



Data Protection as Human Rights and International Legislation on Personal Data

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Aim of Lecture

- To understand origin and justifications for data protection laws
- To understand the influence of international data protection laws on national data protection legislation
- To understand the interplay between the two main objectives of data protection legislation
 - Protection of human rights, esp. privacy, and
 - Promotion of free flow of information



Introduction

- Background
- Protection of Personal Data and Human Rights
- International Laws on Data Protection
- Fundamental Principles of Data Protection
- Persons and Organisations of Influence
- Conclusion



Background Information

- Advancement in information and communication in the 60s and 70s
- Interest in data protection regulation world wide
- Proliferation of national data protection laws in the 70s
- Most countries with data protection laws are European
- Presence of international data protection laws has encouraged the proliferation
- The international laws set minimum data protection standards
- The international laws require countries to enact national data laws bearing in mind the minimum standards
- Human rights law provides the formal normative basis for data protection laws both at national and international levels.



Most Important Human Rights Instruments

- The United Nations Universal Declaration of Human Rights 1948 – Article 12
- **The United Nations International Covenant on Civil and Political Rights 1966 – Article 17**
- **The European Convention on Human Rights and Fundamental Freedoms 1950 – Article 8**
- European Union Charter of Fundamental Rights of European Union – 2000 – Article 7 & 8
- American Declaration of Rights and Duties of Man 1848 Article V
- American Convention on Human Rights 1969 Article 11



ICCPR - I

- Article 17:
 - 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
 - 2. Everyone has the right to the protection of the law against such interference or attacks.
- Taken verbatim from UDHR – Article 12



ICCPR - II

- UN Human Rights Committee:
 - Article 17 demands that processing of personal information within public and private sectors to be regulated according to fundamental principles of data protection
 - (cf. General Comment no. 16 of 23.3.1988)



ECHR - I

- Article 8:
 - 1. Everyone has the right to respect for his private and family life, his home and his correspondence
 - 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
- Based on Article 12 UDHR



ECHR - II

- The European Court for Human Rights have made important decisions in respect of Article 8 provisions touching on personal information
- Processing of personal data amounts to interference with respect for private life unless justified under Article 8 (2) exceptions
- Example of the most important decisions
 - *Klass and others v. Germany* (1983)
 - *Malone v. United Kingdom* (1984)
 - *Leander v. Sweden* (1989)
 - *Gaskin v. United Kingdom* (1989)
 - *Niemitz v. Germany* (1992)
 - *Amann v. Switzerland* (2000)
 - *Peck v. United Kingdom* (2002)
 - *Von Hannover v. Germany* (2004)



ECHR – Some Case Law

- Processing of personal information without consent or knowledge of the persons involved = interference - *Klass and others v. Germany, Lusting-Prean & Beckett v. United Kingdom (consent)*
- Processing information and refusal of access to the information by the person concerned = Interference
Leander v. Sweden, also Gaskin v. United Kingdom
- Private life is defined in a broad manner – it involved also a number of activities in the public sphere - *Niemitz v. Germany (1992)*
- Collection and storage of personal information even where the information is not put to use = interference –
Amann v. Switzerland
- Regard and consideration must be taken of reasonable expectations of privacy by people - *Von Hannover v. Germany*



ECHR – Justifications for interference under Article 8 (2)

- **In accordance to law**
 - procedures that ensure rule of law
 - *Corresponding to legality or fairly and lawfully principle*
- **Legitimate aim**
 - Must be stated
 - *Corresponding to purpose specification principle*
- **Necessary in a democratic society**
 - Necessary – pressing social need
 - *Corresponding to quality and minimality principles – non excessiveness and relevance*
 - Proportionate to legitimate aim pursued
 - *Corresponding to compatibility of purpose principle*

Cf. Incal v. Turkey (1998) 29 EHRR 449 §57



ECHR - Summary

- ECHR case law has not developed new principles but has affirmed those found in data protection instruments,
- But the decisions are important and must be taken into consideration in interpretation of other data protection instruments.
- Further reading BUT not necessary
 - Stephen Kabera Karanja, (2008) Transparency and Proportionality in the Schengen Information System and Border Control Co-operation. Leiden-Boston: Martinus Nijhoff Publishers, chapter 4 pp. 85-121.



