however not necessarily the case for the German Constitutional Court which initially favoured the absolute doctrine (BverfG 7, 377, 411), but in later case law prioritised the relative doctrine (BverfG 22, 180, 219). See Sachs, 743.

⁴² Casas Baamonde, Rodríguez-Piñero y Bravo-Ferrer, *Comentarios a la Constitución Española* (Kluwer, 2008), p. 1168.

⁴³ Sachs, *Grundgesetz: Kommentar* (Beck, 2009), p. 743.

⁴⁴ So Kokott, p. 891.

⁴⁵ After the fall of the communist regime, Hungary adopted a new constitution only in 2011; for text see <<http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf>> (last visited 25 May 2016) which was amended with rather controversial amendments in 2013; for text see <<http://www.mfa.gov.hu/NR/rdonlyres/8204FB28-BF22-481A-9426-D2761D10EC7C/0/FUNDAMENTALLAWOFHUNGARYmostrecentversion01102013.pdf>> (last visited 25 May 2016).

⁴⁶ In the framework of interpretation of the concept of ‘essential content’, the Hungarian Constitutional Court, deciding on a case concerning the right to have one’s own name, even went as far as to define the entirety of the right as an essential content and thereby to declare this right as an absolute right. See Decision 58/2001 (XII. 7.) AB, in Holló, Erdei, *Selected Decisions of the Constitutional Court of Hungary (1998-2001)* (Akadémiai Kiadó, 2005), p. 417-418.

⁴⁷ According to the Article I(3) of the Hungarian constitution, “[a] fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of such fundamental right.”

⁴⁸ Küpper, *Die ungarische Verfassung nach zwei Jahrzehnten des Übergangs* (Peter Lang, 2007), p. 92.

⁴⁹ See, in media, for example BBC: “Q&A: Hungary’s controversial constitutional changes” <<http://www.bbc.com/news/world-europe-21748878>> (last visited 25 May 2016).

⁵⁰ Case C-286/12, *Commission v Hungary*, ECLI:EU:C:2012:687. For a commentary see Vincze, “The ECJ as the Guardian of the Hungarian Constitution: Case C-286/12 *Commission v. Hungary*” 19 *European Public Law* (2013), 489–500.

national constitutional traditions, have a normative value in determining how the concept of essence should be conceptualised.

Furthermore, irrespective of different theories, the practice of the constitutional court is also of importance in Poland where the Constitutional Court uses the provision of the Polish Constitution relating to ‘essence’ (*istota*)⁵¹ in its case-law,⁵² confirming that this provision does not only have a declaratory, but indeed a practical value. Moreover, the Slovak constitution equally protects the essence (*podstata*).⁵³ Even though the provision of the Romanian constitution regulating restrictions on the exercise of certain rights and freedoms commands that the measure restricting a right should not infringe the existence (*existenței*) – and not the essence – of such right or freedom,⁵⁴ it can be claimed that questioning the existence of a fundamental right is indeed a way of infringing the essence of a fundamental right.⁵⁵ Despite differences in the conceptualisation of the notion of ‘essence’ in the different constitutional orders of EU Member States, their main purpose remains the same: to protect the holder of the fundamental right to be stripped of the inalienable core of her fundamental right.

Apart from this horizontal cross-fertilization between legal orders of Member States, from the perspective of EU law, we can also observe vertical cross-fertilization through the adoption of the concept of essence into Article 52(1) of the Charter. This shows a true multi-level nature of the notion of essence which is protected on several constitutional levels: national and EU (and, as we will see later, the ECHR). The argument on influence of German constitutional law on the adoption of the notion of essence into the Charter can be strengthened by the circumstance that the President of the Convention in charge of drafting the Charter, Roman Herzog, was a German constitutional lawyer. Moreover, the fact that the German version of the Charter contains the term *Wesensgehalt*, aligning it with the German constitutional tradition, also seems to confirm that we are witnessing vertical cross-fertilization. Finally, a strong

⁵¹ Article 31(3) of the Polish Constitution.

⁵² Judgment of Polish Constitutional Court of 12 January 2000, as cited in ECtHR, *Hutten-Czapska v. Poland*, Appl. No. 35014/97, judgment of 19 June 2006.

⁵³ See Article 13(4) of the Slovak Constitution. In theory see Drgonec, *Ústava Slovenskej Republiky: Komentár*, 3rd ed. (Heuréka, 2012), p. 291.

⁵⁴ Article 53(2) of the Romanian Constitution. The original Constitution of Romania of 1991 (Official Gazette of Romania, Part I, No. 233 of 21 November 1991) was revised in 2003 with the Law No. 429/2003 on the revision of the Constitution of Romania (Official Gazette of Romania, Part I, No. 758 of 29 October 2003). The initial article dealing with the existence of fundamental rights (Article 49(2)) was renumbered, in the new version, into Article 53(2). Available on <<http://www.cdep.ro/pls/dic/site.page?id=371>> (last visited 25 May 2016).

⁵⁵ Romanian constitutional doctrine points out that this provision needs to be read together with the provision prohibiting “suppression of the citizens' fundamental rights and freedoms.” See Zlatescu, *Constitutional Law in Romania* (Kluwer, 2012), p. 116 and Article 152(2) of the Romanian Constitution.

argument in favour of such cross-fertilization is the close binding between the ‘essence’ and human dignity⁵⁶ which will be discussed below in Part 3 of this article.

2.2. Essence in ECHR and ECtHR jurisprudence

In the multi-level fundamental rights structure, both the Charter and the ECHR aim to protect the essence of fundamental rights. Adding this additional layer to the protection of ‘essence’ of fundamental rights does not create a tension between the two European levels of fundamental rights protection. On the contrary, from the perspective of constitutional pluralism such an additional level of protection, characterised by heterarchy rather than hierarchy, in principle leads to the convergence of legal orders.⁵⁷

Contrary to the Charter, the ECHR does not contain an express requirement to protect the ‘essence’ or the ‘core’ of fundamental rights.⁵⁸ However, what seems to be absolute silence on this issue could be broken by the voice of other provisions of the ECHR. It has been claimed that Article 17 ECHR, prohibiting the abuse of rights, could be seen as protecting the core of such rights.⁵⁹ According to this article, the ECHR may not ‘be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the *destruction* of any of the rights and freedoms set forth herein.’⁶⁰ It is submitted that, through a purposeful interpretation of this provision, it is possible to understand it as aiming to protect the essence of fundamental rights enshrined in the ECHR. The prohibition of the *destruction* of any of the rights and freedoms’ contains a hypothesis of the total abolition of rights which is, to our understanding, akin to compromising its essence, despite the fact that the ECHR does not actually expressly speak about legislative abolishment but merely of the interpretation of ECHR provisions. The ECtHR is not silent on the notion of essence. Several of its cases relate to the breach of essence of a fundamental right, albeit in rather different contexts such as for example on the right of access to court (Article 6(1) ECHR),⁶¹ privilege against self-incrimination and the right to remain silent,⁶² the right to marry⁶³ or the right to vote.⁶⁴ As we will see in later analysis in this paper, this case law partially

⁵⁶ Borowsky, in Meyer (Ed.), *Charta der Grundrechte der Europäischen Union* (Nomos, 2011), p. 674. Compare Von Bernstorff, p. 171-172.

⁵⁷ Fabbrini, *Fundamental rights in Europe: challenges and transformations in comparative perspective* (Oxford, 2014), 20-21.

⁵⁸ Grote, Marauhn (Eds), *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Mohr Siebeck, 2006), 369.

⁵⁹ Bernstorff, p. 170.

⁶⁰ Emphasis added.

⁶¹ *Philis v. Greece*, Appl. No. 12750/87; 13780/88; 14003/88, judgment of 27 August 1991, paras 59, 65; ECtHR, *Baka v. Hungary*, Appl. No. 20261/12, judgment of 23 June 2016, para 121; ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, Appl. No. 5809/08, judgment of 21 June 2016, para 151.

