BOOKENDS

REGULATING PRIVACY

As Colin Bennett, the author, claims in his preface, *Regulating Privacy* is a comparative study of the data protection policies of Sweden, the United States, West Germany and the United Kingdom. It is complementary to David H Flaherty's 1989 Protecting Privacy in Surveillance Societies, which is a comparative examination of the passage, revision and implementation of data protection laws in West Germany, Sweden, France, Canada and the United States.

What does Bennett give us that we do not already have from Flaherty? First, Bennett takes in the United Kingdom, which Flaherty omits, but not France and Canada which Flaherty covers. Bennett also writes some four years later than Flaherty, during which period our experience of the subjects of data protection and privacy has advanced. Third, Bennett's approach is centred on the development of public policy where Flaherty is concerned with the cumulative impact of surveillance and the use of intrusive technologies on the right of individuals to be left alone: as Flaherty says in his preface, he is persuaded that data protection laws and agencies are necessary, and he wants them to be as effective as possible.

Comparative Policy Analysis

Bennett claims that his present book is within the general category of political science known as comparative policy analysis. Unlike Flaherty, he does not individually review the data protection models, goals, data protection institutions, and data protection experiences of each of his subject countries: he looks instead at the convergence of national data protection policies, choices of policy instruments, divergences, policy determinants and styles, drawing conclusions from his enquiries without setting out a comparative survey of each country's data protection regime. In his preface, Bennett acknowledges Flaherty's work and project papers, to which he has had access and which he describes as paving the way to his own analysis.

Both authors are observers of the developing world of data protection and the threats to privacy. Flaherty is an advocate for strengthening data protection laws, and is strongly aware of current threats to personal privacy: Bennett is less of an overt advocate, more a concerned commentator looking at the reasons for convergence and divergence of national policies, the political pressures both for and against the development of effective privacy laws, and the effects which differing national sociological and legal cultures have had on these developments.

The different focuses of these two works makes them admirable companions to each other. If you want comparative and comparable materials on the 1989 data protection regimes and experiences of Germany, Sweden, France, Canada and the United States, go to Flaherty. If you want updated analysis of the similarities, differences and trends as between three of those countries, with the United Kingdom added to them but France and Canada omitted, go to Bennett. In practice, you will probably do both.

Wider Privacy Issues

Each author focuses on data protection, and leaves aside wider issues of privacy. With the Common Market Commission's policy sights set on widening European data protection laws to include manual data, we may be approaching a broader concept of mis-use of structured personal information, in whatever form such information may be held. Even this concept is only a small part of Judge Cooley's "Right to be let alone", as first formulated by him in the United States in the 1880's. Perhaps we may look forward to a later work by one or other of these authors examining the political, social and policy issues affecting the wider aspects of privacy, now the subject of a current UK Government enquiry in succession to the Calcutt Committee's 1970 Report. Perhaps the time has come to tackle head on the central

issue of privacy, and to move away from the too limited field of data protection.

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RECENT DEVELOPMENTS IN DATA PRIVACY LAW

Recent Developments in Data Privacy Law focuses both on the current Belgian Data Protection Bill and the EC Draft Directive and is probably the first book in English to analyse the former. The book is a compilation of the proceedings of the international conference on data privacy law organised by the Inter-disciplinary Centre for Law and Information Technology in Leuven, Belgium in December 1991. This book written by highly respected specialists on recent legislative developments is edited by Professor Jos Dumortier.

New Trends in Data Protection Law

In the opening article on new trends in data protection law, **Professor Dr. Spiros Simitis** handles skilfully a massive amount of information and uses his knowledge of diverse national and international data protection legislation, in order to distil, from the past twenty years of regulation, the following six principal lessons:

Firstly, being only a provisional response to a given political, societal and technological context, "none of the various laws can claim to offer not only the right, but also the definitive solutions to the problems arising out of the processing of personal data."

Secondly, "all attempts to regulate the processing of personal data have to be understood as a permanently open process," since different laws reflect only a stage of development of processing technologies.

Thirdly, "the regulatory models of the past two decades must be substituted by a policy-mix," recognising additional sectoral regulations (with necessary modifications), as well as regulated "codes of conduct".