EU Human Rights Instruments

- EU Charter - Article 8
- Recognises data protection as a human right
 - 1. Everyone has the right to the protection of personal data concerning him or her.
 - 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
 - 3. Compliance with these rules shall be subject to control by an independent authority.
 - Charter is the first human right instrument to incorporate a right to data protection
- Treaty of Lisbon 2009
 - It makes a cross-reference to the Charter as a real catalogue of rights enjoyed by EU citizens.
 - It makes the rights guaranteed in the Charter binding Article 6 of TEU
 - Makes the rights operational and ECJ will supervise compliance by the EU institutions



Main International Data Protection Legislation

- Convention for protection of Individuals with regard to Automatic processing of personal data 1981- (**European Council Convention**)
- Guidelines governing the protection of privacy and transborder flows of personal data 1980 - (**OECD Guidelines**)
- EU Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (**EU Directive**)
- Other Instruments on Data Protection
 - UNs Guidelines Concerning Computerized Data Files -1990
 - ILO – International Labor Organization



European Council Convention

- **Background and Objectives**
 - Proliferation of national data protection laws
 - Aim – Harmonisation and regulation of free flow of personal information across borders
 - Sets minimum standards for processing of personal data (principles)
 - Tries to promote free flow of personal data across borders (Freedom of information and promote trade)
- **Its Limitations**
 - General not detailed provisions
 - Not self executing – requires ratification
 - Lacks rules on compliance (enforcing and supervision) authority
 - No Supervisory Authority
- **Additional Protocol to the Convention – 2001**
 - Allows transfer of personal data to non-party states
 - Introduces supervisory authority
 - Duplication of provisions in EU Directive
- **Sectoral laws – give detailed recommendations for processing of personal information in specific sectors**
 - Police
 - Telecommunication
 - Research and statistics
 - Exchange of information in public institutions
 - Not legally binding but of great political importance (legal reform and practice)
- **Of great Importance**
 - Influenced formulation of core data protection principles in national laws of many countries and also on EU Directive.
 - Countries not members of the Council of Europe can ratify the Convention but the opportunity has not be used at all.
 - Has been influential in processing of personal data in police sector (Third Pillar) e.g Schengen, Europol etc.



OECD Guidelines



- Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data 1980
 - Not legally binding but have great political significance
 - Great influence in areas outside Europe esp. APECs
 - 2004 APEC Privacy Framework
- Similar contents and objectives like the European Council Convention
 - Broad and not detailed rules
 - Harmonization
 - Protecting privacy
 - Allowing realization of economic and social benefits brought about by information technology
- Principles of data protection similar to CoE Convention
 - Promoting transborder free flow of information
 - Enabling collection and further processing of information
- Other OECD Guidelines
 - Security of information systems (1992)
 - Cryptography (1997)
 - Consumer Protection (1999)



Other Instruments on Data Protection

- UNs Guidelines Concerning Computerized Data Files -1990
 - They have limited practical significance
 - Not legally binding
 - But signify that interest for data protections is world wide.
 - Encourage countries without data protection laws to enact laws based on the Guidelines
 - and international organizations to observe these rules while processing personal data
- ILO – International Labor Organization
 - Has issued a code of conduct on – Protection of worker’s personal data based on the Guidelines.



EU Data Protection Directive - I

- **Background**
 - Very important, has great influence and is detailed
 - Minimum level that must be observed by all EU/EEA Member States
 - An international law binding for Norway & other EEA Members
- **Objectives**
 - Harmonisation main justification
 - Realisation of internal market - important justification
 - Free flow of information in EU/EEA
 - Idealistic objective – to ensure a high standard of data protection, and
 - Protection of human rights
 - Its role in human rights doctrine increasing
- **Level Harmonisation**
 - Minimum standard of data protection
 - Allows discretion to member states leading to divergences
 - Compromise legislation
 - Uniform national legislation

EUs Data Protection Directive -II

Main Provisions



- Scope
 - Both automated and manual processing
 - Both public and private processing
 - Applies to natural persons – “can also apply to legal persons and organizations”
 - Applies to data processing in the Community (first pillar) not national security, criminal matters (third pillar)
 - Does not apply to data processing of personal and domestic activities
 - Exemptions allowed on freedom of expression and research, statistical and national interest matters
- New rules for data processing
 - Not found in earlier legislation
 - Duty to inform
 - Right to object (market and automatic processing)
 - Exceptions - article 13
- Independent Data Protection Supervisory Authorities
 - Reporting obligation
 - Internal control



EUs Data Protection Directive -III

Main Provisions

- Transfer of personal data across borders
 - Transfer within EU/EEA cannot be restricted on privacy considerations
 - Restrictive rules for transfer to third countries
 - Equivalent level of protection criterion,
 - Many countries recognized as having equivalent level : Switzerland, Argentina, and Canada
 - Safe Harbor rules - USA
 - Standard contracts for countries not meeting criterion
- Codes of Conduct
 - Self regulation
 - Supplement and strengthen general processing rules
 - Status in relation to national law unclear
 - Internet Ombudsman in Norway



EUs Data Protection Directive –III

Human Rights Concerns

- ECJ - has recognised the Directive as having an idealistic objective (in addition to the internal market role), - Protection of privacy
- and that the interpretation should be in the light of the ECtHR case law on Article 8. Cf. Consolidated cases 465/00, 138/01 og 139/01 *Österreichischer Rundfunk et al* (judgment of 20 May 2003).