⁶² ECtHR, *Heaney and McGuinness v. Ireland*, Appl. No. 34720/97, para 55, 58.

⁶³ ECtHR, *Christine Goodwin v. the United Kingdom*, Appl. No. 28957/95, judgment of 11 July 2002, paras 99-101.

⁶⁴ ECtHR, *Matthews v. the United Kingdom*, Appl. No. 24833/94, judgment of 18 February 1999, para 65.

adheres to the relative and partially to the absolute theory, without a coherent approach to the conceptualisation of the notion of essence. The ECtHR case law is therefore only a limited source for what we consider a correct normative conceptualisation of the notion of essence.

2.3. Autonomous EU source of essence

The third source of ‘essence’ from Article 52(1) of the Charter is the concept of very substance of fundamental rights, developed in the case law of the CJEU.⁶⁵ Even though the Explanations to the Charter do not expressly state that the very substance is the source for essence, it can be reasonably assumed that the former notion had an impact on the inclusion of the latter into the Charter text. The concept of very substance of a fundamental right, embedded in the famous phrase spelling out the ways in which fundamental rights can be restricted, has seen its birth in the early case law of the CJEU,⁶⁶ prior to *Karlsson* to which the Explanations make a reference, and prior to the adoption of the Charter. This early jurisprudence, marked with reliance on fundamental rights as general principles and absence of a (binding) legal document codifying pan-EU fundamental rights, demonstrates the desire on the part of the CJEU to protect a core of relative rights, potentially subjected to restrictions.

However, it could have been expected that, after the entry into force of the Charter in December 2009, the CJEU would base its reasoning relating to limitations of rights on Article 52(1) of the Charter, including the notion of essence, and no longer on the line of case law prohibiting the interference with the very substance of a right. It is therefore rather peculiar to observe that the latter reasoning did not only mark the early case law, but firmly persevered in the Court’s jurisprudence even after the entry into force of the Charter. Indeed, in some of those cases the use of the very substance reasoning instead of relying directly on Article 52(1) of the Charter is justified due to non-applicability of the Charter, either *ratione personae*⁶⁷ or *ratione temporis*.⁶⁸ For example, in *Polkomtel*,⁶⁹ the

⁶⁵ Explanation on Article 52 — Scope and interpretation of rights and principles, O.J. 2007, C 303/32.

⁶⁶ Fundamental rights ‘may be restricted, provided that any restrictions in fact correspond to objectives of general interest pursued by the European Union and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the *very substance* of the rights guaranteed’. Emphasis added. See, for example, Case C-44/79, *Hauer v Land Rheinland-Pfalz*, ECLI:EU:C:1979:290, para 23, 30; Case 265/87 *Schröder v Hauptzollamt Gronau*, ECLI:EU:C:1989:303, para 15.

⁶⁷ In cases C-249/13, *Boudjlida*, ECLI:EU:C:2014:2431, para 32,33; and C-166/13, *Mukarubega*, ECLI:EU:C:2014:2336, para 44, the Charter did not apply because it is not addressed to Member States. Instead, the fundamental rights as general principles were applicable which leads to an interesting conclusion of general principles having a broader scope of application than the Charter. It could even be argued that the reasoning of the CJEU, *de facto*, leads to the broadening of the scope of application of the Charter. because the Charter is not addressed to Member States,

⁶⁸ Case C-397/14, *Polkomtel*, ECLI:EU:C:2016:256, para 60;

⁶⁹ See Case C-397/14, *Polkomtel*, ECLI:EU:C:2016:256, para 60; Case C-129/13, *Kamino International Logistics*, ECLI:EU:C:2014:2041, para 29. See also cases C-539/10 P, *Al-Aqsa*

CJEU relied on the reasoning establishing fundamental rights as general principles, including the prohibition of the violation of ‘very substance’ of those rights, because the facts occurred prior to the entry into force of the Charter.⁷⁰

Nonetheless, in several cases, the CJEU’s reliance on the jurisprudence invoking the very substance of fundamental rights seems to unjustifiably ignore the essence test contained in Article 52(1) of the Charter or even the article’s existence. For example, in *G. and R.*,⁷¹ *Texdata Software*⁷² and *Križan*,⁷³ the CJEU expressly established that the Charter is applicable, but used the very substance formulation instead of Article 52(1) when assessing the restriction of fundamental rights. Another example is found in *UPC Telekabel Wien* where the CJEU invoked the fundamental rights from the Charter but, without relying on either Article 52(1) or the formula on restrictions, jumped to the conclusion that the very substance of the fundamental right was not affected.⁷⁴ In *Council v Manufacturing Support & Procurement Kala Naft*, the CJEU, deciding in an appeal procedure, used Charter rights and its Article 52(1) reasoning with regard to a plea and then, when deciding on the issue, made use of the old formula without mentioning Article 52(1).⁷⁵ Even though in the post-Charter case law, the very substance argument is used in a rather declaratory manner, in the context of a long-standing formulation of the CJEU pointing out that the EU fundamental rights are not absolute and can be limited in a proportionate manner, it is submitted that the essence test should find its appropriate place in the CJEU jurisprudence relying on Article 52(1) of the Charter. For that purpose, we seek to conceptualise the notion of essence below.

3. Conceptualising the notion of ‘essence’ of fundamental rights

How should the notion of ‘essence’ be conceptualised and its content determined? Just as Raz, asking himself what ‘counts as an explanation of concept’, came to the conclusion that ‘it consists of setting out some of its necessary features’,⁷⁶ it needs to be elaborated what the necessary (i.e., defining) features of the concept of ‘essence’ should be. A normative conceptualisation of a right’s essence is not an easy task, in particular due to an outward absence of a coherent methodological tool that helps to define such a

v Council, ECLI:EU:C:2012:711, para 121; C-548/09 P, *Bank Melli Iran v Council*, ECLI:EU:C:2011:735, para 114, where the CJEU did not expressly raise the issue of non-applicability of the Charter, but this can be implicitly concluded from the occurrence of facts of the case.

⁷⁰ *Polkomtel*, para 60.

⁷¹ Case C-383/13 PPU, *G. and R.*, ECLI:EU:C:2013:533, para 32-33.

⁷² Case C-418/11, *Texdata Software*, ECLI:EU:C:2013:588, para 71-77 and 84.

⁷³ C-416/10, *Križan*, ECLI:EU:C:2013:8, para 111-116.

⁷⁴ Case C-314/12, *UPC Telekabel Wien*, ECLI:EU:C:2014:192, para 47, 51.

⁷⁵ Case C-348/12 P, *Council v Manufacturing Support & Procurement Kala Naft*, ECLI:EU:C:2013:776, para 122, 123.

⁷⁶ Raz, “Two Views of the Nature of the Theory of Law. A Partial Comparison” in Coleman (Ed.), *Hart’s Postscript. Essays on the Postscript to The Concept of Law* (Oxford, 2001), p. 8.

concept or outline its application in practice. Nevertheless, we argue that certain defining elements can be put forward with regard to the concept of essence.

