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Abstract: Since it first appeared in the 1960s, the legal notion of personal data protection has been living in the shade of the term privacy. Whereas in the United States (US) the regulation of the processing of information related to individuals was solidly framed under the privacy tag as early as the beginning of the 1970s, European legal orders were witnessing the emergence of concurring labels. Eventually, a genuinely European legal construct was to see the light of day: personal data protection, now recognised as a specific fundamental right of the European Union (EU), formally different from any right to privacy. At the core of the construction of the notion of personal data protection there is an attempt to steer clear of the private v. public distinction, on the grounds that the boundary between private and public, as well as any traditional conceptualisations of privacy in terms of intimate or private space, had been rendered inoperative by emerging technologies – concretely, by automated data processing. The notion of personal data protection proposed to structure reality from a different perspective, based on the distinction between personal and non-personal – terms that European data protection laws were soon to define for their own purposes. Almost 50 years after its genesis, European personal data protection still appears to be strikingly intertwined with the evolving notion of privacy. This contribution examines European data protection from the perspective of its relation(s) with privacy, sketching out both the two notions and their different entanglements. It devotes particular attention to the ongoing review of the European data protection legal landscape, which seems (finally) to be announcing a formal emancipation of personal data protection from privacy but is at the same time built upon (hidden) references to it. Between claims and silences, privacy thus continues to play a role in the shaping of EU data protection. The importance of such a role is described with the help of Jacques Derrida’s insights on the functioning of the word.

Keywords: Data Protection, European Union, Law, Personal Data, Privacy.

Authors

Gloria González Fuster is a researcher at the Faculty of Law and Criminology of the Vrije Universiteit Brussel (VUB), where she is completing a doctoral thesis on the right to personal data protection as a fundamental right of the European Union (EU), as well as contributing to the EU-funded Privacy and Security Mirrors (PRISMS) project. She has an academic background in law and communication sciences, and professional experience in different EU institutions.

Rocco Bellanova is assistant and researcher of the Centre de Recherche en Science Politique at the Facultés universitaires Saint-Louis (Brussels, Belgium) and researcher of the Law, Science, Technology and Society (LSTS) Research Group at the Vrije Universiteit Brussel (VUB). He holds a research master of political science and international relations of Sciences-Po Paris. His ongoing PhD research focuses on data protection applied to European security measures.

It was computers, however, that were soon singled out as encapsulating the major threat to society that required government action. At the beginning of the 1960s, computer makers started raising the alarm that the accumulation of information rendered possible by the new machines threatened to leave individual privacy at the mercy of the man in a position to press the button that made them ‘remember’. By the mid-1960s, the issue of ‘computers and privacy’ became a topic of official interest.

As it turned out that privacy was dangerously threatened by the advent of computers, the question became: how exactly does the computer endanger privacy? And what was privacy, in the first place? The ‘right to privacy’ had traditionally been conceptualised in the US as a "right to be let alone", following the impulse given by Samuel Warren and Louis Brandeis in 1890. Their definition focused on the need to protect the individual against external interferences, such as, for instance, the publication in the press of pictures obtained through ‘modern’ photograph cameras. It was a conception of privacy that seemed to assume that privacy was the opposite of publicity, and that it was about keeping things ‘private’ in the sense of hidden, secret, or undisclosed. Could that conception cover the problems linked to the storage of computerised information?

To explain exactly how the computer threatened privacy, the notion was eventually broadened. By the beginning of the 1970s, the word
Privacy was thus re-defined as including a new dimension, re-invented as encompassing what was to be (sometimes) called 'informational privacy', or the right of individuals to determine for themselves when, how and to what extent information about them could be processed. Soon, however, this new meaning of the word started to prevail upon any other, at least in the context of discussions on emerging technologies. It was in this peculiar sense of privacy as informational privacy, and, de facto, with the exclusion of any other meaning, that the word was stamped on the major US act that since then ostensibly bears its name, the 1974 Privacy Act, marking the inclusion in US law of what has been qualified as a 'serious debasement' of the term. And it was in this particular new incarnation that the word privacy then crossed the Atlantic.

3. Europe and (no) Privacy

European countries had also been concerned since the 1960s with the impact of emerging technologies on human rights. Initially, the unease referred mainly to the spread of devices depicted as facilitating eavesdropping, such as hidden and directed microphones. As in the US, however, worries eventually concentrated on computers, and more concretely on the use of large computerised data systems by public authorities.

