

Introduction to basic concepts of Data Protection Laws

10.00 - 11.30 a.m.

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What is Privacy?

- Privacy is a “Perceived Right” in a society that respects freedom
 - Earliest reference is reported from the Indian texts of the 12th and 14th century, by Narayan Pandit in documents such as “Hitopadesha” and “Panchatantra”, developed to educate the sons of the King of Pataliputra
 - The texts are said to contain the statement “Sarve sve sve grihe raja” (every man is a king in his own house)
 - These words were reflected in the Supreme Court case of Kharakhsingh Vs the State of UP where the judgement recalled the concept “Every man’s house is his castle” and attributed it as an English Common law maxim.
 - Section 509 of the IPC, 1860, makes it a crime to intrude into the privacy of a woman. It was not imported from England, but just a long tradition in India.
 - In 1888, Chief Justice John Edge of the Allahabad HC observed, “In my opinion, the fact that there is no such custom of privacy known to the law of England can have no bearing on the question whether there can be Indian custom of privacy valid in law.”
 - The modern global history of Privacy refers to 1891 when an American Lawyer Samuel Warren and Louis Brandeis described the right to privacy in an article as the “Right to be let alone”.

What is Privacy?

- Kharak Singh vs State of UP (AIR 1963) , Supreme Court held
 - “an unauthorized intrusion into a person’s home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man
 - an ultimate essential of ordered liberty, if not of the very concept of civilization”.
 - Privacy as a Right to Physical distancing
- R. Rajagopalan Vs State of Tamil Nadu (1995 AIR), Supreme Court held
 - “the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21.
 - It is a ‘right to be let alone’.
 - A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters.
 - None can publish anything concerning the above matters without his consent – whether truthful or otherwise and whether laudatory or critical.....

What is Privacy?...

Current Concept-

Puttaswamy

Judgement

2017

- **J Chelmeshwar**

- “In my opinion, there is no need to resolve all definitional concerns at an abstract level to understand the nature of the right to privacy....
 - Definitional uncertainty is no reason to not recognize the existence of the right of privacy....”.

- **J Chandrachud**

- “Privacy, in its simplest sense, allows each human being **to be left alone** in a core which is inviolable.”
 - “In an age where information technology governs virtually every aspect of our lives, the task before the Court is to impart constitutional meaning to individual liberty in an interconnected world.
 - While we revisit the question whether our constitution protects privacy as an elemental principle, the Court has to be sensitive to the needs of and the opportunities and dangers posed to liberty in a digital world.”

Defining Privacy..
Puttaswamy
judgment-Justice
Chandrachud

- *“This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit...*
- *We may, for one reason or another, wish or be compelled to reveal such information,*
 - *but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.”*

Information Privacy

- The judgement brought the focus on the concept of
 - Information Privacy
 - Protection of Information Privacy therefore boils down to “protecting the information” that “protects the right to be left alone”
 - This is the bridge between Privacy Protection and Data Protection.
 - Has made it necessary for us to distinguish “Personal Data” from “Data” in general and accord special protection so that “Privacy” is protected for those for whom the constitution accords protection.

Privacy is a Fundamental right

- The Puttaswamy Judgement declared
 - Privacy is a fundamental right and is part of Right to life under Article 21
 - Subject to reasonal Restrictions under Article 19(2)
- It is therefore an obligation on the Government to protect the Right to Privacy
 - It is an obligation of the rest of the society to be guided by the statutory laws enacted by the Government for Privacy Protection.
 - In India the law related to Information Privacy is ITA 2000 and will be supplemented by PDPA 2021.

Global perspective of Privacy

- The logic for Privacy across the globe is same
 - To Protect the Right to Privacy of the Citizens of a country
 - In DIFC it is to protect the business in the zone
 - In some countries it is part of the Constitution
 - In some countries it is derived like in India as part of the Constitutional principles supplemented by Data Protection Laws.
- In many countries Privacy Protection laws first emerged as laws to protect the citizens against excessive surveillance by the Government which was undemocratic (Nazis of Germany)
- With the advent of “Digital Era”, the concerns of Privacy extended to “Information Privacy” and also to the “Private Organizations”

But.. Feeling
“Left Alone”
is essentially
a state of
mind of an
individual

- A person may feel free from interference even in a crowded local train
- A person may long for interaction with human beings in a Covid induced social distancing
 - Physical Privacy is different from Mental Privacy
- The challenge has been to find the means of protecting the Right to Privacy of the population of crores of individuals whose state of mind is in a constant flux through one law.

