

# The Law v. The Code

**The Law**

**The Code**

# How do we regulate digital technologies?



# The role of law in technology

## *Phenomena*

Technological Sovereignty

The Splinternet

The Brussels Effect

## *Problems*

Intellectual Property

Economic Disincentives to  
Technological Developments

The “Matthew Effect”

# What are legal systems?

**People**

**Laws**

**Institutions**

***Institutions serve to legitimize, enact, and enforce laws***

# The two main legal models

**Civil law: Parliaments enact legislation**

**Common law: judges make law by adjudicating cases**

***The Constitution: is above the law, says how laws must be enacted, and usually requires that laws against the constitution be struck down***

***Common law countries: have narrow—but growing numbers of—statutes***

# The two main models when it comes to data

## United States

### *The Federation has*

- *limited legislative powers*
- *its own judiciary*

### *Each State has*

- *broad legislative powers*
- *its own judiciary*

Most legislation that is relevant is state legislation

Exception: *Federal Trade Commission regulations*

## European Union

### *EU has*

- *limited powers*
- *the Court of Justice*

### *States have*

- *most powers*
- *the bulk of the judicial activity*

Most rules that are relevant are EU rules

# Two Understanding of Rights & the Constitution

Vertical Rights

USA

Horizontal Rights

EU

China

# The Types of Laws

## **EU Treaties**

**EU regulations: create immediately enforceable rights**

**EU directives: address states. After the deadline, sufficiently precise rules are immediately enforceable**



# Why the EU is so powerful?

**“Direct effect” doctrine**

**“EU law supremacy” doctrine**

# Why the Court of Justice of the EU is so important?

## **The preliminary ruling procedure:**

- a domestic case starts
- the local judge thinks that EU law is involved
- EU law is ambiguous
- the local judge suspends the proceedings and requests the CJEU to issue a preliminary ruling
- the domestic trial resumes and the local judge will enforce the EU rule as interpreted by the CJEU

# The Regulatory State and Technocratic Institutions

USA: The Federal Trade Commission

EU: The Privacy Authority

*At the State Level: Privacy Authorities*

Such institutions often have: regulatory, executive, and judicial powers

# CHINA

The Central State and the Local Government

The Communist Party's Rule

Regulating by principles and instructions

## An Additional layer of complexity in Europe: The European Convention and the European Court of Human Rights



# Art 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

## Art. 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

# The European Court of Human Rights' powers

It intervenes after the exhaustion of domestic remedies

It addresses complaints against States

Its rulings establish obligations, but hardly have direct effects within state jurisdictions



# How Privacy Was Born



# The Development of Privacy & Dignity

From Places...

To People...

From Protecting People from Private Powers...

To Protecting People from Public Powers

From People to Information

# The Barbra Streisand Effect & the Paradox of Privacy



# The Shield of Privacy: which limits? The Proportionality Scrutiny

Other interests can prevail over privacy—it depends on the jurisdiction

(es. Intellectual property)

Proportionality scrutiny: it is a means to assess the legitimacy of a solution

# The structure of proportionality

1. Is the goal of a measure lawful?
1. Does the measure truly pursue the goal it purports to pursue?
1. Is the measure the least restrictive means to achieve the goal?
1. Do the benefits outweigh the damages?

# Why the Proportionality Test is so important?

It shapes judicial assessments

It forces parliaments and executives to incorporate the proportionality analysis

It allows authorities without democratic legitimacy to address political issues

It incorporates technical considerations into legal analysis

It pushes private companies that deal with data to incorporate privacy analysis

## **An Example: Costeja Gonzalez v. Google Spain (C-131/12)**

Google publishes results and ranks them

Costeja Gonzalez complains that by publishing old information about him it is damaging his reputation and privacy

The “Right to be Forgotten” is born

The “Right to be Forgotten” requires a proportionality assessment

# Legal & Technical Problems

How do you translate a proportionality assessment into google search?