As the word ‘privacy’ landed in Europe, there was some general agreement on the opportunity of taking it into account, but also on the great difficulty in determining its possible relationship with European legal orders. European experts were very much aware of the debates in the US, and often alluded to the authors of privacy’s re-invention. Nevertheless, it was unclear how a general notion of privacy could – if at all – be translated into different languages. For instance, many Dutch-speaking scholars thought that, in Dutch, it would be better to incorporate it as such. European countries had developed their own legal techniques to protect different specific facets of what could be envisaged as privacy. Typically, for instance, what was being offered was protection for private (in the sense of confidential) correspondence and for inviolability or sacred nature of the home, conceived as a private space, but the explicit recognition of a broad ‘right to privacy’ as a unitary right is a late phenomenon in Europe. A common European legal notion under the name of ‘privacy’ was in any case nowhere to be found.

The word privacy was not mentioned in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed on 4 November 1950, which constitutes the major European human rights reference. The Convention, equally authentic in English and French, formally protects in its Article 8 the right to respect for the private life (vie privée) of individuals, but does not refer to their privacy, in contrast to the international human rights instruments from which it is directly inspired. As a matter of fact, the word privacy almost made it to the English version of Article 8 of the ECHR. Initial English draft versions of the text mentioned it, but the word was replaced by the expression private life only a few months before the signing of the Convention, allegedly to reinforce the impression of equivalence between the English and French versions.

The ultimate interpreter of the wording of the ECHR is the European Court of Human Rights (ECtHR), based in Strasbourg. Over the decades, the Court has construed the meaning of the expression private life of Article 8 of the ECHR very broadly, underlining that it cannot be reduced to an inner sphere of individual existence that would exclude social relationships and contacts with the outside world, but which, on the contrary, can definitely encompass them. The Court has regularly taken great care to avoid using the word ‘privacy’ to refer to what is protected by Article 8 of the ECHR, and it has insisted on the need to read the expression ‘right to respect for private life’ as referring to the obligation not to interfere with the personal life of each individual, taking into account their personal autonomy, and therefore not framing it in terms of the defence of a ‘private life’ as opposed to a ‘public life’ or a ‘private space’ (as opposed to a ‘public space’).

As such, the construction of private life by the ECtHR has no exact match in any national European legal order, although it has undoubtedly influenced all of them. Early comparative studies pointed out that what some called ‘privacy’ seemed to be protected under different names in some European countries.

Germany, for instance, granted somewhat similar protection through its Federal Constitutional Court’s reading of a right to free development of personality protected in Article 2(1) of the German Basic Law. This Court eventually started to adopt a more privacy-sounding terminology, and developed in its case law what came to be known as the “theory of the spheres”, incorporating different legal categories providing different degrees of protection based on distinctions related to degrees of “the private”. This case law contributed to the widespread use in German of the word Privatsphäre (‘private sphere’), which has sometimes been used in EU law as the German equivalent to ‘privacy’ even if intermittently privileg scope (a carbon copy of the ECHR’s ‘private life’) replaces it.

France, which had paradoxically played a key role in contributing to early conceptions of the need to respect the ‘private life’ of individuals, in the context of the general need to respect individual freedom, explicitly incorporated in its legislation the need to protect the ‘vie privée’ of individuals as late as 1970. In the United Kingdom, the word ‘privacy’ was for many years regularly alluded to in important studies and unsuccessful legislative proposals with a variable scope, but for many decades failed to achieve any consolidated legal meaning.

4. Personal Data Protection as European Language

Instead of a consensus on how to incorporate or re-interpret privacy so as to better address the issue of the protection of individuals against the threats of computers, what Europe began to witness at the beginning of the 1970s was, in parallel with a continuous broadening of the concept of private life as construed by the ECtHR, the emergence of new, obliquely concurring notions.
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As such, the construction of private life by the European Court of Human Rights (ECtHR) has no exact match in any national European legal order, although it has undoubtedly influenced all of them.

In 1970, the German Land of Hessen enacted its Datenschutzgesetz, or Data Protection Act. In 1973, Sweden adopted its Data Lag, or Data Act. These acts bear in their names the description of their objects: the German and Swedish words Daten and data, contrary to similar words coming from the Latin datum in other languages, do not refer to any kind of information, but to information operated upon by machines. Thus, these were acts aimed at regulating the automated processing of information. Soon after, France adopted similar legislation, though under a different tag, through which also resounded the need to regulate computerised data processing: ‘informatique et libertés’. Germany was itself aimed at regulating the automated processing of information. Soon after, France adopted similar legislation, though under a different tag, through which also resounded the need to regulate computerised data processing: ‘informatique et libertés’. Germany was itself not systematically loyal to the ‘Datenschutz’ term, and not all the initial German acts related to the regulation of data processing were referred to by this name. In addition, in 1983, the German Federal Constitutional Court granted constitutional-level protection to a right concerning the processing of personal data under a different name, namely ‘informationelle Selbstbestimmungsrecht’, or ‘right to informational self-determination’.