Privacy as A Right of Choice

- The impossibility of protecting the “State of Mind” of an individual by law has resulted in the right of privacy being redefined
- ***Right of an individual to decide how his/her personal information may be used by others***
 - How it can be collected, processed or disclosed

The Current operating definition

- Right to Privacy Means
 - *“Right of self determination of a natural person on sharing personal data specifying how the personal data may be used by the recipient and shared with others.”*
 - Naavi

How Privacy Protection became the responsibility of the industry

- Personal Information is Data
- Data is an essential input to the decision making in a business and
- Data is a raw material to the Data Business
 - Privacy protection has become part of “Data Protection” in the IT industry

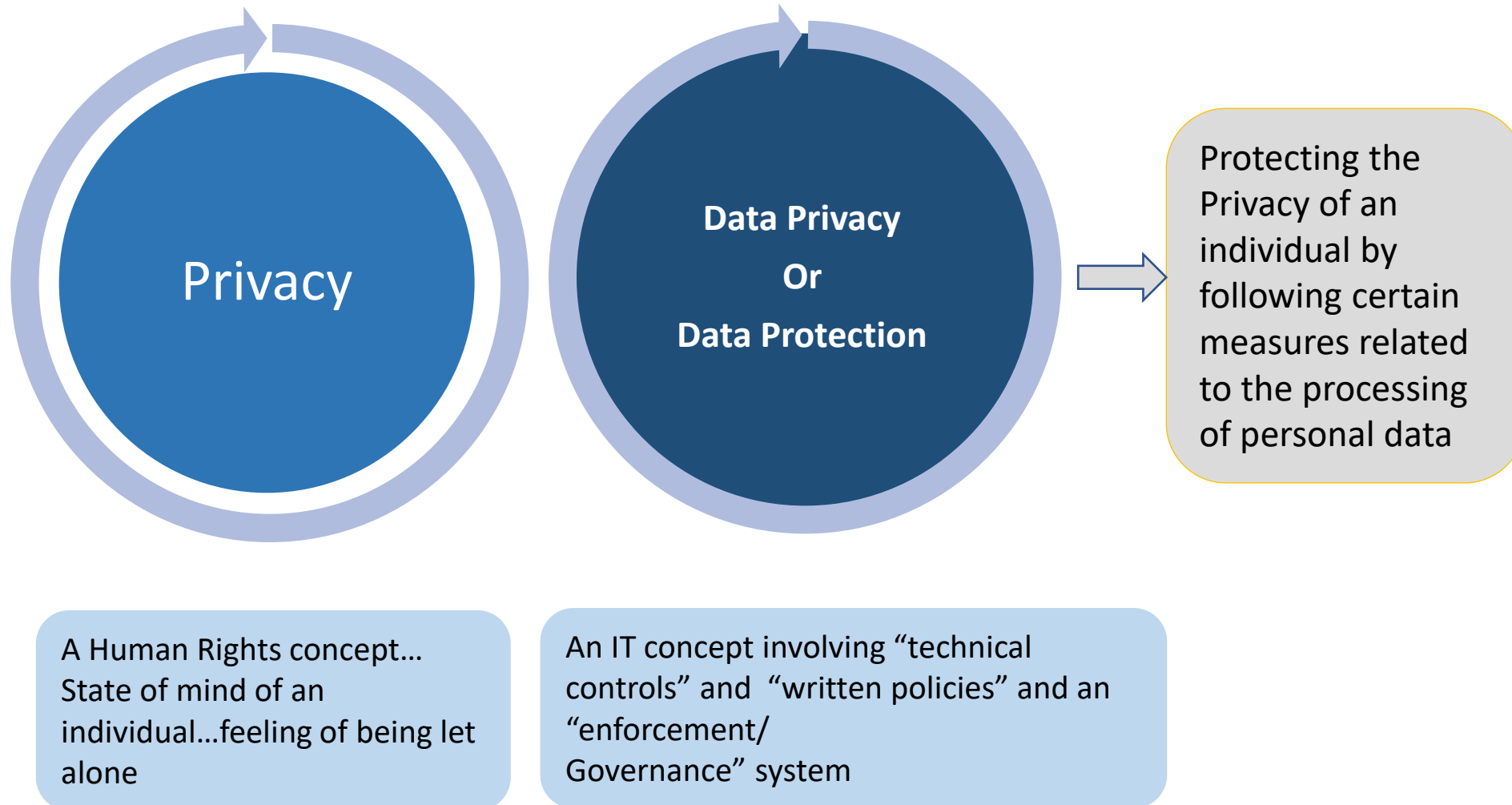
Concerns in Privacy invasion for commercial purposes