First, following the national constitutional traditions and the ECtHR case law, we submit that each⁷⁷ fundamental right has an inalienable core which cannot be impinged upon. *In abstracto*, it is possible to have a theoretical idea of what the essence should be; however, the actual essence of each fundamental right can be determined only through its *breach*. This is important to keep in mind as the essence of a fundamental right can be breached in many different circumstances, thereby resulting in many possible ‘essences’ of one fundamental right.⁷⁸ For example, if a person receiving a decision from an authority affecting her legal status does, by law, not have any means to challenge that decision, this would most likely amount to a breach of the essence of her fundamental right to effective judicial protection. In this case, the breach of essence occurs because she was denied her right to a legal remedy. Another possibility is that the breach of essence would be derived from the fact that the right holder could not *exercise* her fundamental right. For instance, imagine that the right holder has a remedy to challenge the decision issued by a public authority, but the deadline to challenge this decision is so short that no reasonable claimant would ever be able to meet the deadline. Along these lines, the infringement of essence must only be used for the most extreme breaches where a fundamental right is *de iure* or *de facto* denied to the right holder. A special category of rights are absolute rights which constitute the essence themselves. Because they cannot be limited in any way, their entire scope of application is the essence of this right: the moment a public authority tortures a person, the essence of the prohibition of torture is impinged upon; there can be no overriding reasons for such an act.

Second, we argue that every breach of essence amounts to a breach of human dignity which is one of the grounds for recognising essence as a separate legal concept.⁷⁹ This hypothesis which appears to be confirmed by the Explanations to the Charter which builds upon the premise that the essence of a fundamental right equals its human dignity core and that touching upon this core would amount to a breach of the essence of a fundamental right. According to the Explanations to Article 1 (human dignity), none of the Charter rights ‘may be used to harm the dignity of another person’, because ‘the dignity of the human person is part of the *substance*’ (*la substance*) of Charter rights.⁸⁰ Even though the Explanations build upon the ‘substance’ and not the ‘essence’ of a right, they

⁷⁷ We admit that this claim has not been empirically proven, but it is rather a result of argumentative logic.

⁷⁸ Compare Ojanen, 'Making the Essence of Fundamental Rights Real: The Court of Justice of the European Union Clarifies the Structure of Fundamental Rights under the Charter: ECJ 6 October 2015, Case C-362/14, Maximilian Schrems v Data Protection Commissioner' 12 European Constitutional Law Review 2 (2016), 326.

⁷⁹ On a more philosophical account of dignity, see Rosen, *Dignity: Its History and Meaning* (Harvard University Press, 2012) and for a commentary Waldron, “The Paradoxes of Dignity. About Michael Rosen, *Dignity: its History and Meaning* (Harvard University Press, 2012)” (2013) 54(3) European Journal of Sociology, 554 – 561.

⁸⁰ Explanations to the Charter’s Article 1. Emphasis added.

point out that this substance has to ‘be respected, even where a right is restricted’.⁸¹ From this perspective, the Charter seems to closely follow the German theory which links the essence (*Wesensgehalt*) very closely to human dignity,⁸² thereby ascribing the German roots of essence a normative value for the EU legal order. It therefore seems that we are again facing an example of vertical cross-fertilization which is all the more interesting because there seems to be no reception of this German reasoning to other countries.⁸³

If the legislator was to suddenly abolish the prohibition of torture or degrading treatment, this would be a direct assault on the essence of prohibition of torture – and human dignity. Or if the citizens, merely for their political beliefs (let us suppose those beliefs are democratic and not extremist), were detained by the police and tried by the courts, would that not impinge upon the essence of their right to liberty and security – and also their dignity? Every fundamental right, be it the freedom of religion, expression, to property or equality before the law, has – to a stronger or lesser degree – a firm rooting in human dignity.⁸⁴ McCrudden puts forward constitutive elements of human dignity: every human possesses intrinsic worth merely by being a human and this intrinsic worth should be respected by others.⁸⁵ In other words, every human, merely by virtue of being a human, possesses dignity that needs to be protected through the essence of her fundamental rights.

Third, we consider that the breach of the essence of a fundamental right should not be equated with a serious or even a particularly serious breach of this right; this is because the methodological tool for the latter breach is the principle of proportionality. We analyse this issue in more detail in Part 4 where we discuss the differences and similarities between the method of finding a breach of essence of a fundamental right and finding a (particularly) serious breach through proportionality. Briefly, the argument goes as follows: as long as there is a potential justification for a breach of a fundamental right, it is possible to balance the values protected by a fundamental right with other competing values. The outcome of such balancing can be either a justified or an unjustified breach of a fundamental right, but not a breach of the essence of this right. This is because the essence lies beyond the proportionality exercise and there can be no possible justification for a breach of essence. An illustrative example in this regard are the abovementioned absolute rights: because there is no justification for their breach (they are absolute after all), it is also not possible to apply the proportionality test and balance them with competing values.

⁸¹ *Ibid.*

⁸² Kokott, p. 890, 892 who points out that, according to German doctrine, the essence protects the absolute core, which cannot be subjected to any restriction, of a human dignity in a fundamental right.

⁸³ Von Bernstorff, p. 171-172.

⁸⁴ Kumm, Walen, “Human Dignity and Proportionality: Deontic Pluralism in Balancing”, in Huscroft, Miller, Webber (eds.), *Proportionality and the Rule of Law. Rights, Justification, Reasoning* (Cambridge University Press, 2014), 68.

⁸⁵ McCrudden, “Human Dignity and Judicial Interpretation of Human Rights“ (2008) 19(4) *The European Journal of International Law*, 679.

Below, we seek to conceptualise the breaches of essence by classifying them into different categories. This seeks to provide an improved account compared to national or ECtHR approaches as to how the essence should be understood. Through classification, we seek to get a better overview as to who the addressees of essence are and in what circumstances the essence of their rights can be breached. This theoretical account is thus aimed to facilitate the correct finding of the breach of essence in practice. The category that we label as ‘existential breach of essence’, builds upon the premise that a breach of the essence of fundamental rights amounts to the negation of the existence of fundamental rights. We submit that such an existential breach of essence can be subdivided into two categories which can be designated as objective and subjective existential breach of essence. The last type that we deal with is the breach of absolute rights that always amounts to the breach of the essence of that fundamental right.

3.1. Objective existential breach of essence

The objective existential breach of essence implies either an illegitimate abolishment of an entire fundamental right or an illegitimate limitation of this right to such a degree that the right’s existence is impaired. Such a breach would lead to non-existence of the right for *all* right holders.⁸⁶ The notion of essence or core of rights seeks to prevent a ‘constitutional rights provision from being so reduced that it becomes meaningless for all individuals, or for a large part of them, or for life in society generally’.⁸⁷ According to the German doctrine, the addressee of the prohibition of interference with the ‘essence’ is primarily the legislator⁸⁸ which is competent to decide about the possibility of restriction of rights. This was also a historical goal of the German *Wesensgehaltgarantie*,⁸⁹ which aimed to prevent, after the Second World War, the Nazi-like abolishment of fundamental rights during wartime.⁹⁰ In the constitutions or judicial practices of other Member States, the legislator is equally bound to respect the essence of fundamental rights: for example in the Austrian legal system where this notion does not appear in the constitution, but was developed by the judiciary;⁹¹ as well as can be seen in the Spanish⁹² legal order.

⁸⁶ Compare Barak, p. 497.

⁸⁷ Alexy, p. 193.

⁸⁸ Enders, in Epping, Hillgruber (Eds.), *Beck’scher Online-Kommentar Grundgesetz*, 29th ed, para 24. Compare Sachs, *Grundgesetz: Kommentar* (Beck, 2009), p. 733, 741/742.

⁸⁹ Kokott, “Grundrechtliche Schranken und Schrankenschranken” in Merten/Papier (Eds.), *Handbuch der Grundrechte in Deutschland und Europa* (Müller, 2004), p. 886.

⁹⁰ Wildhaber, Limitations on Human Rights in Times of Peace, War and Emergency: A Report on Swiss Law in de Mestral (ed), *The Limitation of Human Rights in Comparative Constitutional Law* (Yvon Blais, 1968), p. 55, who gives as an example Nazi anti-Jewish legislation impairing upon the essence of personal liberty. Compare also van der Schyff, “Cutting to the Core of Conflicting Rights: The Question of Inalienable Cores in Comparative Perspective” in Brems (ed.), *Conflicts Between Fundamental Rights* (Intersentia, 2008), p. 132.