Human Rights Concerns Cont'd.

- ECJ decision in the case 101/01, *Bondil Lindqvist* (judgment of 6 November 2003)
 - Publication of personal data on a private web site
 - Publication falls outside the protection of Article 3(2) (exemption on processing of personal data for personal and household activities)



Other EU Directives on Data Protection

- EU Directive 2002/58 of 12 July 2002 concerning the processing of personal data and protection of privacy in the electronic communication sector
- Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC
- EC Regulation 45/2001 on protection of individuals with regard to the processing of personal data by the Community Institutions and Bodies and on the free movement of such data
- EC Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters 2008



Fundamental Principle of Data Protection



- Fairly and Lawful
- Minimality
- Purpose Specification
- Data Quality
- Data Security
- Sensitivity
- Individual Participation
- Anonymity
 - Requirement for technological and organisational measures
 - Pseudonyms
- Fully Automatic Decision Making Art. 15 Directive



What are Data protection Principles?

- Abstractions from rules
- Good practices
- Safeguards
 - ECHR & case law
- Normative force
- Balancing Interests
- Influence new data protection laws
- Principles and Interests (Norwegian interest theory)



Fundamental Principles of Data Protection - II

- **Fair and Lawful**
 - Most important principle
 - Fairly: Conform to laid down rules and procedures as well acceptable in society, proportionality
 - Lawful: Legality principle– permitted by law or authorised, transparency
- **Minimality**
 - Necessary – guiding principle is purpose and further purpose: entails deletion and anonymity
- **Purpose Specification**
 - Specified, defined and stated purpose
 - Lawful/legitimate purpose – social morality, transparency & proportionality
 - Further processing not incompatible with original purpose
- **Data Quality**
 - Personal data should be valid with respect to what they are intended to describe, and relevant and complete with respect to the purpose for which they are intended to be processed
 - Adequacy
 - Relevancy
 - Non-excessiveness
 - Accuracy
 - Up to datedness
 - Completeness
 - Data Controller should establish routine or measures to ensure data quality



Fundamental Principles of Data Protection - III

- **Data Security**
 - Ensure that data are not destroyed accidentally and not subject to unauthorised access, alteration, destruction or disclosure
 - Implement appropriate technical and organisational measures
 - Securing technical equipment and networks
 - Contracts where processing is carried out on behalf of the controller
- **Sensitivity**
 - Limits the processing of certain types of data which are regarded as especially sensitive for data subject and requires specific safeguards as compared with other personal data
- **Individual Participation**
 - Constellation of rights
 - The rights are designed to enable data subjects to have a degree of control and participate in the processing of their personal data
 - Right to access
 - Right to rectification, erasure and blocking
 - Right to information regarding automated decisions
 - Right to object
 - Obligation to notify or provide information
 - Right to demand manual processing



Other EU Initiatives etc.

- European Data Protection Supervisor (EDPS)
 - His powers and scope limited to Community Institutions
 - Ensure compliance and respect for individual privacy by community Institutions
 - First EDPS appointed on 22.12.2003 -
 - Issues reports and opinions
- Article 29 Working Party
 - Issues important commentaries, recommendations and opinions
 - Very influential
- The Committee under Article 31 EU Directive



Persons and Organizations of Influence

- Prominent Persons
 - Leading scholars have influenced policy in this field
 - Scholars attached to international organizations
- Major organizations
 - UN, Council of Europe, OECD, EU and APEC
- Other organizations
 - National Data Supervisory Authorities (Datatilsynet)
 - International Working Group on data Protection and Telecommunications (IWGDPT)
 - International Private Organizations
 - Privacy International
 - Electronic Privacy Information Center
 - Consumers International
 - ILO – International Labor Organization
 - Statewatch
 - Lobby and Industry Groups



Some Concluding Remarks

- Recent instruments are more extensive than the older legislation reflecting consensus in data protection rules
- Freedom of individual states to adopt national specific solutions in the area drastically reduced in EU and EEA
- But differences still exist in some areas for example that of EU and USA based on whether to legislate or self-regulate.
- States given some discretion e.g the use and status of Codes of Conduct; protection of data in organisations and other legal entities.
- Impact on Norway
 - Policy greatly influenced by EU policies
 - But Norway has always been influenced by data protection policies in other countries especially Sweden