- Currently the world is dominated by technology
 - Google, Face Book, Apple, Amazon etc control a large part of information with embedded personal information
 - Used for commercial exploitation such as “Advertising”
 - “Profiling” is an inherent part of this advertising and marketing activity
 - Profiling requires “Collection of personal information” and “Processing of the data”
 - Artificial intelligence and Data Analytics have emerged as new science in the society
- Data Protection laws need to be in harmony with the industry and Government through designing of appropriate laws

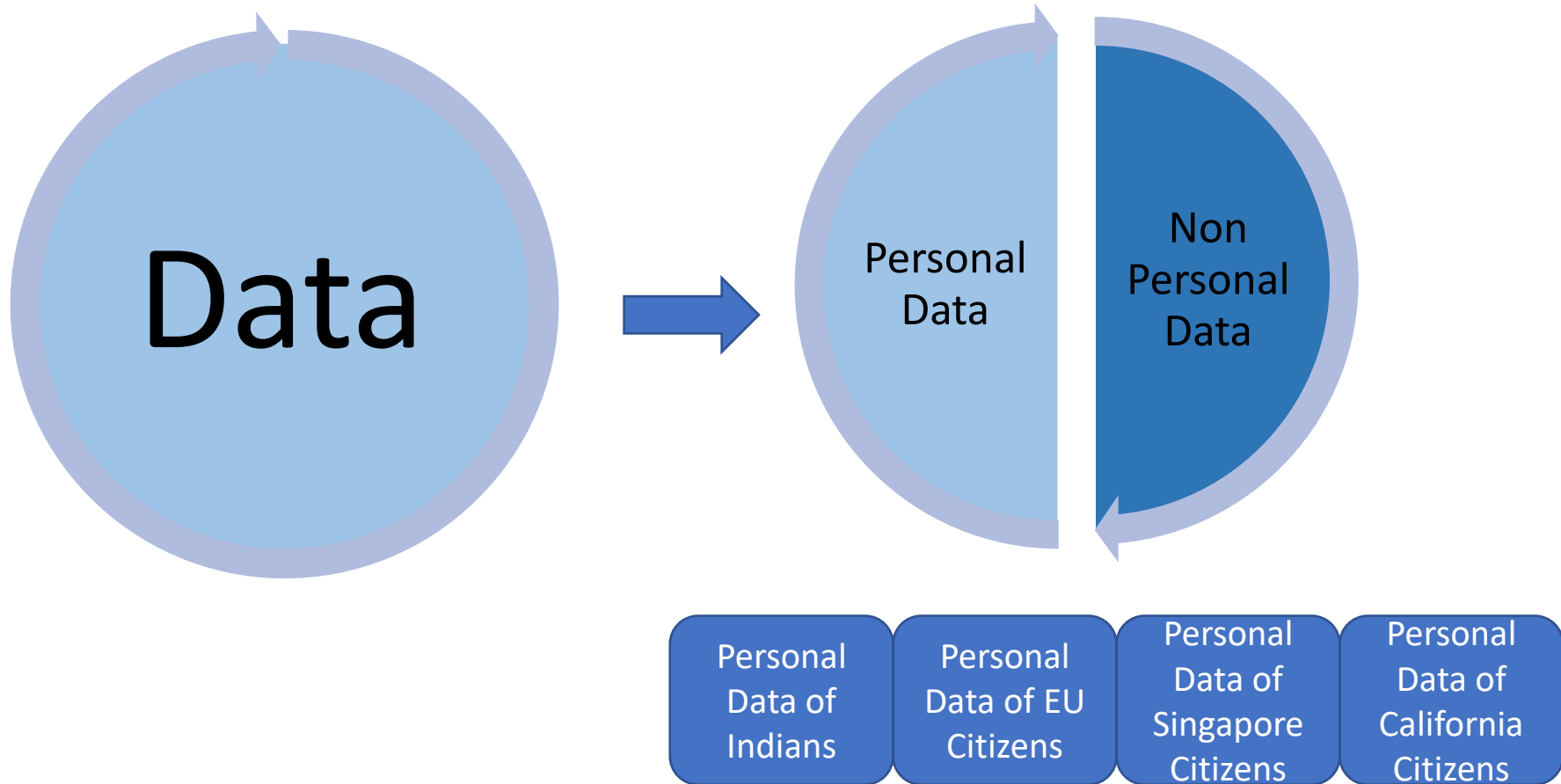
Right to Privacy has inherent conflicts

- Privacy is essential a prevention of disclosure
- Right to Information is a contrarian concept
- Cyber Security is a duty of the Government and requires reasonable surveillance
- Law Enforcement needs empowerment for intelligence gathering and forensic investigations
- Law has to manage the conflict with business needs and the needs of Governance
 - Data Protection Law cannot therefore be a perfect fit for Privacy Protection as per the perspective of a Privacy activist