Can you review it? The problem of “gaming the system”

The problem of intellectual property

The more you use privacy, the more boring the Internet becomes



# Art 17 GDPR The Right to Erasure (“to be forgotten”)

1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:
  - a. the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
  - b. the data subject withdraws consent on which the processing is based according to point (a) of [Article 6](#)(1), or point (a) of [Article 9](#)(2), and where there is no other legal ground for the processing;
  - c. the data subject objects to the processing pursuant to [Article 21](#)(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to [Article 21](#)(2);
  - d. the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;...

2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.

3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:

- a. for exercising the right of freedom of expression and information;
- b. for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
- c. for reasons of public interest in the area of public health in accordance with points (h) and (i) of [Article 9](#)(2) as well as [Article 9](#)(3);
- d. for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with [Article 89](#)(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or
- e. for the establishment, exercise or defence of legal claims.

# The logic of privacy in the US and the EU

## US

- the state by state basis
- the “information” logic
- the internet monopoly

## EU

- the “one stop shop” logic
- the “opt in” logic
- *privacy by design and privacy by default*

PROS

CONS

What are the consequences of too much privacy?

# The Importance of Privacy Design and of Going Beyond It

The time-consuming privacy protection

Information as cost and resource: the market and the burden of data

The consequence of the “opting in system”

The Healthcare Conundrum

The AI Act: going beyond privacy

# LLM & Privacy: The notion of “risk”

## AI ACT (still in the making)

*1c) ‘foundation model’ means an AI system model that is trained on broad data at scale, is designed for generality of output, and can be adapted to a wide range of distinctive tasks;*

...

*Foundation Model providers will ... process and incorporate only datasets that are subject to appropriate data governance measures for foundation models, in particular measures to examine the suitability of the data sources and possible biases and appropriate mitigation*

*.. train, and where applicable, design and develop the foundation model in such a way as to ensure adequate safeguards against the generation of content in breach of Union law in line with the generally-acknowledged state of the art, and without prejudice to fundamental rights, including the freedom of expression*

*... without prejudice to Union or national or Union legislation on copyright, document and make publicly available a sufficiently detailed summary of the use of training data protected under copyright law.*

# What is the Social Credit System?

In the East?

... and in the West?

*Which are the main issues of a Social Credit System-based model?*

*Which are the main achievements?*



# Problems

The end of the separation between private and public

Biases

Determinism

IP protection of software

Training

# High Risk systems

AI systems intended to be used to evaluate the creditworthiness of natural persons or establish their credit score , with the exception of AI systems *used for the purpose of detecting financial fraud (Dutch Syri)*

*AI systems intended to be used for making decisions or materially influencing decisions on the eligibility of natural persons for health and life insurance*

AI systems intended *to evaluate and classify emergency calls by natural persons or* to be used to dispatch, or to establish priority in the dispatching of emergency first response services, including by *police and law enforcement*, firefighters and medical aid, *as well as of emergency healthcare patient triage systems*

# Social Credit & Biases

Garbage In, Garbage Out

Bias—how do you fix biases?

# Privacy and the Types of Data

personal/non personal data

anonymized/pseudonymized data

synthetic data

# Social Credit & Biases

Garbage In, Garbage Out

Bias—how do you fix biases? — The Reading on Affirmative Algorithms

# PUBLIC SPACE & AFR

## The Problem of Privacy in Public Spaces

- *what do we expect when we are in public?*
- *is there any difference between a human observer and AI?*

*The case of South Welsh Police*

# The GDPR: Art. 22

1. The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.
2. Paragraph 1 shall not apply if the decision:
  1. is necessary for entering into, or performance of, a contract between the data subject and a data controller;
  2. is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or
  3. is based on the data subject's explicit consent.
3. In the cases referred to in points (a) and (c) of paragraph 2, the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision.

# Politics and echo chambers

<https://osome.iu.edu/demos/echo/>