In any case, it was the German expression Datenschutz that was eventually exported as a blueprint to all other European languages (‘data protection’) and managed to become the European way of approaching the legal issues related to the protection of individuals against automated data processing. Furthermore, since 2000, the Charter of Fundamental Rights of the European Union formally recognises a fundamental right to the protection of personal data.

The emergence and consolidation of the notion of personal data protection in Europe not only marked a change of terminology, but also a crucial conceptual move away from any protection of anything ‘private’. For data protection law, the determining factor to assess whether anything (for its particular purpose, any data) deserves to be protected or not, is whether or not it can be qualified as ‘personal’ - an adjective to be understood as ‘relating to a particular person’, i.e. to any identified or identifiable individual. If the data can be linked to somebody, then it is to be covered by data protection. The question of whether the data are ‘private’ or ‘public’ is, for the purposes of data protection law, irrelevant.

The logic behind this new approach relates to the difficulties of establishing genuine limits between ‘private’ and ‘public’ information, but also to the fact that even data that can be qualified as ‘public’, or that are obtained in so-called ‘public’ spaces can have an impact on the individual and, consequently, require some regulation.

The irrelevance of the private/public distinction for the purposes of data protection law echoes its lack of pertinence in construing the right to respect for private life as recognised by Article 8 of the ECHR by the ECtHR. The likeness between its broad interpretation of ‘private life’ and the scope of data protection has been recognised by the Strasbourg Court itself. The Court has actually explicitly included under the scope of Article 8 of the ECHR elements of data protection, which in turn have confirmed and contributed to the stabilisation of the broad interpretation of ‘private life’.

As an exception confirming the general rule, one can find in many data protection legal instruments special norms whose existence is based on the need to provide strengthened protection of some data. Indeed, in the beginning, there was some resistance to the idea that all ‘personal data’ deserve a degree of protection regardless of whether they could be described as ‘private’ or ‘public’. As a sort of compromise between those favouring the protection of all ‘personal data’ and those opposing the idea, a new, ‘mixed’ category of data was invented: what was to be known as ‘sensitive’ data, or ‘personal data’ entitled for specially enhanced protection because of their peculiar nature, which links them to the intimate - e.g., data related to health, political choices or sexual life.

6. Embroiling Privacy and/or Data Protection

Despite the apparently sustained development of the protection of personal data as a fully-fledged autonomous legal notion in Europe, and despite the formal absence of the word privacy in the ECHR and in the Strasbourg case-law thereof, the term has remained at the forefront of many debates on law and technologies in Europe. Both external and internal factors help to explain this.

Privacy delineates a certain context of European data protection, which operates in a predominantly English-speaking world of global private companies, and among a profusion of data exchanges with the US. It has become the lingua franca word for the regulation of data processing. Privacy is the dominant term in the context of the Organisation for Economic Co-operation and Development (OECD), and of the Asia-Pacific Economic Cooperation (APEC) forum to refer to something that, like European data protection, is concerned with the processing of data related to individuals. As a result, the expressions data protection and privacy (understood as ‘informational privacy’) often co-occur in international discourse.

Privacy also features in European data protection law, acting on it from the inside. Even if there is no mention of privacy in Article 8 of the ECHR, data protection legal instruments adopted both at the level of the Council of Europe and by the EU have routinely asserted that there is. This practice can be traced back to 1968 when, in tune with the computers and privacy spirit of the 1960s, the Parliamentary Assembly of the Council of Europe adopted a Recommendation explicitly referring to the “the right to privacy which is protected by Article 8 of the ECHR”. This document led, eventually, to the adoption in 1973 and 1974 of two resolutions on data protection, and, in 1981, of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (generally known as ‘Convention 108’), which explicitly recognised as its main purpose the need to secure the respect of the right to privacy of individuals (with regard to automatic processing of personal data relating to them).

The major EU data protection instrument, Directive 95/46/EC, officially aimed at giving substance and amplifying Convention 108, and faithfully reflected its wording by identifying as its object the protection of fundamental rights and freedoms in general, but, in particular, the “right to privacy”. As a result, even if Article 8 of the ECHR does not establish any ‘right to privacy’, it does so for the purposes of EU data protection law. Since the Strasbourg Court has affirmed that data protection is an integral part of the scope of Article 8 of the ECHR, it follows that data protection is part of (what itself refers to as) privacy.