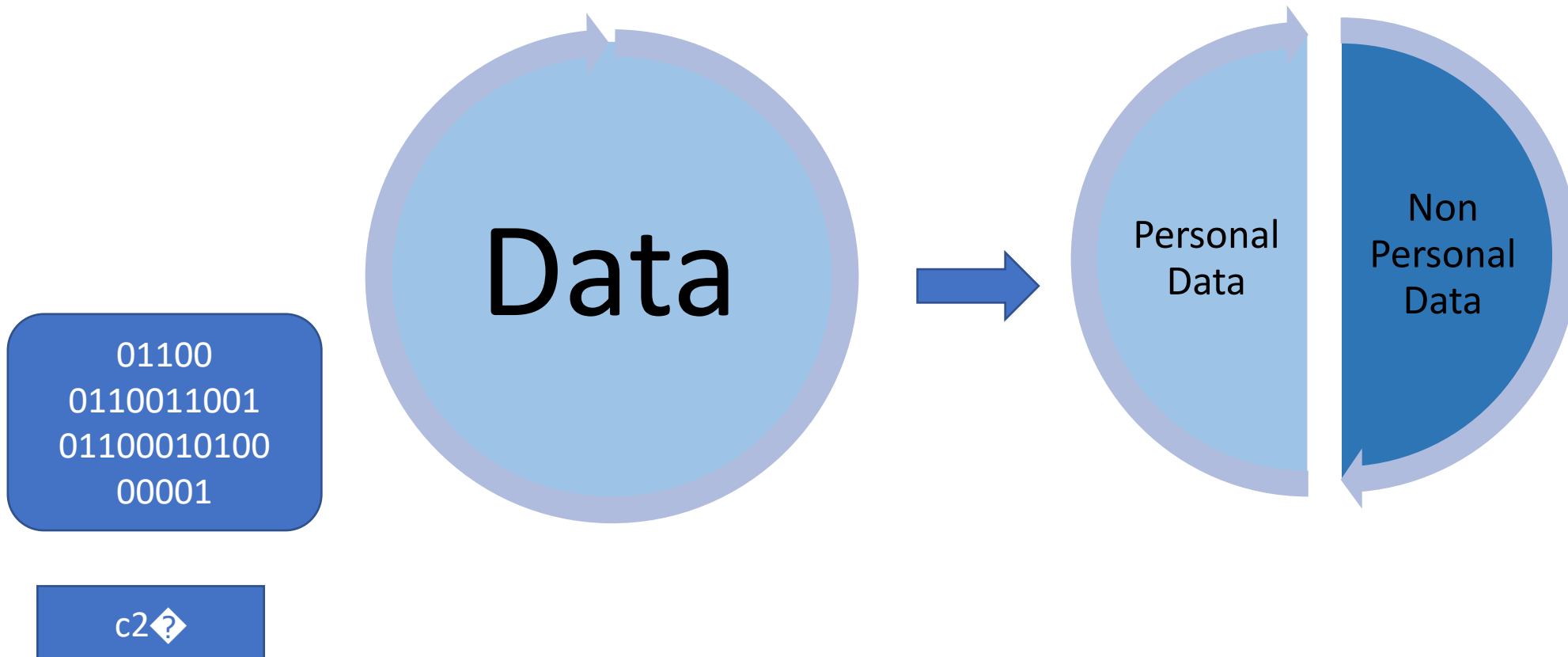
Privacy of an individual and Data Privacy



