

JUR 5630 – 2010
Lecture 1
Introduction to course. Trends in surveillance and control. Catalysts
for emergence of data protection law
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1. Disposition

- Overview of course and course literature.
- Trends in surveillance and control.
- Affected interests / values.

2. Course overview and literature

- See overview via: <<http://www.uio.no/studier/emner/jus/jus/JUR5630/v10/>>
- Core literature
 1. Bygrave, *Data Protection Law: Approaching Its Rationale, Logic and Limits* (2002)
 2. Compendium of regulatory instruments
 3. Main compendium of selected course literature
 4. Supplementary compendium of selected course literature
- Supplementary literature
Not mandatory; skim-read only; particularly useful for tutorials (latter are primarily for LL.M. students studying ICT Law)
- Useful websites
 1. EU: <http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm>
 2. Council of Europe: <http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Data_protection/>
 3. Electronic Privacy Information Center (USA): <<http://www.epic.org/>>

3. Surveillance and control – basic trends

- Four scenarios:
 1. a prison plan
 2. a war on terror
 3. a war on fraud
 4. a battle for profit
- Principal trend = increasing *mass* surveillance and control (but relative decline in intensity of surveillance and control by *small-scale* groups?)
- Growing pervasiveness along two main axes:
 1. across national boundaries
 2. across organisational sectors
- Cf. Roger Clarke's "surveillance vignettes", at <<http://www.anu.edu.au/people/Roger.Clarke/DV/SurvVign.html>>
- Developments in surveillance techniques: Increasingly ...
 - automated
 - de-personalised
 - miniaturised
 - continuous
 - preemptory
 - directed at large groups of people
 - based on transactional and/or biometric data

- Causative factors:
 - Reflexivity (Giddens)
 - Rationalisation (Weber)
 - Growth in social scale
 - Increasing symbiosis between surveillance systems
 - Growth in “fine-grained” concern by organisations for their clients
 - Wartime exigencies
 - Economic significance of information
 - (IRM, data warehousing, data mining, profiling)
- Role of technology (primarily ICT):
 - Double-sided effect of technological developments on privacy (the paradox of technology)
 - Privacy-invasive technologies
 - Privacy-enhancing technologies (PETs) – see Burkert 1997
 - Appeal of ICT:
 - enhance performance efficiency (and *appearance* of efficiency)
 - fascination for the “technically sweet”
- Role of dystopian visions: e.g., ...
 - Orwell’s *1984*
 - Huxley’s *Brave New World*
 - Zamyatin’s *We*
 - Bradbury’s *Fahrenheit 451*
 - Kafka’s *The Trial*
 - Issue: to what extent are these visions realistic and analytically useful?
 - Cf. Foucault’s work on *panopticism*
 - Cf. Anna Funder’s *Stasiland* (2003)

4. Affected interests / values

- Privacy
- Autonomy
- Integrity
- Dignity
- Democracy
- Pluralism

Definitional issues

Privacy as:

- right to be let alone (e.g., Warren & Brandeis)
- informational control / informational self-determination (e.g., Westin)
- limited accessibility (e.g., Gavison, Bygrave)
- solely concerned with intimate sphere (e.g., Wacks, Inness)

Autonomy = self-determination

Integrity = harmonious functionality based on respect

Dignity = intrinsic worth

Democracy = active participation in public government of societal processes

Pluralism =

- diversity of lifestyles and opinions;
- distribution of power so that not one single group/organisation can dominate others

5. Catalysts for emergence of data protection law

5.1 Technological-organisational trends, particularly as regards data processing

- Growth in amount of data stored
- Integration of these data
 - plans for centralised data registers
 - introduction of PIN systems
 - national census plans
- Increased sharing of data across organisational boundaries
- Growth in re-use and re-purposing of data
- Increased risk of data misapplication
- Information quality problems
 - US surveys
 - tendency to ignore quality issues
 - poor “cognitive” quality
- Diminishing role of data subjects in decision making processes affecting them
 - increasing reliance on “digital persona”
 - increasing “anonymisation” of transactions
 - reduction in “cognitive sovereignty”
- Causative factors: see list in section 4
 1. information appetite of organizations
 2. economic significance of information
 3. Appeal of IT
 - enhance performance efficiency (and *appearance* of efficiency)
 - fascination for the “technically sweet”

5.2 Public fears

- Two main kinds of fears:
 1. fears over threats to privacy and related values
 2. economic fears
- Three sets of first kind of fear:
 1. Power imbalance
 2. Loss of control over technology
 3. Dehumanisation
- First kind of fears nourished by:
 - trauma of fascist oppression
 - Watergate
 - dystopian visions
 - certain types of IT (mainframe computers)
 - increased risk consciousness (Beck)Cf. Surveys of public attitudes to privacy
 - what do these tell us?
- Second main kind of fear:
 - focuses upon potential for restricting TBDF and thereby trade in goods and services
 - manifest in *international* instruments, particularly OECD Guidelines, EC Directive on data protection, APEC Privacy FrameworkCf. Data protection laws as instruments for economic protectionism?
 - Lack of solid evidence

5.3 Legal factors

- Positive legal factors

- international human rights, especially right to privacy
 - Art 12 UDHR, Art 17 ICCPR, Art 8 ECHR
 - rights in national constitutions
 - See especially German Federal Constitutional Court – Census Act decision of 1983; Hungarian Constitutional Court – PIN decision of 1991
 - administrative law; doctrines on rule of law
 - right to privacy/personality in statute and case law
 - See, e.g., Norwegian Supreme Court decision of 1952 on film screening; US case law
 - rules on defamation, discrimination, intellectual property, fair labour practices
 - role of property doctrines?
 - role of FOI law?
 - Negative legal factors:
 - pre-existing rules found insufficient
 - pre-existing rules sometimes privacy-threatening
 - E.g., Swedish tradition of open government / FOI
- Cf. cross-fertilisation process
- development of data protection guarantees in international human rights law
 - EU recognition of data protection as fundamental right in itself.