⁹¹ Kokott, p. 889.

⁹² Casas Baamonde, Rodríguez-Piñero y Bravo-Ferrer, *Comentarios a la Constitución Española* (Kluwer, 2008), p. 1168; Ferreres Comella, *The Constitution of Spain: A Contextual Analysis* (Hart, 2013), p. 237.

It is submitted that this reasoning, stemming from the constitutions of different Member States, should also be valid for the interpretation of the notion of ‘essence’ contained in Article 52(1) of the Charter. In the multi-level system of fundamental rights protection in Europe, these general principles common to the Member States should fertilise and help determine the understanding of essence on the EU level. If a particular fundamental right is restricted by the legislator in an excessive manner, it is quite possible to see that such a restriction breaches the essence of this fundamental right.⁹³ For example, if a legislator either abolishes the right to marry or adopts constitutional changes stipulating that only people over the age of 25 have the right to marry, such an excessive limitation would naturally breach the essence of the right to marry. In this fashion, the Spanish constitutional court rightly considered that “the essential content is destroyed if the interests that the right protects can no longer be served, as a result of unreasonable restrictions”.⁹⁴

In the framework of the objective existential breach, it is necessary to analyse the only case so far where the CJEU established a breach of the essence of fundamental rights: *Schrems*.⁹⁵ In *Schrems*, the CJEU annulled the Commission Decision on the adequacy of Safe Harbour⁹⁶ by which the Commission found that the US Safe Harbour Privacy Principles guarantee an adequate level of protection when data is transferred from the EU to the US.⁹⁷ The *Schrems* case has to be understood in a broader framework of Snowden’s revelations through which it was disclosed that even those US companies certified in Privacy Principles fed the US authorities, notably the US National Security Agency, with data on European data subjects for the purposes of surveillance. In this case, the CJEU delved into the question of whether the Safe Harbour offers effective remedies for European data subjects and whether the right to privacy of those data subjects is infringed and, in its analysis, found the breach of essence of two fundamental rights - the right to privacy and the right to effective judicial protection.⁹⁸

First, regarding the CJEU’s finding of breach of essence of the right to effective judicial protection, it can be noted that the CJEU builds upon the premise that this fundamental right has no practical value for the right holder; the right holder seems to be deprived of the entirety of protection offered by this fundamental right. In the case at hand, the data

⁹³ Compare Kokott, “Grundrechtliche Schranken und Schrankenschranken” in Merten/Papier (Eds.), *Handbuch der Grundrechte in Deutschland und Europa* (Müller, 2004), p. 889.

⁹⁴ Ferreres, p. 248.

⁹⁵ Case C-362/14 *Schrems*, ECLI:EU:C:2015:650.

⁹⁶ Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C(2000) 2441), [2000] OJ L 215/7.

⁹⁷ *Schrems*, para 107.

⁹⁸ It is interesting to note that AG Bot only found a breach of essence of the fundamental rights to privacy and data protection. See Opinion of Advocate General Bot in case *Schrems*, para 177, ECLI:EU:C:2015:627.

subject did not have any possibility at all “to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data”.⁹⁹ It can be claimed that the CJEU’s finding was not only reasonable and followed a clear perception of the deficiency leading to the fundamental right infringement, but also the only possible solution given the factual background in *Schrems*. Even though the CJEU did not give further explanation as to the content and meaning of ‘essence’, it can be understood from its approach that a denial of a fundamental right to a right holder amounts to a breach of essence of this right. The right holder is not offered any minimum protection, but rather *no* protection, since she does not have at her disposal any remedies whatsoever to protect her rights. Even although the CJEU did not raise the issue of human dignity in *Schrems*, we argue that this complete lack of protection also impinges upon the right holder’s dignity. In a democratic society seeking to protect human dignity, members of society should not be left entirely without remedies against acts which have a legal effect on them.

Secondly, the CJEU in *Schrems* also established a breach of essence of the fundamental right to privacy since, under the auspices of Safe Harbour, the public authorities could “have access on a generalised basis to the content of electronic communications” of data subjects.¹⁰⁰ It is easy to see why this breach of essence equates to a breach of human dignity: data subjects are completely stripped of their privacy since any of their electronic communications could be read by public officials, leaving them no space to keep even the most private of information. Situated in the context of broader case law, *Schrems* is a rather unsurprising ruling, given the fact that the ground for such a path was paved already in *Digital Rights Ireland*,¹⁰¹ where a breach of the essence of the fundamental right to privacy was not found because the Data Retention Directive¹⁰² at stake in this case did not allow any person to acquire knowledge of the *content* of electronic communication.¹⁰³ What seems though as a simple *a contrario* reasoning from a previous precedent, raises both practical and doctrinal uncertainties.

From a practical perspective, it is questionable whether the distinction between having access to the content of electronic communications and acquiring knowledge on metadata about electronic communications should really be differentiated to the extent that it leads to different types of fundamental rights violations. One can very well imagine situations where acquiring knowledge about metadata reveals sensitive information about relationships between different data subjects and even the identity of those subjects. Sometimes information about metadata and content data can be mixed, for example access to frequency of electronic exchange and (even randomly selected)

⁹⁹ *Schrems*, para 95.

¹⁰⁰ *Schrems*, para 94.

¹⁰¹ Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland*, ECLI:EU:C:2014:238.

¹⁰² Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ 2006 L 105, p. 54.

¹⁰³ *Digital Rights Ireland*, para 39.

keywords from such a communication. Moreover, it is also not clear into which category encrypted data would be classified, insofar as it does not immediately give direct, but rather potential, information about the content that can be revealed upon the decryption of such data.

From a doctrinal perspective, establishing that certain conduct constitutes a breach of the essence of a fundamental right precludes the possibility of such conduct ever being justified by overriding reasons of public interest. We therefore subscribe to the absolute theory mentioned above. In that sense, *Schrems* actually leads to a result where all broader wiretapping with access to content – that could potentially be justified on legitimate grounds – becomes unlawful. In certain circumstances – for example in a state of war or during a high level terrorist threat – it can very well be imagined that the public authorities could legitimately have “access on a generalised basis to the content of electronic communications”.¹⁰⁴ That being said, it is not submitted here that such a generalised access should be, as a principle, declared lawful. Rather, it is suggested that it would be more appropriate if the CJEU did not take the route of finding a breach of essence and tie its hands for future cases, but rather to leave open the possibility of a potential justification of even such a serious breach of privacy as access to the content of electronic communications. As we discuss in Part 4, a more appropriate answer would be to find the existence of a particularly serious breach instead of finding the breach of the essence of privacy.

If we apply the theoretical framework on objective breach of essence to the ECtHR case law, cases can be identified that fit the scheme. The ECHR rights cannot be interpreted in a way so as to diminish a particular fundamental right for all its addressees. Those are cases where the right holder is put in a position where she cannot, by any means, exercise her fundamental right, as the right is completely denied to her. For example, in *Baka v. Hungary*,¹⁰⁵ the President of the Hungarian Supreme Court whose mandate was terminated as a consequence of controversial constitutional changes had no legal means whatsoever to challenge this termination. Accordingly, the ECtHR found the breach of essence of his right of access to a court (Article 6(1) ECHR). Comparably, in *Matthews v. the United Kingdom*,¹⁰⁶ Ms. Matthews, residing in Gibraltar, was denied the right to vote in the European Parliament elections which led to the breach of essence of her right to vote.¹⁰⁷ The non-availability and denial of exercise of a certain fundamental right can therefore be considered as a breach of essence. Furthermore, in *Goodwin*,¹⁰⁸ the essence of the right to marry¹⁰⁹ of Ms. Goodwin, born as a man and having an operatively re-assigned gender as a woman, was impaired because she had, as a woman, no possibility

¹⁰⁴ *Schrems*, para 94; *Digital Rights Ireland*, para 39.