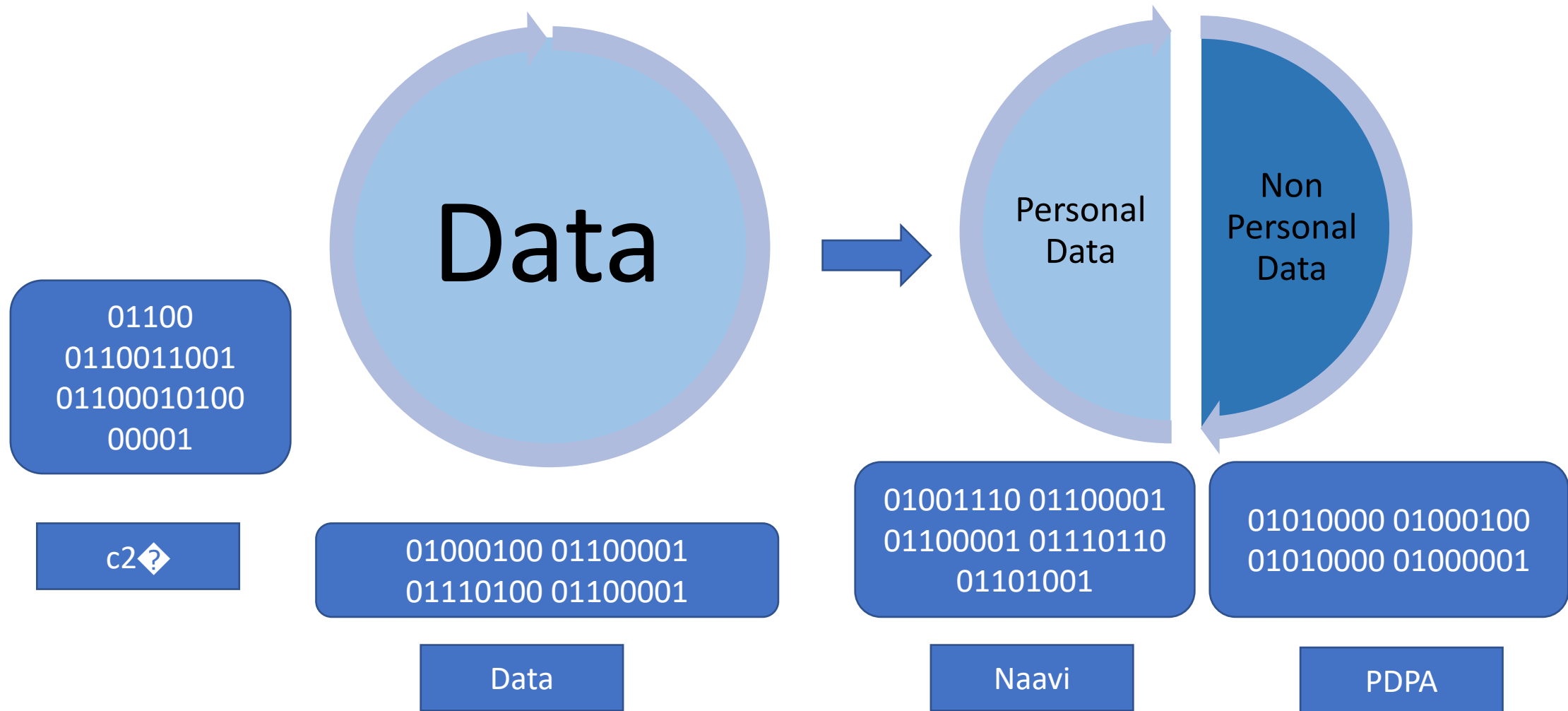
Data Categories from Protection perspective



