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**Master’s Degree in Computer Science**

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**LAW AND DATA**

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# **1. Laws, legal systems and sources of law**

A **law** is a set of conditions under which the choices of each person can be united with the choices of others under a universal law of freedom.

A **legal order** is a collection of general and specific norms that regulate human behaviour, setting expectations for how individuals ought to act. These norms are guidelines that create an "ought," or a prescribed way of behaving, which can function as commands, permissions, or authorizations. The concept of a norm is inherently tied to the concept of the "ought", a behavioural expectation.

A group of norms forms an **order** if they create a unified system, sharing a common foundation of validity. In the case of **positive law**, the norms within a legal order are established or "posited" through deliberate human actions.

The **legal system** includes *rules*, *procedures* and *institutions* by which activities, both public and private, can be carried out through legitimate means. A legal system is a system for interpreting and enforcing the laws. Plurality of legal systems considering several and different social groups.

Examples of what legal systems can be / where legal systems can be found:

* STATES (e.g. Italy, France, USA, India, China, etc.)
* EUROPEAN UNION (Legal system encompassing 27 Member States)
* COUNCIL of EUROPE (Legal system including 47 Member States)
* INTERNATIONAL LEGAL ORDER (Special legal system – independent from States)

Note: European Union is a huge legal system that deals with other 27 legal systems.

Legal systems are organized based on modern theory of **separation of power** where the power is divided into three branches: legislative branch is responsible for making laws; executive for implementing and enforcing these laws; judicial for interpreting them.

This structure ensures that power is not concentrated in one branch, **promoting** **legal certainty** (the law should be easily understandable, making clear what an individual can do or not), **impartiality**, and **equality before the law** (everyone should be treated equally before the law). Every power should be checked by the other powers, in a way a power cannot overcome the others, having all the powers balanced.

The system of **checks & balances** limits the power of a single individual/entity/body of government to ensure balanced and harmonious and relationships and co-existence.

There are two branches of law and each legal systems need to manage this separation: **public law** and **private law**. Branches of law is fundamental universally accepted exhaustive, meaning every law belongs to one of those two branches, there cannot be a third branch.

**Public law** governs the relationship between individuals and the state, ensuring the regulation of public affairs and the protection of individual rights through administrative, constitutional, and criminal law.

**Private law**, on the other hand, manages relationships between private individuals and entities, encompassing areas such as contract law, property law, family law, and tort law.

Privacy law is unique because it fits into both public and private law:

* **Public Law**: privacy law controls how government bodies handle personal information, protecting individuals from government overreach. For example, laws may limit how much data the government can collect on citizens.
* **Private Law**: privacy law also applies to interactions between private individuals or companies. For instance, it regulates how businesses can collect and use customer data or allows someone to sue another for invading their privacy.

Privacy law overlaps with both public and private law because it protects people’s rights both against the government and in private relationships.

There are two primary types of legal systems used by countries worldwide:

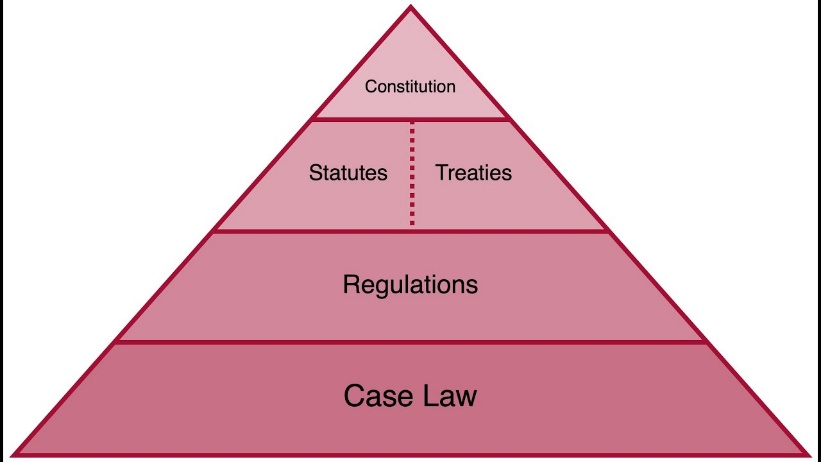
* **Civil Law**:
  + Based on written laws or codes (like statutes and regulations) that are applied and interpreted by judges.
  + Judges play a limited role in creating law; they focus mainly on applying the existing laws to cases.
  + Legal decisions generally do not set binding precedents for future cases.
* **Common Law**:
  + Based on precedents, or past judicial decisions, alongside written statutes.
  + Judges have a more active role in shaping the law because their decisions can set precedents for future cases.
  + This system relies heavily on the principle of *stare decisis*, which means that courts follow the rulings of previous similar cases to maintain consistency.

