European or Universal? The European Declaration of Digital Rights in a global context

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Abstract

This paper examines the potential universality of the European Declaration of Digital Rights, which was proposed to protect fundamental rights within the European Union. The investigation provides insights regarding the status of the Declaration as a position statement with a limited binding character, although it could serve as a reference point for future legislation at various levels. Digital Rights (DR) have the character of general principles, and the challenge in implementing them is the question of *enforceability*. The paper also considers universality in its philosophical, social, ethical, and legal dimensions. Cultural and contextual differences present a challenge to establishing a globally accepted and similarly interpreted set of fundamental rights. Moreover, social values and familiarity with technologies may highly influence social opinion. Additionally, the interpretation of ethical principles varies across different societies, for whom the question of DR is not uniformly relevant or urgent. Legitimacy is a crucial factor in universality, and Peter Wahlgren's model provides a useful analytical framework that includes political, legal, cultural, functional, and internal rationalities that are crucial facets of legitimacy. The paper suggests two paths for future discussions of universality in DR: a *normative approach* that focuses on identifying fundamental and universal values and an *empirical approach* that seeks values that are widely accepted and uses them as criteria for universality.

1. Introduction

In recent years, technological innovations have revolutionized the way we live and work, creating new opportunities while also presenting significant challenges. Although these innovations have enabled people to be more autonomous and enjoy their lives, they may also make users feel more dependent on technologies they do not completely understand, which can, in turn, make them feel insecure. Additionally, balancing the various interests and protecting the rights of all stakeholders involved in the use of such technologies represents a significant legal challenge. In this context, the need to establish a new catalogue of fundamental rights that adequately addresses the challenges posed by technology has become increasingly pressing.

One proposed solution is the European Declaration of Digital Rights. This declaration aims to establish a set of rights that address the challenges of the digital age, but can it be the first step toward establishing Digital Rights (DR) on a global level? This paper seeks to evaluate the potential of the European Declaration of Digital Rights in the global context.

To achieve this goal, this paper will address several key questions. Firstly, it will consider the *legal*

position of the Declaration and of DR more broadly. Secondly, it will examine the extent to which DR are precise enough to be considered *claimable* rights. Thirdly, it will discuss the possible *enforcement* of DR, exploring the challenges that need to be addressed in order to effectively enforce these rights. Fourthly, it will evaluate whether the European Declaration can be a first step towards the Universal Declaration of Digital Rights, exploring the philosophical, social, and legal conditions that must be met for this to be achieved.

Overall, this paper aims to facilitate a discussion on the potential global impact of the European Declaration of Digital Rights and the broader idea of DR. While it does not aim to provide final answers to the questions posed; it does endeavour to deliver valuable insights into the key issues that must be addressed to establish effective Digital Rights on a global level.

2. Legal analysis of the declaration

A legal analysis of various aspects of the Declaration is needed to assess whether it has the potential to have a position comparable to Human Rights law. This research will be conducted in four steps. Firstly, it is vital to acknowledge the legal position of the Declaration and, by extension, that of DR. Secondly, a material analysis of DR will be undertaken. Thirdly, the possible enforcement of DR will be discussed.

2.1.Declaration as the source of law

The European Declaration on Digital Rights and Principles for the Digital Decade is a proposed joint document of three key institutions of the European Union: the European Parliament, the European Council, and the European Commission. Within the EU institutions, the European Commission holds the right to legislative initiative. However, the Declaration does not qualify as a legislative proposal in the strictest sense. The Declaration intends to “Explain political intentions" (no 5 of Preamble), has a "declaratory nature, and does not affect the content of legal rules or their application" (no 7 of the Preamble). The European Commission expects the Declaration to serve "citizens, businesses, public administrations, and policy-makers” as a “guidance for a human-centred, secure, inclusive, and open digital environment”.

It is important to note that inter-institutional agreements are a well-established tradition in the EU. The Declaration may be regarded as such an agreement. These agreements may have binding force, depending on the intentions of the institutions entering into the agreement (Tournepiche; Driessen). Lenearts et al. point out that “where the Treaties do not expressly provide for an agreement to be reached, the legal force of an agreement will depend on whether the institutions intended it to be binding” (27.0500). Monar observes that when institutions do not intend for an agreement to be binding, they expressly state so (700-702). Hence, while it is non-binding for EU States and individuals, the European Declaration may hold binding force for the institutions involved in the agreement.