¹⁰⁵ *Baka v. Hungary*, Appl. No. 20261/12, judgment of 23 June 2016, paras 120-122.

¹⁰⁶ ECtHR, *Matthews v. the United Kingdom*, Appl. No. 24833/94, judgment of 18 February 1999, para 65.

¹⁰⁷ Article 3 of Protocol No. 1 to ECHR. See *Matthews v. the United Kingdom*, paras 63-65.

¹⁰⁸ ECtHR, *Christine Goodwin v. the United Kingdom*, Appl. No. 28957/95, judgment of 11 July 2002.

¹⁰⁹ Article 12 ECHR.

to marry a man.¹¹⁰ In this rather revolutionary decision,¹¹¹ the ECtHR clearly recognised that a denial of a right leads to the breach of essence of this right.

3.2. Subjective existential breach of essence

Contrary to the objective existential breach, subjective existential breach of essence does not lead to the result that the right is abolished or excessively restricted by the legislator for all right holders, but that such a right does not exist or ceases to exist for a *particular* right holder or for a *group* of right holders. The essence of rights thus relates to the individual position of the right holder.¹¹² This category comes relatively close to the *objective* category discussed above, with the difference that the latter works on an abstract level and hence leads to a non-existence of a particular fundamental right in general, whereas, in *subjective* category, there is ‘nothing left’ of a fundamental right for a particular addressee, that is the person invoking the fundamental right. Let us take the right to life as an example: the killing of a person by a policeman without there being a justification for the killing amounts to a breach of essence of the right to life of that person.¹¹³ The guarantee of respect of essence of fundamental rights is thus directed not only to the legislative branch, but also to the executive.¹¹⁴

Looking into CJEU case law, an example of a subjective existential breach is the case law on infringement of the violation of the ‘substance’ (*l’essentiel, Kernbestand*¹¹⁵) of EU citizenship rights.¹¹⁶ Even though the case law on citizens’ rights does not make an

¹¹⁰ *Christine Goodwin v. the United Kingdom*, paras 99-101.

¹¹¹ In *Goodwin*, the ECtHR overturned its previous jurisprudence on the right to marry for transsexuals: ECtHR, *Rees v. United Kingdom*, Appl. No. 9532/81, judgment of 17 October 1986; *Cossey v. United Kingdom*, Appl. No. 10843/84, judgment of 27 September 1990; *Sheffield and Horsham v. the United Kingdom*, Appl. No. 31–32/1997/815–816/1018–1019, judgment of 30 July 1998.

¹¹² Compare Alexy, p. 192-193.

¹¹³ Compare Barak, p. 497. That person is also deprived of (the essence of) all other fundamental rights since without life, no other fundamental right has a meaning; see Schwarze (ed.), *EU Kommentar*, 3rd ed. (Nomos, 2012). p. 2618.

¹¹⁴ Enders, para 25; Sachs, *Grundgesetz: Kommentar* (Beck, 2009), p. 733, 741/742. Normatively the prohibition of breach of essence binds also the judicial branch (typically as to right to defence or the right to a fair trial); it only needs to be ensured that another court (i.e. constitutional court) decides on the matter.

¹¹⁵ Part of the German doctrine argues that the notion of *Wesensgehalt* – just as the notion depicting ‘essence’ in the German Constitution – should be used instead of the term *Kerngehalt*. See Wallrabenstein, ’21, 18, Zambrano – Zum Wesensgehalt der Unionsbürgerrechte’ in Franzius et al., *Grenzen der europäischen Integration* (Nomos 2014), p. 320.

¹¹⁶ C-34/09, *Ruiž Zambrano*, ECLI:EU:C:2011:124, para 42; C-202/13, *McCarthy and Others*, ECLI:EU:C:2014:2450, para 57; C-256/11, *Dereci and Others*, EU:C:2011:734, paras 66 and 67; C-40/11, *Iida*, EU:C:2012:691, para 71; C-87/12, *Ymeraga and Others*, EU:C:2013:291, para 36; *Alojka and Moudoulou* (C-86/12, EU:C:2013:645, para 32); C-115/15, *NA*, ECLI:EU:C:2016:487, para 72. Compare also the analysis of case law in the Opinion of Advocate General Szpunar in C-165/14 and C-304/14, *Rendón Marín and CS*, EU:C:2016:75.

explicit link to the fundamental rights aspects of citizenship, such a connection between the two sets of rules can be presupposed from the inclusion of citizen's rights into the Charter.¹¹⁷ While the Court makes a clear distinction between Articles 20 and 21 TFEU and links the infringement of substance to the former provision (qua content its paragraph 1), it is however not entirely clear which article of the Charter would overtake the function of this Treaty paragraph.

Yet, this seeming *lacuna* could be overcome if the reasoning on citizenship being the “fundamental status of nationals of the Member States”¹¹⁸ would be read into the interpretation of Charter's articles on citizenship. In any event, the essence of a citizen's fundamental right (embedding her fundamental status) would be affected if the EU citizen(s) – just as in *Zambrano*¹¹⁹ or *NA*,¹²⁰ – would need to leave the Union's territory altogether. Similarly, an automatic deportation of a national of a Member State who does not have the capacity to produce documents required to obtain a residence permit would amount to impairment of her (fundamental) right of residence.¹²¹ Even though the reasons for infringement of essence and substance might differ, the rationale behind the infringement of the essence of a fundamental right and of the substance of citizens' rights follows the same line of reasoning. In both cases, the right itself ceases to exist for the right holder; we are not facing only an unjustified or disproportionate breach, but a breach where the addressee of the right is not in a position to exercise her rights. Again, the link with human dignity is easy to see: a request to an EU citizen to leave its territory or a deportation of such citizen would strip her of her dignity in the sense that she would lose her home, her entourage and her living conditions within the EU.

3.3. Absolute (breach of) essence

A special category of essence breaches are breaches of absolute rights, that is, rights which are inviolable and which can, under no conditions, be restricted. They represent the foundation of a democratic human society and embed the core values of this society. Typical examples of absolute rights are the prohibition of slavery or forced labour¹²² and the prohibition of torture and inhuman or degrading treatment.¹²³ For example, the ECHR, apart from prohibition of torture and slavery also contains the right not to be convicted if certain conduct was not an offence at the time the conduct occurred and the prevention of imposing a heavier penalty than the one existing at the time of offence.¹²⁴ Absolute rights form a limited, yet separate, category of rights whose abolishment would

¹¹⁷ Von Bogdandy et al., “Reverse Solange—Protecting the essence of fundamental rights against EU Member States” 49 *CML Rev.* (2012), 506.

¹¹⁸ C - 184/99, *Grzelczyk*, EU:C:2001:458, para 31; C - 34/09, *Ruiž Zambrano*, EU:C:2011:124, para 41; C-115/15, *NA*, ECLI:EU:C:2016:487, para 70.

¹¹⁹ C-34/09, *Ruiž Zambrano*, ECLI:EU:C:2011:124, para 42.

¹²⁰ C-115/15, *NA*, ECLI:EU:C:2016:487, para 72.

¹²¹ C-408/03, *Commission v Belgium*, ECLI:EU:C:2006:192, para 68.

¹²² Article 4 of the Charter.

¹²³ Article 5 of the Charter.

¹²⁴ See more in detail Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe Publishing, 2000), p. 27.

lead to abrogating the foundations of a value-based society respecting human dignity. Rights such as the prohibition of torture or prohibition of child labour do not themselves have a separate core because they *are* the core themselves; it is thus meaningless to search for additional essence in absolute rights because they are, as a whole, inviolable. Even the smallest restriction of such rights leads to the impairment of them as an embodiment of essence.

