

Data Protection and Academia: Fundamental Rights in Conflict

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European Data Protection Timeline

- **1970s: Emergence**
- **1980s: Council of Europe DP Convention (1981)**
- **1990s: DP Directive 95/46/EC**
- **2000s: EU Charter DP Right (2000 & 2009)**
- **2010s: General DP Regulation 2016/679**

GDPR: Very Broad Scope

- **Personal Data (art. 4(1)):**

any information **relating to** an **identified or identifiable** individual

- **Regulated Processing (art. 2 & 4(2))***

Any operation on data involving **digital device** (or filing system)

- **Purposive Scope (art. 1(2))**

Protect "**fundamental rights and freedoms** of natural persons and in particular their right to the protection of personal data."

* Subject to certain deviations especially as regards State authority processing which are not relevant to this topic.



Broad & Sometimes Onerous Default Duties

Discipline

- Demo compliance
- Security
- Record-keeping
- DP Officer
- Joint Controller agreements
- Processor agreements
- Impact Assessments
- DPA Consultation
- Data Exports

Supervision

- Courts
- DP Authorities

Sensitive Data

- Criminal Data
- Other:
 - Political,
 - Religious,
 - Trade union

Transparency & Control

- Proactive Direct
- Proactive Indirect
- Subject Access
- Control rights – RtbF, objection

DP Principles

- Fair, lawful, transparent
- Purpose quality & limits
- Information quality & limits
- Integrity & confidentiality

Legitimation

- Legitimizing Criteria

Personal
Data
Processing

Historical & Scientific Research Derogations(A. 89)

Discipline

- Security
- Record-keeping
- Data Export
- Joint Controller agreements
- Processor agreements

Supervision

- Courts
- DP Authorities

Sensitive Data

- Criminal Data
- Other:
Political,
Religious,
Trade union etc.

Transparency & Control

- Proactive Direct
- Proactive Indirect
- Subject Access
- Control Rights
RtbF/Restriction
Objection

DP Principles

- Fair, lawful, transparent
 - Purpose quality & limits
 - Information quality & limits
 - Integrity & confidentiality
- ## Legitimation
- Legitimizing Criteria

Personal
Data
Processing

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graph TD; Discipline[Discipline] --> PDP((Personal Data Processing)); Supervision[Supervision] --> PDP; SensitiveData[Sensitive Data] --> PDP; Transparency[Transparency & Control] --> PDP; DPPrinciples[DP Principles] --> PDP;
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Derogations point to Safeguarded Processing

- Article 89: In all cases must be “*appropriate safeguards*” including “*technical and organisational measures*” to ensure respect for inter alia **data minimisation**.
- Article 9(2)(j): Lifting of the sensitive data ban provide “*suitable and specific measures to safeguard the fundamental rights and the interests of the data subject*”.

Problems for Academic Work: Overview



Specific Issue: Critical Inquiry (Shopes, 2000, 2010)

*“[F]or historians, a **deep disjunction** exists between the [US] Common Rule’s concern for **privacy** and the canons of historical **inquiry**. At times information in an interview, if made public, can indeed place a person **at risk** of criminal or civil **liability**, or be damaging to his financial standing, **employability, or reputation**. Yet historians’ deepest responsibility is to follow the evidence where it leads, to discern and make sense of the past in all its complexity; not necessarily to protect individuals from their past actions.” (2010)*

*“What is at issue is the **notion of critical inquiry**, inquiry that does **challenge**, that may be **adversarial**, that may even “**expose**”, as interviews with Klansmen and women and with Nazi collaborators, for example, have done.” (2000)*

Specific Issue: Covert Research

*“[H]ave to **inform** the data subject about the **purpose(s)** of the processing. Indeed, the data subjects need to be given sufficient information in order to assess and anticipate what the data collected will be used for ... [T]he researcher must, **at a minimum, describe the main object** of the research e.g. ..a study on the evolution of women’s position at work.”*

(Respect Project, 2003)

*“Researchers, for example, who wanted to accompany and interview police officers at work in order to learn about police racism (or corruption, sexism, excessive use of force, etc.) would **likely see their research grind to a halt** at the first sign of a consent form informing officers of the research topic.”*

(Kevin Haggerty, 2004)

Special Expression Derogations (A. 85(2))

*“For the processing of personal data carried out for **journalistic purposes** or the purpose of **academic artistic or literary expression**, Member States shall provide for exemptions or **derogations** ... if they are **necessary to reconcile** the right to the **protection** of personal **data with the freedom of expression** and information.”*

Rationale Behind “Academic Expression”

- **Partly Practical Concerns – see e.g. Wellcome Trust (2015):**

“Freedom of expression ... It is important that arts and humanities research should benefit from derogations because research in areas such as politics and history is unlikely to be compatible with the research model set out in Article 83 [now Article 89] and may not be permitted otherwise.”

- **Also Issues of Equal Treatment e.g. ESRC (2013):**

“A historian or social investigator working in an academic context should not be treated less favourably by the law than a historian or social investigator writing in a non-academic context ... It is therefore essential that the work of academic social science researchers be brought within the ambit of Article 80 [now Article 85].”

- N.B. I actively assisted in both these initiatives.

Continuing Problems for Academics

- Some general implementation problems with A. 85(2)
- Failure in c. 2/3rds cases to explicitly extend A. 85(2) to A. 89
- Need to clarify where A. 89 will still apply (safeguarded sharing & where fiduciary duty) & ensure rules work.
- Danger of institutional “business-as-usual” inertia
- Danger of (formally) risk adverse approach by institutions

Way Forward

- **Legislatures:** Enact laws (i) clearly extending A. 85(2) to A. 89 and (ii) with balanced A. 89 regime otherwise.
- **Regulators:** Formulate purposive guidance especially on special expression.
- **Academic Institutions:** Adopt principled, rights-based approach which upholds academic freedom.