2.2. Material analysis of the Digital Rights

The material analysis of DR constitutes the second step of their legal evaluation. The central issue at hand is whether DR are sufficiently precise to be deemed claimable rights. In addition, secondary queries involve the character of DR as principles or norms, their imposition of positive or negative obligations, and their applicability to national states, the EU, or other entities.

The Declaration comprises of a preamble and six chapters, of which four are further divided into subchapters. Each subchapter, along with the undivided chapters, consists of a statement followed by commitments that align with EU policies oriented toward achieving the goals outlined in the statements. The statements vary in character, with some framed in the language of rights, such as “everyone has the right...” or “nobody is to be asked to...”. Other statements use the word *should*, and express

recommendations or aims of EU institutions. Among the twenty-three statements, seven are expressed in the language of rights, while sixteen are phrased as recommendations. It is worth noting that the seven rights listed in the Declaration are already safeguarded by existing legal documents. The European Commission's intention to prepare a declaratory document is indicated by its choice to phrase certain statements as recommendations, which may be conveniently converted to binding obligations by substituting *should* with *shall* in the future.

In the material analysis of DR, the crucial question is whether they are precise enough to constitute claimable rights. This issue is complicated by the fact that fundamental rights are seldom as specific as statutory or procedural rights. Tharney et al. argue that a law is precise if it enables "ordinary people" to understand their duties (353). Coleman contends that such a test is more appropriate for clarity than for the precision of the law (407-408). Even if that test were helpful for clarity, it is unclear what "ordinary" or "average" means (Cohen). Moreover, the history of Human Rights law in Europe demonstrates that the absolute precision of the law is a myth and that case law may offer greater clarity (Mellinkoff 424). In this context, it is relevant to consider the language of the Declaration. Most DR are phrased with a level of precision comparable to that of human rights law, and the language of the Declaration is not far from that of the European Convention on Human Rights (ECHR) or the Universal Declaration of Human Rights (UDHR). Therefore, it is reasonable to label all statements as "rights" or DR.

DR are *principles* rather than norms, as they are formulated in a quite general way. Some are vaguer than others, such as the statement in Chapter III that "Everyone should be empowered to benefit from the advantages of artificial intelligence by making their own, informed choices in the digital environment while being protected against risks and harm to one's health, safety and fundamental rights." The most precise rights are those related to privacy and individual control of data, as well as the protection of children (Chapter V). Negative rights, such as freedom of expression online and the confidentiality of communication, coexist with positive rights, such as the right to access digital technologies, education, training, and lifelong learning. It is noteworthy that some negative rights of citizens impose a positive obligation on service providers or EU Member States. For example, Chapter IV guarantees everyone the right to freedom of expression online and requires "very large online platforms" to "support free democratic debate online" and "mitigate the risks stemming from the functioning and use of their services."

2.3.Possible Enforcement of Digital Rights

The effectiveness of the enforcement of rights is essential for people to enjoy them and for them to become more than merely idealistic aspirations, as Bilchitz observes (4-6). This issue is particularly crucial for vulnerable groups such as patients, seniors, and people with disabilities. Although the Declaration alone cannot provide a legal basis for enforceable claims, some DR are safeguarded by other legal instruments such as the ECHR, the Charter of Fundamental Rights of the European Union, or the General Data Protection Regulation (GDPR). Such rights may be enforceable through judicial proceedings, or a specific procedure, as is the case with the GDPR (Article 77, 82-84). In the case of other DR, EU institutions can be held accountable, primarily politically. However, as the Declaration may be legally binding for EU institutions, the possibility of a judicial remedy cannot be excluded.

3. Claim of universality

3.1.Philosophical and social aspects of universality

The issue of universality has been a longstanding topic of philosophical inquiry, going back to Aristotle's exploration of whether there could be anything universal – an object, law, or feature – that is stable and

permanent. Universals are characterized by their consistent and abiding properties, which contrast with dynamic and changing properties that can vary over time and circumstances (Owens). In Aristotle's view, universals are expressed through predicates. For instance, the nature of being human is a fixed and unitary concept, such that the predicate *human* should refer to the same property of "being human" when applied to different individuals, such as "Aristotle is human" and "Socrates is human." To demonstrate this, one can use a counterfactual, such as the claim "Aristotle is not human," which indicates that the opposite of the universal property of "being human" is "not being human." This kind of logical reasoning helps to understand the relationship among different things, but it does not provide proof of true universality. The concept of universality is a linguistic measure that has implications beyond philosophy. For instance, in physics, scientists use universal laws to explain natural phenomena that are consistent and reproducible across different contexts (Stankov). In mathematics, the concept of a universal set is used to define a set that contains all possible elements within a given system, including the set itself (Forster 1). Across these fields, there is often disagreement about the nature and scope of universality, as well as the extent to which it can be applied in different contexts.