The importance of absolute rights in the EU legal order and their close link to human dignity was recently pointed out in the joint cases *Aranyosi and Căldăraru*¹²⁵ regarding a Hungarian and a Romanian national respectively who were, after their arrest in Germany, supposed to be returned to their countries of origin where the conditions of retention reportedly violated the prohibition of inhuman and degrading treatment. It is important to point out that the CJEU recognised that “the prohibition of inhuman or degrading treatment ... is absolute in that it is closely linked to respect for human dignity”.¹²⁶ From this narrative – both from the absolute nature of this particular fundamental right as well as the link to human dignity – a close connection to the concept of essence can be established. The essence as the absolute core of rights protects the entire scope of application of absolute rights. *Aranyosi* thus offers a good example of the circumstance that even a minor infringement of absolute fundamental rights would pierce the penumbra of essence.¹²⁷

4. Determining the breach of essence in the European legal order

In this part of the article, we seek to determine a methodology for establishing whether there has been a breach of an essence of a fundamental right. In the current jurisprudence, the CJEU and ECtHR seem to have adopted a rule of thumb method rather than an elaborated methodological tool that would allow for a systematic establishment of whether there has been a breach of a fundamental right. First, we analyse the relationship between the concept of essence and the principle of proportionality. Following that, we propose an EU methodology for determining the breach of essence.

4.1. Hard case: proportionality and essence

¹²⁵ Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198.

¹²⁶ *Aranyosi and Căldăraru*, para 85.

¹²⁷ Terminologically and content wise, it is important to distinguish between the core (essence) of a human right and *core* human rights. The latter are rights that are necessary for a dignified human existence and only partially overlap with absolute rights. Condé, *A Handbook of International Human Rights Terminology* (University of Nebraska Press, 2004), p. 50.

Even though the relationship between the principle of proportionality and the concept of essence might, at a first glance, seem straightforward as being mutually exclusive,¹²⁸ the practice shows that it is rather complex to assign the concept of essence an appropriate place within (or outside) proportionality. There seems to be a certain analogy to Hart's hard cases,¹²⁹ which are difficult to crack. Doctrinal opinions on this issue diverge between those who consider that proportionality is not relevant in the determination of the breach of essence¹³⁰ whereas others believe that there is interplay between the two¹³¹. While the approaches on the issue differ, it is proposed to categorise them depending on whether they appear as stand-alone or interconnected tests – it is consequently suggested that they be termed the *exclusionary* or *absolute approach* and *integrative* or *relative approach* respectively,¹³² following the terminology of absolute and relative theory touched upon in Part 2 of this article. We argue that the exclusionary (absolute) approach should be adopted and integrative (relative) approach rejected.

The exclusionary (absolute) approach. The exclusionary approach can be defined as one where the notions of essence and proportionality are seen as distinct and non-overlapping categories that mutually exclude each other. As supporters of this claim, we argue that if the essence is to be of any (independent) value, it should be possible to define it separately from proportionality since it should play a distinct role in preventing certain limitations.¹³³ We argue that this approach also leads to correctly distinguishing between a breach of the essence of a fundamental right and a particularly serious breach of this fundamental right: the breach of essence is a question of *existence* of a fundamental right and thus relates to a *legal* breach (i.e., the right does not exist at all). On the contrary, a particularly serious breach is a question of *degree*: the more serious the interference of an existing fundamental right is, the more likely it is to amount to a particularly serious breach. We are thus dealing with a *factual* breach to the existing fundamental right. The exclusionary approach can also be supported by a textual and systematic interpretation of Article 52(1) of the Charter which states in its first sentence that any limitations of rights and freedoms must respect their essence, while the principle of proportionality is mentioned only in the second sentence of this provision, elaborating on conditions under which limitations are allowed. Such reasoning would also mean that the analysis of the two notions would be consecutive: the determination of breach of essence would come first, followed by the proportionality analysis if there is no breach of essence.

¹²⁸ Barak, p. 496, claims that “proportionality applies only to what is not included in the core”.

¹²⁹ Hart, *The Concept of Law* 3rd ed (OUP, 2012), p. 252.

¹³⁰ See Rivers, p. 184. Van der Schyff, “Cutting to the Core of Conflicting Rights: The Question of Inalienable Cores in Comparative Perspective” in Brems (ed.), *Conflicts Between Fundamental Rights* (Intersentia, 2008), p. 134.

¹³¹ Van der Schyff, “Cutting to the Core of Conflicting Rights: The Question of Inalienable Cores in Comparative Perspective” in Brems (ed.), *Conflicts Between Fundamental Rights* (Intersentia, 2008), p. 134-135.

¹³² We prefer to use the term 'exclusionary' and 'integrative' rather than 'absolute' and 'relative' as we consider that it describes the relationship between essence and proportionality in a more precise manner.

¹³³ Rivers, p. 184.

In the only case where the CJEU found the breach of essence so far, *Schrems*,¹³⁴ the Court did not use proportionality as a tool to determine that breach; this could imply that the Court followed the exclusionary approach. However, this approach seems to be chosen rather in order to avoid the difficulties related to the proportionality analysis. We argue that the cause for avoiding proportionality in *Schrems* does not necessarily need to be explained through a noble constitutional rationale, but alternatively by practical reasons connected to difficulties in the application of the proportionality test in circumstances where a breach of data privacy takes place in a third country.¹³⁵ Along this line of reasoning, establishing a breach of ‘essence’ could be seen as an elegant way for the CJEU to avoid having to apply the proportionality test in factual circumstances where it was the US authorities that had access to content data of European data subjects.

A hurdle that the CJEU would need to overcome if it followed the proportionality path is the determination which ‘national security’ would need to be balanced against data protection within the proportionality test. Of course, it was EU legislation (Decision 2000/520¹³⁶) which, by declaring that the Safe Harbour guarantees adequate protection and by authorising transfer of data through this agreement to the US, allowed for such a breach of the essence of the fundamental right to privacy to take place. Indeed, this is the reasoning that led the CJEU to the annulment of Decision 2000/520.¹³⁷ According to this Decision, “[US] national security, public interest, or law enforcement requirements”¹³⁸ prevail over principles from Safe Harbour: this leads to the result that the US companies should not respect those principles if US national security or other overriding interests are at stake. Thus, if the CJEU decided to follow the proportionality path, it would have needed to balance the objectives of *domestic* (EU) legislation with the *foreign* overriding requirement of (US) national security. Finding a breach of ‘essence’ of a fundamental right to privacy could therefore have been just a scapegoat to avoid the hurdle of proportionality.

Turning to the case law of the ECtHR, we can establish that the relationship between the notions of essence and proportionality as approached by this Court proves to be both close and complex, with the Court failing to follow a clear doctrinal line of reasoning. An exclusionary approach, although perhaps not deliberately chosen, can be noticed in certain cases where an impairment of essence lead to non-application of the proportionality test. The ECtHR sometimes points out the exclusionary nature between

¹³⁴ *Schrems*, paras 94-95.

¹³⁵ See also Azoulai and van der Sluis, ‘Institutionalizing personal data protection in times of global institutional distrust: Schrems Case C-362/14, Maximilian Schrems v. Data Protection Commissioner, joined by Digital Rights Ireland, judgment of the Court of Justice (Grand Chamber) of 6 October 2015, EU:C:2015:650’, 53 CMLR (2016), 1365-1366.

¹³⁶ Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46 on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, OJ 2000 L 215, p. 7.

¹³⁷ *Schrems*, para 98.

¹³⁸ *Schrems*, para 86.

essence and proportionality expressly in its reasoning¹³⁹ or implicitly by simply omitting the proportionality test.¹⁴⁰ A closer look at these cases reveals that they relate to a situation where the right was, from the outset, entirely non-existent for the applicant. In *Al-Dulimi*, for example, the applicants had no legal means to challenge the confiscation of their assets as ordered by the United Nations Security Council resolution¹⁴¹ and in *Baka*, the former president of the Hungarian Supreme Court had no legal remedy whatsoever to challenge the decision on the premature termination of his mandate.¹⁴² Ms. *Matthews*, resident of Gibraltar, did not have the right to vote in the European parliamentary elections.¹⁴³ In these cases there is no issue of a degree of limitation of a right, but rather a denial of this right; hence, it is impossible to proceed to the proportionality balancing.

