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Seminarie Privacyrichtlijn 95/46/EG

From Fair Information Principles to
Constitutional Principles?

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Where do we start

- Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), agreed in 1950 : introduced a general right to protection of house, communication and privacy
- Interesting example of top down approach: privacy was absent in most of the then existing constitutions



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Relevance of Article 8 ECHR for technology

- Activist handling of European Court influencing understanding in Member States
- Broad interpretation of notions 'house', 'communications' and 'privacy'



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Consequence?

- European Human rights today do their job and protect laptops, most public data and email and internet



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Why data protection in 1980?

- (1) Article 8 ECHR does not apply to the private sector.
- (2) The right to a private life would not necessarily include all personal data, and so there was the question of whether a large proportion of data would be sufficiently safeguarded.
- (3) The right of access to data on oneself was not covered by the concept of the right to privacy as expressed in Article 8.



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Birth of European data protection

- Convention no. 108, January 28, 1981
- Directive 95/46/EC of 24 October 1995
- Directive 97/66/EC and 2002/58/EC
- Regulation (EC) No 45/2001 processing by Community institutions of 18 December 2000
- Charter of Fundamental Rights of 7 December 2000 of the European Union,

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EU Charter (Article 8)

- *Everyone has the right to the protection of personal data concerning him or her.*
- *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 that has been collected concerning him or her, and the right to have it rectified. Compliance with these rules shall be subject to control by an independent authority.*



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Data protection tested in Luxemburg

- CJEC, 20 May 2003, Joined cases C-465/00, C-138/01 and C-139/01, **Rechnungshof**
- CJEC, 6 November 2003, Case C-101/01, **Lindqvist**
- CJEC, 30 May 2006, Joined cases C-317/04 and C-318/04, European Parliament v. Council (« **PNR** »)
- CJEC, Case T-194/04, The Bavarian Lager Company Ltd. v Commission (**Bavarian**)



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Data protection tested in Strasbourg

Very slow but Rotaru (4 May 2000) para. 43 about scope of Article 8 and data protection

- “The Court has already emphasised the correspondence of this broad interpretation with that of the Council of Europe’s Convention of 28 January 1981 (...) and whose purpose is “to secure ... for every individual ... respect for his rights and fundamental freedoms, and in particular his right to privacy with regard to automatic processing of personal data relating to him” (Article 1), such personal data being defined in Article 2 as “any information relating to an identified or identifiable individual”.



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Most data protection principles are recognised

- *Klass v. Germany*, 6 September 1978
- *Leander v. Sweden*, 26 March 1987
- *Z. v Finland*, 25 February 1997
- *Gaskin v. the United Kingdom*, 7 July 1989
- *Rotaru v. Romania*, 4 May 2000.
- *Amann v. Switzerland*, 16 February 2000.
- *P.G. and J.H. v. the United Kingdom*, 25 September 2001.
- *Pretty v. United Kingdom*, 29 April 2002
- *Bensaid v. the United Kingdom*, 6 February 2001
- *Evans v. the United Kingdom*, 7 March 2006
- (Grand Chamber), *Evans v. the United Kingdom*, 10 April 2007
- *Smirnova v. Russia*, 24 July 2003
- *Christine Goodwin v. the United Kingdom*, 11 July 2002
- *Peck v. the United Kingdom*, 28 January 2003.
- *Marper v. United Kingdom*, 4 December 2008

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Segerstedt-Wiberg and others v. Sweden, 6 June 2006.

- It appeared the Data Inspection Board had wider powers. It could examine complaints made by individuals. Where it found that data was being processed unlawfully, it could order the processor, on pain of a fine, to stop processing the information other than for storage. The Board was not itself empowered to order the erasure of unlawfully stored information, but could make an application for such a measure to the County Administrative Court. However, the Court had received no information indicating the effectiveness of the Data Inspection Board in practice. It had therefore not been shown that that remedy was effective.



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But: notion of personal data is problematic

But, the Court excludes from the privacy scope the processing of data:

- -which are not private in itself, and
- -which are not systematically stored images or sound recordings, or other data,
- -which are not systematically stored with the focus on the data subject, and
- -when the data subject could reasonably expect the processing (disclosure)



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But: exclusion of evidence not warranted

- *P.G. and J.H. v. the United Kingdom*, 25 September 2001.
- Antigoon case law in Belgium

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But: proportionality is badly checked

- CJEC, 30 May 2006, Joined cases C-317/04 and C-318/04, European Parliament v. Council (« **PNR** »)
- ECHR, *Marper v. United Kingdom*, 4 December 2008

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But: Data protection in national courts

- *Durant case (8 December 2003)*. Michael Durant wanted to have access (through the British Data Protection Act/DPA) to a report, held by the Financial Services Authority (FSA), which contained personal data about himself. Because this report contained personal data, he should have had access to it. However, the FSA disclosed some information, but Mr. Durant wanted further disclosure.
- The Court of Appeal didn't base its decision on the fact that the data must be related to an identifiable person (as is also stated in Directive 95/46/EC), but to the '*relation to*' a person. Because the Court stated that certain data, although they can lead to an identifiable person, can not be considered as personal data, the Court limited the effect of the British Data Protection Act.



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Court of Cassation, 27 February 2001

- The owner of a shop installed a hidden camera and microphone to monitor the area around the cash register for he suspected one of the employees of stealing. In doing so, he recorded all the cashiers movements and conversations to gain some proper evidence.
- Starting point of the judgement is Article 8 of the European Convention of Fundamental Rights and Freedoms. The right to respect for one's private life is not an absolute right, interference is allowed when certain conditions are met. In this regard the Court remarks that the action of the employer is both legitimate and necessary. The Court of Cassation doesn't object to this kind of initiative as long as the employer has a legitimate suspicion of one of the employees committing a criminal offence.



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Cour Cassation 2 March 2005

- criminal case which stated that video images, which were obtained by the employer without applying the rules of the collective labour agreement N° 68, could be used
- Data protection bill is not applicable since the video **camera only focused on the cash register** itself and not on the cashier.



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Critical considerations

- *Revision of directive is not necessary; judges need their voice in too*
- *But: Back to the old constitutionalism; challenging the activist constitutionalism of the 60s*
- *Why not amend Art. 8 EU Charter?*

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Read More

- RONALD LEENES, BERT-JAAP KOOPS & PAUL DE HERT (eds.) *Constitutional Rights and New Technologies. A Comparative Study*, The Hague, T.M.C. Asser Press, (Information Technology & Law Series, vol. 15), 2008, 301pp. ISBN 978-90-6704-246-8
- DE HERT, P., 'Balancing security and liberty within the European human rights framework. A critical reading of the Court's case law in the light of surveillance and criminal law enforcement strategies after 9/11', *Utrecht Law Review*, 2005, Vol. 1, No. 1, 68-96. Zie <http://www.utrechtlawreview.org/>
- DE HERT P. & S. GUTWIRTH, 'Privacy, data protection and law enforcement. Opacity of the individual and transparency of power' in E. CLAES, A. DUFF & S. GUTWIRTH (eds.), *Privacy and the criminal law*, Antwerp/Oxford, Intersentia, 2006, 61-104
- GONZÁLEZ FUSTER G. & DE HERT, P., 'PNR and compensation: how to bring back the proportionality criterion', in LODGE, J. (ed.) (2007), *Are You Who You Say You Are? The EU and Biometric Borders*, Nijmegen: Wolf Legal Publishers. Pp. 101-109.

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