Another approach to the problem of universality is to connect it with values. In that way, the philosophical conditions for recognising DR as universal rights would revolve around the question of whether these rights can be claimed as universal and whether they are intended to be universal (Wright). At the heart of this question is the idea that DR are grounded in fundamental human values that are universal and shared by all human beings (Nussbaum; Piechowiak, *Problem of Axiological Legitimization*). For example, privacy, autonomy, and freedom of expression are values that are considered universal and fundamental to human dignity. However, some argue that cultural and contextual differences must be taken into account when considering the universality of DR. For instance, some societies may prioritize communal values over individual rights, while others may value security over privacy. These differences can make it challenging to establish a set of universal digital rights that are recognized and respected across all cultures (Piechowiak, *Universality of Human Rights*). Consequently, the philosophical exploration of universality is linked to social contexts, which in turn expands the conversation into the realm of social sciences.

From a social perspective, universality is a less abstract issue. While it is true that, for instance, the UDHR pertains to a certain universality, the implementation of these rights is up to the respective country and its legal system. Therefore, from a purely cultural perspective – culture being at the centre of social life – universality, again, can be helpful for arriving at an agreement on what the respective culture should value. As Kine et al. aptly put it: "Culture is a human universal, yet it is a source of variation in human psychology, behaviour, and development" (1). To establish a philosophical basis for universal DR, it is necessary to explore the cultural and contextual differences that may impact the recognition of these rights. This requires a deep understanding of the values and norms that underpin different cultures and societies. The social conditions that impact the recognition of DR include social acceptance, economic circumstances situation, and cultural context. The level of social acceptance of technology and its use in daily life can influence the development and regulation of technology, which in turn affects the recognition of DR. For example, in Western societies, where technology is deeply integrated into daily life, there may be greater demand for strong digital rights protections (Lichy and Karine; Walsham; Rasilla; Siems). The assertion that "variation is the only true universal" is both useful and problematic. On the one hand, variation is an unavoidable aspect of existence that can create the appearance of permanence. On the other hand, the universality of variation does not guarantee the practical benefits that are associated with other types of universals, such as a moral principle that can streamline ethical debates. Instead, the universality of variation merely acknowledges the inevitability of change and provides knowledge about it. Thus, it is of limited practical applicability compared to a universal principle that does not change. Interestingly, the idea of variation as the only true universal contradicts

the notion of true universality in ethics, which is an ongoing topic of debate (Fox; Christians).

3.2.The ethical aspect of universality

The most famous attempt at a universal ethics is utilitarianism (Buckle; Singer). It is beyond the scope of this paper to try to summarise the entirety of the arguments surrounding a universal moral code. Therefore, we will focus on a famous argument by Peter Singer about a universal moral sense. Instead of emphasising universal moral principles, Singer talks about the human ability to act morally. In his 1995 paper, he summarises an argument by E. O. Wilson, who tried to find a biological basis for moral reason. This Kantian notion of a universal moral ability based on our cognitive (reasoned) makeup can support a more nuanced view of why ethical principles can and perhaps should be universal. Without going into much detail, the argument goes as follows. If a principle, rule, or law is said to be universal, it applies to every person in the same context under equal conditions. If, on the other hand, the conditions vary, a different principle, rule or law should be applied. Now, when we consider this argument, two things are noteworthy: 1) the nature of universal variation that we addressed earlier, and 2) the problem of judging what "same" means. In terms of societal coherence, a law should be followed
because it serves a specific purpose; that is to say, it helps facilitate social harmony and order. If, however, the personal preferences shift from social order to anarchy, does this mean that the law is no longer applicable? To a certain extent, the universality of the law needs to be a given for the majority of similar or same cases. Otherwise, there would be no necessity for any law to begin with. Therefore, in the context of universal digital rights, the question of an ethical approach inevitably raises the question of the necessity for universal DR.