Since 2000, the EU Charter of Fundamental Rights offers a different perspective on the issue. It consecrates personal data protection as a fundamental right in a specific article (Article 8), while reproducing the content of Article 8 of the ECHR, on the right to respect for private life, in its Article 7. It follows that, for the Charter, data protection is not part of (what EU data protection law designates as)
European data protection is currently at an historic crossroads: EU institutions have embarked on the revision of the main instruments of the EU data protection legal framework.

All in all, personal data protection appears to be sometimes understood as an equivalent to privacy (then interpreted as ‘informational privacy’ or control over personal information), sometimes as an element of privacy (then portrayed as a broad right, not limited to the protection of what is ‘private’ in the sense of opposed to ‘public’) and sometimes as different from privacy (then potentially contracted to a mere protection of the ‘private’ as opposed to the ‘public’). Thus, personal data protection and privacy can relate to each other in various, seemingly conflicting ways, and the word privacy can conceal different meanings in relation to personal data protection, meaning which will be temporarily determined precisely by such relationships.


European data protection is currently at an historic crossroads: EU institutions have embarked on the revision of the main instruments of the EU data protection legal framework. The legislative package presented to this end by the European Commission in January 2012, consisting primarily of a Regulation, a Directive and a Communication introducing both, is particularly illustrative of the complex relations between privacy and data protection. On the surface, the European Commission seems to be announcing the liberation of EU data protection from any reference to the right to privacy, incorporating the new instruments directly as the development of the EU right to the protection of personal data, now unambiguously portrayed as an autonomous fundamental right of the EU. At a deeper level, however, the force of privacy can be perceived as the original impetus behind various mechanisms suddenly re-named as data protection instruments, and, thus, also as the concealed path through which various future provisions might need to be read and interpreted.

The new Regulation proposed by the European Commission is to become the major future EU data protection legal instrument. It should replace Directive 95/46/EC, which, as highlighted, singled out as one of its objectives the insurance of the right to privacy. The text proposed by the European Commission for the upcoming Regulation obliterates such reference to privacy, to be replaced by a reference to the protection of personal data. Remarkably, despite this being a major proposed change in the wording of the very first Article of the new legal instrument, which is to determine the interpretation of all its other provisions, the European Commission has not acknowledged this as being a change requiring deeper discussion. Nor does the European Commission ever point out that there are outstanding terminological differences between the Regulation and the Communication that is supposed to introduce it.

The proposed Regulation mentions privacy only in a limited number of cases: in relation to sensitive data and data breaches, but little more. In contrast, the Communication uses it abundantly. As if privacy and data protection were synonymous, or, at least interchangeable words, the English version of the Communication is titled “Safeguarding Privacy in a Connected World”, and subtitled “A European Data Protection Framework for the 21st Century”. It explains that the European Commission, in order to reinforce EU data protection, is to encourage the use of privacy-enhancing technologies, privacy-friendly default settings and privacy certification schemes, as well as of the ‘privacy by design’ principle. Should these occurrences of the word privacy be interpreted as meaning the same as data protection, or something different?

Read in conjunction with other language versions, all of them equally authentic for the purposes of EU law, the Communication reveals a fluctuating understanding of the word. In the German version, privacy has in some instances been translated as Privatsphäre (private sphere); ‘privacy-enhancing technologies’ are referred to as Technologien zum Schutz der Privatsphäre. In others, privacy has been replaced with Datenschutz (data protection); for instance, ‘privacy-friendly default settings’ are identified as datenschutzgerechte Standardeinstellungen. The Spanish and the Italian versions support the idea that the word privacy is used by the Communication in its own peculiar modern sense that none of these languages have ever attempted to fully translate – the Spanish version thus relies on systematically referring to privacidad (a loan translation from ‘privacy’), and the Italian version on the direct borrowing of privacy.

If the interpretation of the word privacy in the Communication is uneasy, what is clear is that most of its potential occurrences in the Regulation have been replaced with allusions to data protection. The references to ‘privacy by design’ are especially demonstrative of the movements that have taken place between texts. Whereas the Commission announces in the Communication that it is introducing the principle of ‘privacy by design’ in the opening paragraphs presenting the Regulation it asserts that its provisions will set out obligations arising from the principles of ‘data protection by design’ without providing any explanation on whether this might be something different, or new. There are no references to ‘privacy by design’ in the English version of the proposed text for the Regulation, but only to ‘data protection by design’ except for one, actually, which seems to have survived as a residual proof that there were mentions of ‘privacy by design’ at some point of the drafting.