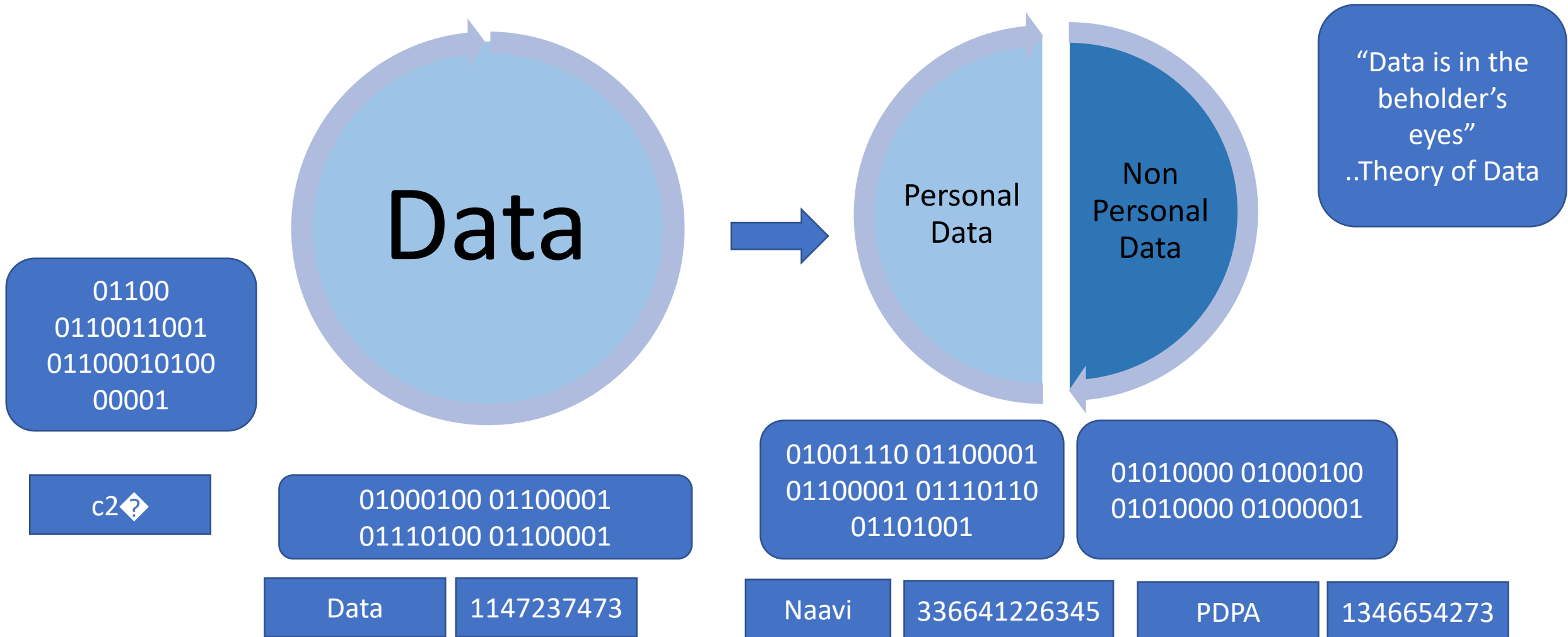
Avatars of Data...



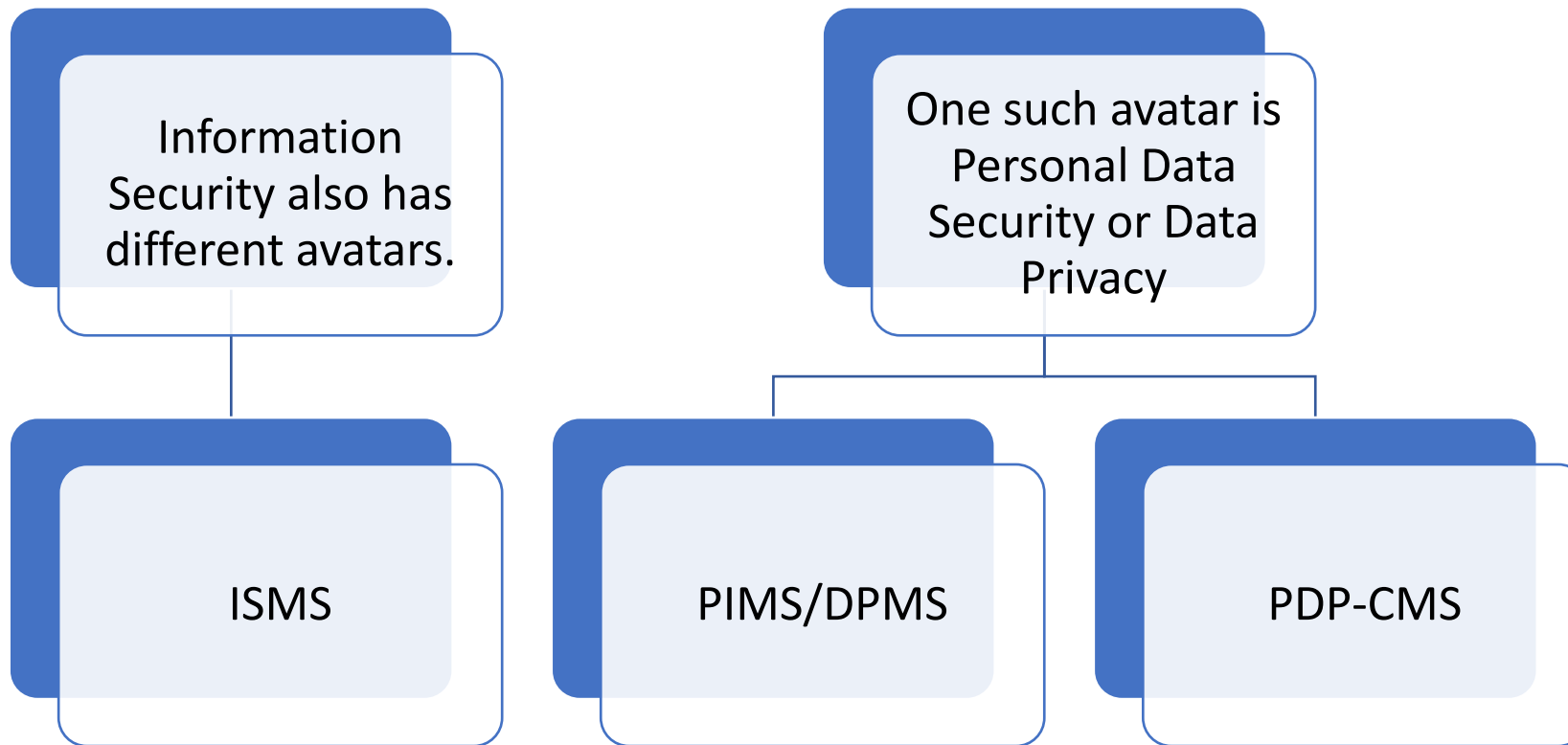
When binary data is organized, they acquire a capability to be interpreted by device into Text or otherwise