The universality of a right can be claimed only if the right applies to every person, in the same context, and under equal conditions. However, with DR, the conditions vary extensively across different countries around the globe since their digital development is far from equal. Still, assuming that the digital infrastructure was equal, would there be an ethical argument for the universality of digital rights? In principle, universal digital rights would benefit the global community and streamline the debate about digital misconduct. In addition, universal digital rights would help to protect people and social coherence in the same way that other rights and laws do. Circling back to utilitarianism, the utility of universal digital rights would have to be determined relative to its costs in order to assert that they are necessary or, to be more precise, morally obligatory. This, however, is a very complex task as it involves numerous stakeholders. From a practical standpoint, it might be more efficient and ultimately successful to make this a question of legal necessity rather than ethical inquiry.

3.3.The legal aspect of universality

In the legal evaluation of the potential universality of digital rights, several criteria may be considered. Three of them are the most vital ones: clarity, coherence, and enforceability (Tharney 353; Coleman 407-408; Cohen). It is important to note that digital rights, like fundamental rights, are often less precise than statutory or procedural rights. This is because they have a character of *legal principles* rather than norms, which allows them to be more flexible and adaptable to changing social and cultural contexts, as well as to technological developments (Shany; Hallström).

For a law to be universal, it must be clear and understandable. The clarity of the law is vital for its universality because it ensures that people can comprehend and comply with the law. If the law is unclear or ambiguous, individuals may struggle to understand their legal obligations, raising the possibility of confusion and non-compliance. This can lead to a breakdown in the social order and undermine the legitimacy of the legal system. Another consequence of unclear laws is that they are more likely to be applied unfairly or inconsistently. If the law is open to interpretation, different judges and legal

authorities may interpret it in different ways, giving rise to conflicting decisions and a lack of legal certainty. This can result in unequal treatment under the law, which is contrary to the role of human rights in providing minimum security and protection to individuals. Fundamental rights shall protect especially the most vulnerable people, i.e., the sick and people with disabilities. Therefore, human rights should be understandable to all members of society. This requires clear and concise language, definitions, and guidelines to ensure that the law is accessible also to the less educated.

The coherence of the law is an essential aspect of ensuring its universality. Coherence refers to the logical and consistent framework of the legal system as a whole. It involves the relationship between different laws, legal principles, and legal institutions. The coherence of the law is vital for its universality because it ensures that the legal system functions as a whole and legal decisions are made predictably and consistently. The coherence of the law promotes legal certainty. That contributes to individuals' confidence in their legal rights. If the law is incoherent, individuals may struggle to understand how different laws and legal principles fit together, leading to confusion and uncertainty. That aspect is especially vital in the context of innovative technologies. Coherent human rights law is a prerequisite for equal protection of the fundamental rights of users despite new circumstances.

Universal law should also be enforceable. Without enforceability, the law becomes nothing more than words on paper, lacking any real impact on the behaviour of individuals or the functioning of society at large. In the context of human rights, the lack of enforceability results in a lack of protection for individuals. Non-enforcement of the law can undermine public confidence in the legal system. Individuals may perceive the legal system as impotent or ineffective, resulting in non-compliance and further erosion of social order. If digital rights are to be enforceable, they must be recognized and protected by legal instruments and institutions, and there must be effective mechanisms in place for individuals to seek redress in the event of violations.

The problem of the universality of DR may be addressed differently from a legal perspective – as an issue of legitimacy. Universal rights would be those that are recognised as legitimate in all societies and jurisdictions. That approach comes with a theoretical challenge: how to define legitimacy. That concept, vital for legal scholarship and legal philosophy, has been discussed and approached differently throughout history. For example, some authors believe that law is legitimate if it respects or endorses some more fundamental norms: divine law (e.g., the Hebrew Law given to Moses), or natural law (Thomas Aquinas; Blackstone; Finnis), or commonly accepted fundamental principles of law (Buchanan). Others link legitimacy to the proper
establishment of the law (Kelsen; Hart) or to values (Weber; Tischner). There are also theories of legitimacy that do not try to explain what legitimacy is but rather focus on when the law is legitimate by setting up some conditions of legitimacy. While that approach may be criticised for evading the topic or being reductive, there are at least two reasons in favour/favor of such theories. First, legitimacy has been conceived in many different ways. Very often, these understandings relate to similar concepts, like justice, the validity of the law, or social acceptance. While engaging in that discussion may be intellectually fascinating, it is hardly likely that firm conclusions will be reached on these matters in the foreseeable future. Meanwhile, the issue of legitimacy is practically relevant and vital for a proper settling of many real-life dilemmas. That brings me to the second argument. Focusing on some conditions of legitimacy may help to propose potentially acceptable legitimacy tests which could be used by scholars, legislators, and courts.