The (almost complete) replacing of ‘privacy by design’ by ‘data protection by design’ in the final text of the proposed Regulation can be interpreted as suggesting that privacy and data protection must mean the same, because otherwise one could not function as a substitute of the other. But it can also be perceived as the confirmation that they do not mean the same, or else there would be no reason for the substitution. In any case, what is certain is...
that the notion of ‘data protection by design’ as presented in the proposed Regulation now harbours inside it the traces of the ‘privacy by design’ whose place it has taken. With it, the expression also carries the traces inhabiting privacy, which can include echoes of facets that ‘data protection’ as such was supposed to be **absolutely unconcerned with**, such as those related to any distinction between the private and the public. Thus, despite announcing a significant step towards the emancipation of EU personal data protection from privacy, the current review process of the EU data protection legal framework continues to fuel their entanglement.

6. **Concluding Remarks**

It is commonplace to assert that law changes (or can, or should change) in reaction to technological progress. While this is undeniably true, it is also true that language (the language that law is made of) has also a crucial role to play. In this contribution we have highlighted the role of the word privacy in the emergence and shaping of EU personal data protection. Debates on privacy and computers contributed significantly to its genesis, which nevertheless occurred outside any privacy framing – even if personal data protection was eventually to be deeply entangled with international privacy discourses. Privacy has played many contradictory roles in the progressive construction of EU protection of personal data: as a legal notion to be surpassed, as a concept contributing to its re-shaping, as an intermittent *alter ego* and, more recently, as a (sudden and uncommented) void to be filled.

We claim that European personal data protection should not, for the sake of accuracy, be generally described as privacy – not even as a sort of ‘informational privacy’. It is a legal notion which emerged historically as something different, and the specificity of which is being increasingly asserted in EU law. At the same time, we acknowledge that it can sometimes be accurately envisaged, referred, treated, interpreted as privacy, and that this word and the relationships to it are crucial for the existence of personal data protection. In a sense, it is the instability of the meaning of privacy that has kept and continues to keep personal data protection moving forward, despite the apparent disconnection of EU data protection law; like an inescapable spectre privacy still haunts it.

This paradoxical situation is in our view best understood with the help of French philosopherJacques Derrida and his insights into the dissemination of meaning through words.

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**Notes**


2 Especially after in 1965 a report recommended that a centralised data system should store all information collected by the US government.


4 For an example of a defence of this conceptualisation, see in many fields: Christena E. Nippert-Eng. *Islands of Privacy*, The University of Chicago Press, Chicago, p. 4, 2010.


7 Notably, Alan F. Westin.


10 See, notably, Article 12 of the Universal Declaration of Human Rights, which in 1948 asserted that “no one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour and reputation”.

11 In the documents of the ‘travaux préparatoires’ of the ECHR the appearance of the expression ‘private life’ in the English draft can be dated to August 1950. Although it was common practice to underline in each new draft the changes proposed in relation to the previous draft, the sudden replacing of ‘privacy’ with ‘private life’ was not identified as a change, and not underlined (Draft Convention adopted by the Sub-Committee on Human Rights (7th August 1950) (Registry of the Council of Europe (1967), Travaux préparatoires de l’article 8 de la Convention européenne des Droits de l’homme -European Court of Human Rights: Preparatory work on Article 8 of the European Convention on Human Rights (Bilingual information document), CDH (67), 5, 12 May, Strasbourg, p. 17).


13 The word tends to appear only exceptionally in a very peculiar context, namely each time that the ECHR considers the possible relevance of the ‘reasonable expectations of privacy’ doctrine (see, for instance, Gillan and Quinton v. the United Kingdom, Application no. 4158/05, Judgment of 12 January 2010, § 61).


15 Pretty v. the United Kingdom, no. 2346/02, § 61, ECHR2002-III.

16 PG and JH v UK (Reports 2001-IX, Peck v UK (Reports 2003-I), Perry v UK (Reports 2003- X).


20 See, for instance, the German version of the Directive 95/46/EC.

21 See, for instance, the German version of the EU Charter (“Artikel 7: Achtung des Privat- und...
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Yvetta Bölsterli
Yvetta Bölsterli is a legal and political scientist with a focus on data protection and privacy law. She has contributed significantly to the field, particularly in the context of emerging technologies. Her work often explores the intersection of technology, law, and ethics, with a special emphasis on the implications for privacy in the digital age. Bölsterli's research has been influential in shaping policy and legal frameworks around data protection worldwide.