**Sources of law** are the origins from which laws derive their authority and content. They include the foundational rules and principles that govern a legal system, such as constitutions, statutes, regulations, case law, and customary practices. These sources establish legal standards, rights, and obligations and guide the judiciary, legislators, and public in the application and interpretation of law.

Sources of law can be classified as:

* **Hard law** consists of binding legal rules that can be enforced in a court of law (e.g., European Convention of human rights). Examples include constitutions, statutes, regulations, and treaties, which impose clear obligations and specify consequences for non-compliance. Hard law provides the legal certainty and authority necessary to govern conduct, protect rights, and ensure accountability within society.
* **Soft law** includes non-binding guidelines, principles, and agreements, such as codes of conduct (e.g., Universal Declaration of human rights). Soft law can be used by a judge to interpret hard law. Many rights and obligations regarding data protection originates from soft law provision.

**Sources of law are hierarchical**, meaning that lower sources of law cannot contradict higher sources of law. This hierarchy determines which laws take precedence in cases of conflict. To have an idea consider the following source of law pyramid, keeping in mind every country has its own one that my differ from this.



# **2. European Union (EU)**

The European Union is a legal system, composed by rules (defined by legislators), procedures (set up by rules) and institutions. It is an example of legal system composed by other 27 states (other legal systems) and due to that is one of the most complex.

In Europe there are also international organizations (legal systems) that deal with states that belong to EU and not, in general with European states. It is important to talk about them since these organizations are involved in data protection policies.

* The **Council of Europe (CoE)** operates with the goal of upholding human rights, democracy and the rule of law (compliance to existing legal systems) in Europe. Composed by 46 member states. The most important institution is the European Court of Human Rights.
* The **European Free Trade Association (EFTA)** is an intergovernmental organisation established in 1960 by the EFTA Convention, that promotes free trade and economic integration between its members, within Europe and globally.
* The **European Economic Area (EEA)** includes EU and EFTA members (excluding Switzerland) under an international agreement from 1994, ensuring the application of EU single market rules across a defined geographic area.

What we need to understand is how the rules of each legal system of interest are applied in data protection, asking so ourselves which is the legal boundary in which we can operate when talking about personal data.

**Members of the different international organizations**

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**Schengen Area** is a group of 27 European countries that have abolished most of their internal borders to allow free and unrestricted movement of people across member states. This means that within the Schengen Area, people can travel from one country to another without going through passport checks or border controls, much like moving between states within a single country.

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EU was born to prevent conflicts of any type between the member states (e.g., wars). Now the European Union counts 27 members states (28 before UK left).

*“The Community constitutes a* ***NEW LEGAL ORDER*** *OF INTERNATIONAL LAW for the benefit of which the states have limited their sovereign rights”*.

In the *Costa v. ENEL* case, the European Court of Justice (ECJ) ruled that the European Community (now the EU) established a new legal order, distinct from international law and above the individual laws of member states. This new legal system requires that **member states** **cede some aspects of their sovereignty to the EU**, meaning that EU law takes precedence in areas governed by EU treaties.

*“its own legal system which, on the entry into force of the Treaty, became an* ***integral part of the legal systems of the Member States*** *and which their courts are bound to apply (…)”*.

In *Van Gend en Loos*, the ECJ established that EU law is directly applicable in member states and forms an integral part of their national legal systems. This principle means that EU law can create rights and obligations for individuals and entities within member states that national courts must enforce.

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**Article 2** sets the foundational values for EU membership, while **Article 49** defines the structured, consensus-driven process by which eligible countries can join the EU. These articles reinforce the EU as a **values-based union** with strict entry requirements to maintain cohesion among its member states. In general, both articles set the basis for the respect of the fundamental human rights which is also related to data protection.

The **Copenhagen Criteria** defines the different kind of requirements for a country to join EU:

* **Political**: stability of institutions guaranteeing democracy, the rule of law\*, human rights and respect for and protection of minorities.
* **Economic**: a functioning market economy and the capacity to cope with competition and market forces, protecting so the consumers’ rights (freely able to purchase what they want).
* **Administrative and institutional capacity**: to effectively implement the *acquis communautaire\*\** and ability to take on the obligations of EU membership.

\* rule of law: all public powers must operate within the limits established by law.

* LAW-MAKING PROCESS: transparent, accountable, democratic and pluralistic.
* JUDICIAL PROTECTION: effective 🡪 access to justice, independent and impartial courts, separation of powers.
* EQUAL PROTECTION: everyone enjoys equal protection under the law and prevents the arbitrary use of power by governments.
* POLITICAL AND CIVIL RIGHTS: protection of basic political and civil rights, civil liberties.

\*\* *acquis communautaire*: body of common rights and obligations binding upon EU member states.