In contrast, the proponents of the *integrative (relative) approach* claim that the concepts of essence and proportionality are interlinked either in the sense that they partially overlap or in the sense that the conclusion on breach of essence depends on the balancing exercise within the framework of proportionality.¹⁴⁴ The integrative approach can regularly be found in the case law of the ECtHR through an often used phrase, according to which limitations, to be lawful, should not impair the essence of the right *and* they should pursue a legitimate aim, providing for a “reasonable relationship of proportionality between the means employed and the aim sought to be achieved”.¹⁴⁵ This reasoning seems to imply that the essence analysis forms part of the proportionality balancing.

In *Kart v. Turkey*,¹⁴⁶ for example, where an immediate conclusion on the breach of essence was not possible, the ECtHR sought to verify this breach of essence by referring to the principle of proportionality. Further, in *Cudak*, a case concerning a Lithuanian employee having been dismissed from a Polish embassy invoking immunity against her claim, the ECtHR began its analysis by verifying the legitimacy of the aim, followed by

¹³⁹ ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, Appl. No. 5809/08, judgement of 21 June 2016, para 37.

¹⁴⁰ ECtHR, *Baka v. Hungary*, Appl. No. 20261/12, judgment of 23 June 2016, para 122; *Broniowski v. Poland*, Appl. No. 31443/96, judgment of 22 June 2004, para 185; *Matthews v. the United Kingdom*, Appl. No. 24833/94, judgment of 18 February 1999, para 65.

¹⁴¹ *Al-Dulimi*, para 2 juncto 37.

¹⁴² *Baka*, para 121.

¹⁴³ *Matthews*, para 7.

¹⁴⁴ Van der Schyff, “Cutting to the Core of Conflicting Rights: The Question of Inalienable Cores in Comparative Perspective” in Brems (ed.), *Conflicts Between Fundamental Rights* (Intersentia, 2008), p. 137.

¹⁴⁵ ECtHR, *Waite and Kennedy v. Germany*, Appl. No. 26083/94, judgment of 18 February 1999, para 59; *Al-Adsani v. the United Kingdom*, Appl. No. 35763/97, judgment of 21 November 2001, para 53; *McElhinney v. Ireland*, Appl. No. 31253/96, judgment of 21 November 2001, para 34; *Cudak v. Lithuania*, Appl. No. 15869/02, judgment of 23 March 2010, para 55; *Ashingdane v. the United Kingdom*, Appl. No. 8225/78, judgment of 28 May 1985, para 57.

¹⁴⁶ ECtHR, *Kart v. Turkey*, Appl. No. 8917/05, judgment of 3 December 2009, para 93-111.

an assessment of proportionality - the breach of which led to an impairment of an essence of the applicant's right of access to a court.¹⁴⁷ The ECtHR jurisprudence therefore seems to indicate that there is a certain degree of overlap between the notions of essence and proportionality. Even a claim that "proportionality ... does not overlap *entirely* with the protection of the minimum core (or the 'essence')"¹⁴⁸ could point to the fact that such an overlap could exist. In *Şabin*, the ECtHR confirmed this overlap by ruling there is no such breach of essence if the restrictions of a right "are foreseeable for those concerned and pursue a legitimate aim".¹⁴⁹

Moreover, in certain cases, the ECtHR seems to look at the notion of the breach of essence as a question of a(n excessive) degree of limitation, reiterating that "limitations must not restrict the exercise of the right in such a way or *to such an extent* that the very essence of the right is impaired".¹⁵⁰ An illustrative example is case law relating to the privilege against self-incrimination and the right to remain silent (Article 6 ECHR) where this fundamental right was breached due to coercion from the part of authorities to provide documents or statements that would incriminate them. Measures used in criminal proceedings against the applicant *Funke*,¹⁵¹ who refused to produce documents that could incriminate him, were designated in later case law as having "destroyed the very essence of the privilege against self-incrimination" due to the "degree of compulsion" used against the applicant.¹⁵² Similarly, in *Heaney and McGuinness*, the ECtHR concluded that the essence was impaired due to the degree of compulsion against the applicants who were compelled to provide information relating to charges against them.¹⁵³ By following this approach, the ECtHR seems to confound the breach of essence of a fundamental right with a particularly serious breach of this right and thus confusing the test of breach of essence with proportionality balancing.

We argue that, as soon as it is possible to apply the principle of proportionality in order to determine whether there was an interference with a right, such balancing can only lead to a determination that there was a justified or unjustified breach of fundamental right, but not a determination of the breach of essence. We thus claim that, in the majority of ECtHR's jurisprudence on essence, this Court should have found a breach of fundamental rights at stake, but not of their essence.

4.2. Proposal: EU methodology for determining the breach of essence

¹⁴⁷ Article 6(1) ECHR. ECtHR, *Cudak v. Lithuania*, Appl. No. 15869/02, judgment of 23 March 2010, paras 60-74.

¹⁴⁸ Dissenting opinion of Judge Pinto de Albuquerque in *Mouvement raëlien suisse v. Switzerland*, footnote 32.

¹⁴⁹ ECtHR, *Leyla Şabin v. Turkey*, Appl. No. 44774/98, judgment of 10 November 2005, para. 154.

¹⁵⁰ Emphases added. ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, Appl. No. 5809/08, judgement of 21 June 2016, para 35.

¹⁵¹ ECtHR, *Funke v. France*, Appl. No. 10828/84, judgment of 25 February 1993.

¹⁵² ECtHR, *John Murray v. the United Kingdom*, Appl. No. 18731/91, judgment of 8 February 1996, para 49. Emphasis added.

¹⁵³ ECtHR, *Heaney and McGuinness v. Ireland*, Appl. No. 34720/97, para 55, 58.

Building on the findings above, we seek to construct an EU methodology on determination of breach of essence of fundamental rights. In other words, what abstract criteria should be used in order to determine, in practice, whether there has been a breach of the essence of a particular fundamental right? A proposal in this regard is elaborated below.

Our proposal regarding a breach of essence for the EU legal order is inspired by the exclusionary (absolute) approach explained above. If essence is to remain an independent concept, it is impossible to determine the breach of essence through proportionality balancing since, in the field of application of essence, the principle of proportionality does not apply. Moreover, as elaborated above, every breach of essence also carries in itself a breach of human dignity. Therefore, the test we propose is the following: *the essence of a fundamental right is breached if overriding reasons for such a breach do not exist or they are illegitimate, and if the breach amounts to the impairment of human dignity*. As Alexy correctly states, ‘an absolute guarantee of an essential core cannot say that outweighing reasons do no outweigh, but only that there are no outweighing reasons’.¹⁵⁴ The definition of essence of a particular right is thus a negative definition where the proportionality functions as a mirror in which a breach of essence can be seen clearer and the impairment of human dignity functions as an additional substantive test to make sure that only the most blatant breaches of a fundamental right are qualified as a breach of their essence. We consider that the overriding reasons are illegitimate when they are either not provided by law (as requested by Article 52(1)) or when they run contrary to the values of a democratic society (as embedded in Article 2 TEU).¹⁵⁵

Most of the essence breaches would be recognised in this way, namely those where it is clear that the existence of a right would be denied to all or a particular right holder(s). The cases allowing for immediate determination of breach of essence are, for example, those where the legislator illegitimately abolishes an existing fundamental right:¹⁵⁶ for example, after a *coup d'état* and the establishment of a new radical government, the prohibition of torture would be abolished. Or, the state abolishes the right to vote for all homosexuals on the basis that discrimination of them should be allowed; this, also, would infringe the essence of both their right to vote and prohibition of discrimination, because the overriding reason is illegitimate. Moreover, the breach of essence of the right to effective judicial protection as established in *Schrems* would fall under this category since the right holder did not have any legal means whatsoever to challenge the data breaches in the framework of Safe Harbour.¹⁵⁷ There were no overriding reasons that could justify this absence of legal remedies, leading to the breach of essence of this fundamental right, impairing also human dignity.

