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# The legal construction of privacy and data protection

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# Legal construction: why?

- D.1: multidisciplinary analysis of P/DP.
  - Law, society, economics, ethics
  - Meaning of P/DP is discipline dependent → disciplinary construction
  - We focus on law
    - EU legal approach





# Legal construction: importance

- Legal content is derived from the Courts and Tribunals
  - Adjudicate on basis of the legislation and work of the legal authors
  - Build upon the legal construction
- Legal approach is “binding”





# Legal construction: specificities

- Makes the difference between Privacy and Data Protection
- Two different rights with distinct legal content.
- Yet:
  - (Possible) overlap
  - Articulation





# P/DP: formal distinction 1

- Privacy:
  - Art. 8 ECHR, Art. 7 EUCFR
- Data Protection
  - Art. 16 TFEU
  - Art. 8 EUCFR
  - Directives 95/46/EC, 2002/58/EC, 2006/24/EC
  - Regulation (EC) No 45/2001
  - Council Framework Decision 2008/877/JHA (DPFD).





## P/DP: formal distinction 2

- Upcoming DP reform:
  - Directive 95/46/EC to be replaced by the General Data Protection Regulation
  - DPFD to be replaced by a Directive concerning the processing of personal data in the field of police and criminal law.





# P/DP: content distinction 1

- Privacy → ECtHR:
  - It is neither possible nor necessary to determine the content of privacy in an exhaustive way...
  - ... but 2 main approaches: intimacy + autonomy/self-determination.
  - Liberty approach to privacy





## P/DP: content distinction 2

- Data Protection: a set of Fair Information Practices:
  - Quality of the processing: Purpose specification, legitimacy, fairness, data quality, data minimisation.
  - Subjective rights for data subjects: Information, access to data, rectification/erasure, objection.
  - Obligations for data controllers: confidentiality of data, security, notification.
  - Institutional Framework: Article 29 Working Party, DPAs, EDPS (45/2001).







# Overlaps 1: (non) personal data

- Privacy:
  - Applies **both** to the processing of personal and non personal data
    - Criteria: nature of data and/or extent of the processing
- DP: Only personal data
  - Art. 2(a)
- D.2 case-study: Body scanners
  - Use of PETs in body scanners might prevent application of DP, but not of P.





# Overlaps 2: Consent

- Privacy:
  - Encompasses intimacy, BUT also autonomy and self-determination.
    - Consent is an important element of self-determination (e.g., S&M practices)
- Data Protection:
  - Consent can never serve alone as a legitimate basis.
  - Article 7(f) already justifies processing for any legitimate aim. Consent would justify illegitimate aims?





- D.2 case-study: Human Enhancing Technologies
  - Privacy:
    - The recourse to such technologies (e.g., BCI) is part of the individuals' privacy, cf. self-determination and autonomy.
    - DP: The use of such technologies will be legitimised by the sole consent of the user if and only if, the aim pursued is legitimate.





# Overlaps 3: Proportionality

- Privacy:
  - Art. 8.2: broad proportionality test including the “necessity in a democratic society” condition.
- Data Protection:
  - Art. 6(c): more lenient test: proportionality to the (legitimate) aim pursued
- D.2 case-study: Genetic databases for medical research
  - Lawfulness depends on the severity of the proportionality test





# Articulating privacy and data protection 1

- The 2 rights should be articulated
- The articulation is to be constructed along two axes:
  - Types of Constitutional protection:
    - Opacity vs Transparency tools.
  - Relationship to technology





# Constitutional protection

- P and DP are tools of constitutional protection:
  - Both aim at safeguarding the individual's sphere of liberty (the political private sphere) in the democratic constitutional state
- Their nature differs:
  - Privacy as an *opacity tool*: a normative, prohibitive instrument that sets limits to State's powers
  - Data protection as a *transparency tool*: a regulatory instrument that channels the use of accepted powers through transparency safeguards





# Constitutional protection 2

- The articulation goes as follows:
  - 1. The opacity regime that will determine the acceptability (or not) of FETs
  - 2. The transparency regime that will provide safeguards in case of acceptability.





# Technology

- Privacy is (ICT) technologies-neutral
  - Yet, not out-dated by techs
    - Privacy is born from FETs
      - More adapted to dealing with FETs?
- DP is embedded into the technological context
  - Advent of ICTs.
    - Dependency has called for reforms: personal data, profiling, e-privacy.
    - Attempts towards technology neutrality, but remains to be seen.
  - However: protection afforded is more comprehensive than privacy.