Fourthly, "a regulation of the processing of personal data must include all forms of retrieval", including manual retrieval, "since an increasingly sophisticated combination of the various retrieval forms has developed".

Fifthly, "the inclusion of every processing form does not mean unlimited application of the retrieval rules," for example to private users of personal data such as electronic diaries. The reason is that "the more the information technology transcends the sphere of purely professional uses and becomes a part of everyday life, the less it appears possible to demand that the processing principles must be observed in all retrieval cases." He added that any attempt, however, to apply these rules indiscriminately, for example to all electronic diaries, trivializes the regulatory system and therefore questions its legitimacy.

Last but not least, "a powerful and independent control authority is probably the most important condition for workable and efficient data protection."

Comprehensive and deductive, this article is as useful to absolute beginners as to experts in the data protection field. Specifically, in relation to the latter, it is an indispensable guide to both policy and law makers, as much in countries with data protection legislation, as in those without.

The EC Data Protection Draft Directive

The difficult task of justification and explanation of the solutions provided in the EC Draft Data Protection Directives (the General Directive and the ISDN Directive) is achieved well by **Georges Papapavlou.** As an EC official closely involved in EC data protection

proposals, Papapavlou sets out the most recent state of play in the long legislative process of adopting these directives. However, in view of the second, revised, text of the EC Draft Directive under current discussion in Brussels, this article loses some of its actuality. Nevertheless, the introduction, dealing with the background and options for the EC action in data protection field remains valid.

In an attempt to analyse the Draft Directive from a different and practice-oriented angle, **Douwe Korff** examines, in a coherent and direct manner, the anticipated effect of this Directive on business operators. Starting from the hypothesis that data protection legislation is based on the three broad principles of transparency, control and balance, the author assesses the provisions of the Draft Directive, taking into account, where appropriate, the amendments of the European Parliament. Thus, some of the most critical provisions of the Directive, believed to have the most practical implications on data users in the private sector, are examined: the collection of personal data, the processing and use of personal data, "profiling", the communication of personal data to third parties and transborder data flows. The author concludes that, "where the Draft Directive clearly ensures adequate transparency and control in the private sector, it fails to balance its more formal restrictions against the possible harm that may ensue from data users".

Even though some modifications may occur after the revised text of the Draft Directive is finally published, this article is instructive and has the merits of a practical approach.

Belgium's Data Protection Bill

The remaining four articles all concentrate on the proposed Belgian Data Protection Bill. After substantial domestic and international pressure, particulary in the context of Belgium's commitments under the Schengen Agreement, the former Belgian government presented the proposal of the Bill in May 1991. It was approved by the legal committee of the lower house of Parliament in mid-June this year (PL&B August '92 p.2).

Frank Robben's presentation gives a general overview of the Belgian Bill and an analysis of its scope, the obligations and restrictions imposed on the controller of the file, the rights of data subjects, the powers and tasks of the Commission for the Protection of Privacy and, finally, the sanctions for the breach of these provisions.

These same points are used by **Jos Dumortier** in his comparison between the Belgian Bill and the EC Draft Directive. Dumortier concludes that, in spite of the same principles, definitions and scope, there are still differences between the two texts which are likely to become even greater in the revised Draft Directive.

The specific provisions of the Belgian Bill relating to transborder data flows are examined by **Dr. Adriana Nugter.** Both the export and import regimes are analysed, taking into account general problems involved in transborder data flows and the Council of Europe Convention and EC Draft Directive.

Closing the discussion on the Belgian Bill, **Jon Bing's** final evaluation of its provisions does not spare it from constructive criticism.

The section on the Belgian Bill is well structured, analytical and provides a comprehensive picture of the proposed law. It may be more useful as a point of reference than the section on the EC Draft Directive, the latter being, unfortunately, outdated.

The useful appendices contain an original English translation of the Belgian Bill on Data Protection, as well as the texts of the EC Draft Directives (General Directive and ISDN Directive) uniquely *including* the European Parliament's amendments.

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This review was written by Bojana Perovic who has just completed a postgraduate thesis on the EC Data Protection Draft Directive and its impact on the private sector at the European University Institute, Florence.