¹⁵⁴ Alexy, p. 195.

¹⁵⁵ For the link between the essence and Article 2 TEU, see further Von Bogdandy et al., “Reverse Solange—Protecting the essence of fundamental rights against EU Member States” 49 *CML Rev.* (2012), 489 et seq.

¹⁵⁶ This obviously does not mean that any change of constitution or constitutional rights would lead to the infringement of their essence, but only those that are illegitimate and incompatible with a democratic society.

¹⁵⁷ See *Schrems*, para 95.

However, if overriding reasons exist and they are legitimate, the courts need to take the proportionality path of balancing these interests and the interference with the right. If we apply this test to the *Schrems* case with regard to the breach of the right to privacy, we would come to a different conclusion than the CJEU. If the Court did indeed balance the right to privacy with (US) public security, it would come to the conclusion either that public security would outweigh the authorities' access to content data or that this overriding reason would not outweigh such access. In any event, the Court would have ruled that we are facing either a justified breach or a (particularly serious) unjustified breach. In our understanding, there would be no reason for the CJEU to find a breach of essence. As long as it is possible to (out)balance a fundamental right with a competing right or interest, the essence of a right does not come into play.

5. Conclusion

As the title of this piece expresses it, this article is an endeavour to search for the concept of essence: a search for its origins, a search for its meaning and a search for a methodological conceptualisation of its breach. This search reveals that the concept of essence can be found on different layers of the multi-level system of protection of fundamental rights in Europe. Not only the Charter, but also constitutions of Member States as well as – through interpretation by the ECtHR – the ECHR, rely on this notion and use it in the constitutional practice. This paper argues that the introduction of this notion into the EU legal system is a combination of sources on different layers which, through cross-fertilisation, contributed to the protection of essence on the EU level. Even though the protection of essence and the methodology to determine the essence of a breach somewhat differs in these layers, a certain degree of convergence can be observed. The common feature of multi-layered essence protection is that this notion epitomizes its untouchable core that should under no circumstances be restricted or breached; in case of restriction or breach, the right loses its value for either the right holder or for society as a whole.

Coming back to the introduction of this article, equating the establishment of a breach of a fundamental right with the peeling of an onion where the essence constitutes the most-inner layer thereof, the essence could be compared to the last *bastille* within a fundamental right which, if ruined, leads to the non-existence of this right. These so-called existential breaches, either objective or subjective, can be detected in all layers of multi-level protection, and so too can the protection of absolute rights which are the core or the essence themselves. This article thus aims to shed light on the elements of essence present in all these layers of protection and to give them a framework that contributes to the theory on essence of fundamental rights.

This article further seeks to establish a methodology to determine a breach of essence. Taking the comparison with the peeling of an onion further, all other types of interferences with a fundamental right – from justified to an unjustified and particularly serious breach – have to be determined through proportionality balancing. In cases

where no overriding reasons can be found or those reasons are illegitimate, it is not possible to perform the proportionality test and there is a high likelihood that the essence of the fundamental right is breached. Therefore, determination of breach of essence should follow a different methodology than a determination of an ordinary or particularly serious breach: where balancing is not possible because the overriding interest does not exist or is illegitimate, and human dignity is compromised, the essence of a fundamental right is impaired. An example in this regard is the CJEU *Schrems* case with regard to the breach of the fundamental right on effective judicial protection: data subjects had no possibility to challenge the contested measure. Similarly, in the ECtHR case of *Baka*,¹⁵⁸ the claimant equally had no legal means whatsoever to challenge the contested decision. A certain degree of convergence regarding the understanding of essence can therefore be detected in the multi-level fundamental rights system in Europe.

This multi-layered system, however, also reveals some divergence as to the methodology used to determine the breach of essence. In particular, the case law of the ECtHR partially uses proportionality as a method to determine the breach of essence in cases such as *Kart*,¹⁵⁹ *Cudak*¹⁶⁰ or *Şahin*.¹⁶¹ We suggest that the EU should not follow this methodology which leads to the overlap between a particularly serious breach and a breach of essence of a fundamental right. Failing the EU's accession to the ECHR,¹⁶² it is however questionable how this departure from the ECtHR's approach could be situated within the broader question of the position of the Convention in the EU legal order which falls under general principles of Union's law¹⁶³ and determines the minimum level of protection.¹⁶⁴ The text of the Charter leaves unclarified the question of the relationship between different paragraphs of Article 52, in particular the relationship between paragraph 1 dealing with general limitations of fundamental rights and paragraph 3 concerning the interpretation of the rights in conformity with ECHR. In other words, clarification of this relationship is necessary in order to establish whether paragraph 1 of Article 52 containing the verification of the 'essence' requirement would still apply in case the fundamental right is contained also in the ECHR.

It is certainly true that, if the Charter provides for a higher level of protection than the ECHR, the limitations clause contained in Article 52(1) of the Charter would apply. However, it is not entirely clear whether such a simultaneous application would mean that, if the ECHR provides a higher standard of protection, it would still be possible to apply the limitation clause contained in Article 52(1) – and hence the proposed methodology on the concept of 'essence' from this article. In other words, if the ECtHR finds a breach of essence of a particular fundamental right, can the CJEU, in the same factual circumstances, come to the conclusion that this is 'merely' a disproportionate

¹⁵⁸ ECtHR, *Baka v. Hungary*, Appl. No. 20261/12, judgment of 23 June 2016, paras 120-122.

¹⁵⁹ ECtHR, *Kart v. Turkey*, Appl. No. 8917/05, judgment of 3 December 2009.

¹⁶⁰ ECtHR, *Cudak v. Lithuania*, Appl. No. 15869/02, judgment of 23 March 2010.

¹⁶¹ ECtHR, *Leyla Şahin v. Turkey*, Appl. No. 44774/98, judgment of 10 November 2005.

¹⁶² *Opinion 2/13*, ECLI:EU:C:2014:2454.

¹⁶³ Article 6(3) TEU.

¹⁶⁴ Article 52(3) of the Charter.

breach, given the fact that, according to Article 52(1) “the meaning and scope of [Charter] rights shall be the same as those laid down by the ... Convention”? It is submitted that such a conclusion should be possible because finding a particularly serious breach rather than breach of essence would not undermine the level of protection of this right, but rather lead to the finding of a different type of breach. In practice this means that the CJEU will have to, when determining whether a right’s essence has been breached, bear in mind the Convention’s scope of a fundamental right, but this will not prevent it from applying the methodology from Article 52(1) of the Charter.

The essence of a fundamental right does not exist in a legal and factual vacuum, but is always closely related to the circumstances of the case. This means that it is close to impossible to determine, in abstract terms, what represents an essence of a fundamental right; this can only be done through its breach in a concrete case. Since in practice, different breaches can lead to an impairment of essence, a fundamental right can have multiple ‘essences’. It is important that the finding of the breach of essence does not become a shortcut of finding (ordinary) breaches of fundamental rights. It is thus necessary to check, in every case, whether the case can be decided by deploying the principle of proportionality. Neither should essence be deployed by convenience because it shortens the analysis; it should therefore be reserved for particular and maybe even rare cases where the core of a fundamental right is at stake. If we again invoke the analogy with an onion, one doesn’t peel the onion to its most-inner layer on every occasion.