## **2.1 Hierarchy of sources of law in EU**

The hierarchy of sources in European Union law establishes the order of legal authority among various types of legislation within the EU framework.

1. At the top is **Primary Law**, which includes foundational treaties such as the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). These treaties form the constitutional basis of EU law and set out the structure, powers, and principles guiding the EU.
2. Below primary law are **International Agreements**, which are treaties and agreements that the EU makes with non-EU countries or international organizations. These agreements are binding and integrate into EU law, influencing member states’ legal systems.
3. **Secondary Law** follows, comprising regulations, directives, decisions, recommendations, and opinions issued by EU institutions to implement and operationalize primary law.
4. Lastly, **Supplementary Law** fills in gaps through case law from the Court of Justice of the European Union and unwritten principles that ensure consistent interpretation and application of EU law across member states. This structured hierarchy ensures clarity, coherence, and legal order within the EU.

### **2.1.1 Primary Law**

Primary law includes **Treaties**, the **Charter of Fundamental Rights**, and **General Principles** established by the Court of Justice of the European Union.

Treaties are the core legal documents that founded and continue to shape the European Union:

* **Founding Treaties**: these treaties established the European Communities, which eventually evolved into the European Union. The key founding treaties laid the groundwork for European integration and cooperation.
* **Amending Treaties**: over time, various treaties have been amended to adapt to changing political and economic conditions. Amending treaties expand or adjust the EU’s functions and powers.
* **Protocols annexed to treaties**: protocols attached to the treaties clarify or specify certain aspects of EU law. They are legally binding and part of primary law.
* **Accession Treaties**: these treaties enable new countries to join the EU, setting terms for their membership and adapting the EU structure to accommodate new members.

The **Charter of Fundamental Rights** guarantees key rights and freedoms to individuals within the EU, such as dignity, freedoms, equality, solidarity, citizens' rights, and justice. The Charter reflects the EU’s commitment to human rights.

The **General Principles**,established by the Court of Justice, ensure fairness and coherence in the interpretation and application of EU law. These principles include proportionality, legal certainty and protection of fundamental rights.

As mentioned before, primary law also consists in two treaties that shaped the basis of EU:

* **Treaty on the European Union (TEU)** sets out the EU’s main objectives, principles, and values, such as promoting peace, democracy, and the well-being of its peoples. It also defines the core institutions of the EU (e.g., European Parliament, European Commission, Council of the EU) and describes their functions and relationships. The TEU essentially acts as a "constitutional" document for the EU, outlining its purpose and values.
* **Treaty on the Functioning of the European Union (TFEU)** provides detailed organizational and operational rules to implement the objectives established in the TEU. It includes the procedures, competencies, and responsibilities of the EU institutions, helping to structure the day-to-day functions and powers of the EU.

Together, these treaties form the legal foundation of the EU, setting both broad principles and specific mechanisms for how the EU functions and interacts with its member states and citizens.

**Article 16(1) of TFEU** establishes the right to **personal data protection** as a fundamental aspect of human rights within the EU. This provision underscores that individuals have a right to privacy concerning their personal data, ensuring their control over how personal information is used, stored, and shared. This article laid the groundwork for the General Data Protection Regulation (GDPR).

### **2.1.2 Secondary Law**

**Secondary Law** in the EU refers to legal acts established based on the EU Treaties, and it is governed by Article 288 of the TFEU which defines typical and atypical acts.

**Typical Acts** (Art. 288 TFEU) include:

* **Regulations**, **Directives**,and **Decisions**: these are binding forms of law often referred to as "hard law." They have legal force and are mandatory in specific ways, depending on the type.
* **Opinions** and **Recommendations**: these are non-binding, often termed "soft law," and serve as guidance without enforceable power.

**How much is each typical act binding?**

* A **regulation** is binding in its entirety and is directly applicable in all EU Member States. This means that once it is adopted, it automatically becomes part of national law without the need for transposition. Member States are required to apply it as it is, ensuring consistent application across the EU.
* A **directive** is binding regarding the result it seeks to achieve but allows Member States flexibility in how they implement it. National authorities are responsible for choosing the form and methods to reach the directive’s objectives. This process requires transposition, where each Member State adapts the directive into its own legal framework, while still achieving the intended EU-wide goal.
* A **decision** is fully binding in its entirety. It can be general, applying to all within the EU, or individual, targeting specific entities or individuals. When a decision is individual in scope, it is only binding on the parties to whom it is addressed, making it a tailored instrument for specific cases.

**Atypical Acts** include documents like communications, resolutions, white papers, and green papers. They are not explicitly mentioned in Art. 288 TFEU and generally lack binding force, often used to express ideas, intentions, or proposals from EU institutions.

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## **2.2 EU institutions**

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