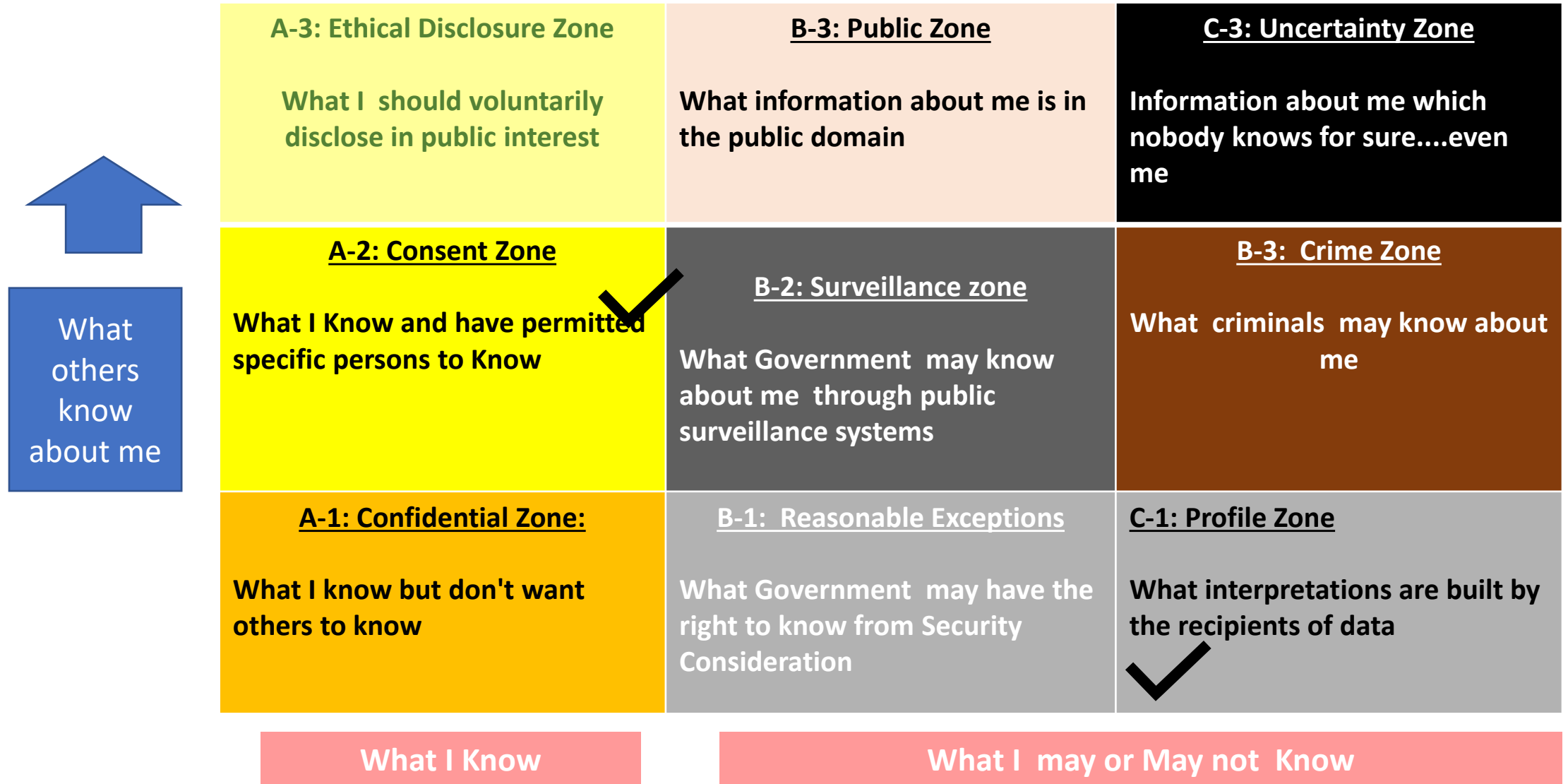
Which Data is Personal or Non Personal or which data interpreting device to be used is the Choice of the human



Evolution of ISMS...