For this contribution, only one set of criteria for legitimacy is discussed. Peter Wahlgren suggests that we could "decompose the concept of legitimacy into various aspects of rationality which can be analysed separately" (428). That principle allows him to expound an explanation of legitimacy that is complex and considers it in its multiple dimensions, while also operationalising it. Wahlgren identifies five aspects

of rationality, "each representing a necessary component of legitimacy" (428): political, legal, cultural, functional, and internal. Political rationality means that the law should be an effective tool for policy implementation. Legal rationality refers to the art of constructing the law – establishing it in accordance with legal principles. Many other theories of legitimacy fit into that category, as legal legitimacy entails both the formal aspects of creating the law and the question of how the law should reflect some values (Wahlgren 432-433). Cultural rationality requires that the law is acceptable in a particular culture. Wahlgren identifies moral, religious, and ethical beliefs as the main aspects of culture (434). Besides mirroring the content of the laws, cultural rationality also reflects the enactment process, including the legislative, implementation, and enforcement procedures. Therefore, cultural rationality requires laws to be in line with the development of a society and be established through a transparent process. Functional rationality refers to cost effectiveness and minor delays in implementing substantial rules. It also includes the enforcement of the law. Internal rationality refers to the coherence and logical structuring of the law (Wahlgren 438).

The five kinds of rationality are not five distinct types of legitimacy but conditions that must be met by legitimate laws. Such aspects "raise demands which may be of a conflicting nature",
and which may overlap (Wahlgren 440-441). These rationalities are claims that may be met in several ways. A legitimate law cannot contradict these claims. The five different rationalities are like borders of what Wahlgren calls a sphere of legitimacy, within which various legitimate laws may be passed. It should be noted that these rationalities include all three aforementioned conditions of universality, i.e., clarity, coherence, and enforceability.

Wahlgren's criteria of legitimacy can be used to assess whether DR can be considered globally legitimate. In a negative way, if there are societies or jurisdictions in which DR would collide with one of the rationalities, and consequently would be considered illegitimate, then DR could be evaluated as not fit for being a universal standard. A positive way of testing DR requires far more work. According to that approach, a legitimate interpretation of DR would need to be identified for each society or jurisdiction. Due to its complexity, this undertaking lies beyond the scope of my contribution, which only seeks to propose legal criteria for evaluating the potential universality of DR.

4. Conclusions

The investigation carried out in this paper provides several important insights regarding the European Declaration of Digital Rights and its potential universality. Firstly, it is clear that the Declaration is more of a position statement than a legally binding document, and it should be read as such. Nonetheless, it could serve as a valuable point of reference for future legislation at the EU, Member State, and international levels. The principles outlined in the Declaration are characteristically general, but this is typical for fundamental rights law and does not necessarily preclude them from serving as a basis for claims. The main challenge for the enforcement of DR is the question of enforceability. In its current form, the Declaration is only binding for those EU institutions that sign it, and their liability is primarily political. However, legal responsibility cannot be entirely ruled out.

The second group of conclusions is connected with the question of universality in its four dimensions: philosophical, social, ethical, and legal. Despite ongoing discussions on the notion of universality in philosophy, there is no commonly accepted set of criteria. Universality may be understood in a more abstract way, as a relationship between various objects or in connection with values. The second position focuses on values shared by all human beings as a normative measure of the universality of rights. That approach opens onto the question of the social conditions of universality. However, in view of the host of cultural and contextual differences that are involved, establishing a globally accepted and similarly interpreted set of fundamental rights presents a challenge. In the context of innovative technologies, i.e.

AI and DR, social acceptance and familiarity with technologies highly influence public opinion. Regarding ethics, utilitarianism is the most famous attempt at a universal ethics. However, the interpretation of ethical principles varies across different societies, which affects the necessity and relevance of DR. Finally, in terms of legal criteria for universality, legitimacy is a crucial factor, and Peter Wahlgren's model provides a useful framework that includes political, legal, cultural, functional, and internal aspects of legitimacy. The cultural norms and values associated with each of these factors present significant challenges to the universality of DR.

Future discussions on the question of universality in DR may take at least two different paths. A *normative* approach would focus on identifying fundamental and universal values and arguing for their justification of specific rights, including DR. An *empirical* approach, on the other hand, would seek values that are widely accepted in order to use them as criteria for universality. This approach would require large-scale social studies and could benefit from the use of AI and big data analysis.

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