Personal Information Grid



Limitation of Data Protection Regulation

- Consent may not be possible in all circumstances
- In online transactions, “Consent” may not be properly authenticated
- What is personal data requiring consent may be contested
 - Joint ownership and community ownership is required
- IPR may interfere with the Right of Ownership if data

Approach to Data Protection in different countries

GDPR is a cross industry approach

- Personal data processing is regulated across all sectors

US adopted a Sectoral regulatory approach

- Now adopting to the General across the

India is adopting the hybrid approach

- Recognizes cross industry approach in PDPB 2021
- Supplements it with ITA 2000 and sectoral guidance

Template for study of Data protection laws

Applicability and Key definitions

Exemptions

Principles of Processing

Rights of Data Principals

Children Data

Accountability and DPO

Data Breach Notification

Cross Border Transfer

Penalties

Regulatory and Grievance redressal structure

Applicability

What is personal data and Special Categories of personal data?

- Does it include finance information? Meta Data?
- Are there “Core Identity Parameters” and “Ancillary Identity parameters”?
- What is a biometric?

Jurisdiction

- Extra territorial jurisdiction
 - Foreigners in the legislating country? Or Residents in Foreign Country?

Non Personal Data

- Anonymisation of Personal Data

Living and Non Living

Data Controller/Fiduciary/Processor/Consent Manager

Exemptions

For processing or Consent or Security

- Government, Law Enforcement
- Judiciary
- Legitimate interest
- Medical emergencies
- Other person's rights

Derogations for cross border transfer

- Adequacy
- Intra Corporate transfers.. With consent?
(Binding Corporate Rules)
- External transfers through Standard contract clauses

Principles of Processing

Lawful, fair and transparent processing

Purpose specific collection

Minimal Collection

Quality,

Minimal retention

Security

Accountability

Lawful basis-Consent, legitimate interest, Vital interest of a data subject, performance of a contract of which the data subject is a party, public interest, Security

Rights of Data Principals



Children Data

Who is a child

- 13 years, 16 years or 18 years?
- Rights of a natural guardian vs Legal guardian
- Natural guardian in case of separated parents

How do we verify the age?

- When do we verify the age?
 - Only when the service is meant to be used by children?

Providing a child service to an adult and adult service to a child by error have different consequences

Accountability and DPO

Record of Processing

Privacy By Design

Privacy by Design Polciy

Data Breach Notification



To the Regulatory authorities



To the data subject



How quickly?



What information?



Means...email, post, advertisement?

Cross Border Transfer

Type of restrictions

- All data? Sensitive data? Critical data?
- With consent or explicit consent or under legitimate interests? Medical emergencies? etc

Is there a sovereign right over citizen's data?

Contract between the Data Exporter and Data Importer

Privacy Shield

- Right of surveillance and national security of the receiving country?
- Should national security interests be subordinated to the commercial interests?

Penalties

Should it be on the basis of the type of violation?

Should it be a graded penalty structure?

Should it be linked to the turnover?

What is turnover...local country or global?

How do we compute global turnover in respect of inter connected companies?

Regulatory and Grievance redressal structure

Supervisory authority/ DPA

- One man executive or a Committee of experts

Quasi Judicial entity

- Adjudicator
- Should he be independent? Or under the DPA?

Appellate Tribunal

- Should it be at the level below High Courts or above High Courts?
- Whether the Chair person be a Retired Judge? Or one who is eligible to be a Judge?... But is only a lawyer
- Should there be technical members?... What credentials?

Courts

- Civil and Criminal

Ombudsman, Mediation and Arbitration

Summary

- Privacy Protection is a fundamental Right which is sought to be achieved through a system of protection and Governance of Personal Data
- Different countries adopt different approaches to data protection...sectoral or across the board protection
- General principles include purpose based collection with appropriate consent and security against misuse.
- Compliance is essential to avoid the huge penalties which most laws prescribe.
- Understanding the laws and designing the technical controls are the need of the day

Thank You

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