Introduction

Nouwt, J.; de Vries, B.R.

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Chapter 1
INTRODUCTION

Sjaak Nouwt, Berend R. de Vries[1]

1.1 The Research Project

Reasonable expectations of privacy and the reality of data protection is the title of a research project being carried out by TILT: Tilburg Institute for Law, Technology, and Society, formerly known as Tilburg University's Center for Law, Public Administration and Informatization in the Netherlands. The Netherlands Organisation for Scientific Research (NWO) is funding the project as part of the National Programme for Information Technology and Law (IT*e*R). The project started on 1 January 2002 and will be completed on 1 December 2004. The research project is aimed at developing an international research network of privacy experts and to carry out research on the practice, meaning, and legal performance of privacy, privacy protection and the processing of personal data in an international perspective.

Privacy, regulations to protect privacy, and data protection have already been legal and social issues in many Western countries for a number of decades. Many countries have drafted regulations thereon, but they are continuously amending them. Privacy and personal data are, in general, protected in government regulation and self-regulation. Regulating privacy and the technological developments that influence privacy and data protection are some of the current issues. There is no absolute or uniform concept of privacy or privacy protection although several aspects of privacy can be defined. These are determined by fundamental rights such as 'the right to be left alone' (Warren and Brandeis) and 'the right of individuals, groups, and institutions to determine when, how and to what extent information will be given to others' (Westin). As a result of the current privacy and data protection research projects carried out by our institute, we draw the conclusion that the balancing of different social values and legal, social, political, and ethical arguments can influence the possible opinions on privacy and data protection.

The main question in this research project is what is privacy and data protection and how is it being applied in everyday life in different countries? By answering

[1] Both authors are affiliated to Tilburg University, the Netherlands.

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this question, we hope to be able to outline the similarities and differences of opinions in several countries. We will also be taking a look at the similarities and differences in the regulatory framework of privacy and data protection. Privacy experts from all over the world will participate in this project so our research will not be limited to the European legal framework perspective only.

In the context of this research project, we have taken several initiatives to develop an international network of privacy experts. First, we invited several well-known privacy experts to participate in our research project and, at present, academic experts, lawyers, and data protection commissioners are participating in the privacy network. Second, we developed the PrivacyNetwork[2] web site, which provides information about this research project and other research projects in which our institute is involved. As a third step, a case law database was developed. The database offers access to judgments and documents from data protection authorities from different countries, which can be viewed in their original language but with an English summary. The objective of the case law database is that it can be used as a source of international privacy case law for future research. Network participants continuously provide cases so the information shown is up to date. Fourth, we developed the PrivacyNetwork electronic newsletter which is sent to our subscribers every month. The newsletter focuses on new case law that has been added to the database and contains other information on privacy and data protection issues. Fifth, we organised several workshops, starting on 11 September 2002 at the International Conference of Privacy Commissioners in Cardiff (UK). During this workshop it was agreed to start collecting case law and to focus on two topics: camera surveillance and workplace privacy. In accordance with this agreement, most of the case law stored in our database since the workshop deals with camera surveillance and workplace privacy. This is also the main reason why this book deals with these two topics. At a second workshop on 17 February 2003 in Amsterdam, we organised several presentations on camera surveillance. On 21 April 2004, we organised an international privacy colloquium in Tilburg, the Netherlands which coincided with a visit from Colin Bennett who is one of the participants in our research project.

The work within the current international network of privacy experts has been intensified, resulting in several new research groups in which our institute also participates. These research groups are organised within the context of the PRIME project (Privacy and Identity Management for Europe) and the FIDIS project (The Future of Identity in the Information Society). Finally, as part of our project Tilburg law students are offered an internship at the office of one of the network participants during which they have the opportunity to collect more privacy and data protection case law abroad. This case law is then stored in our database. By collecting, disseminating, and analysing case law on privacy and data protection, this will enable us to investigate the concept of 'reasonable expectations of privacy' in different countries. The concept concerns individuals' subjective expectations of pri-

[2] <http://www.privacynetwork.info>.

vacy and the privacy expectations that societies are prepared to recognise. We will be able to focus on this legal concept through the reality of data protection, as laid down in privacy case law.

1.2 Reasonable Expectations of Privacy

In 1967, the American Judge John Marshall Harlan introduced the litmus test of 'a reasonable expectation of privacy' in his concurring opinion in the US Supreme Court case of *Katz* v. *United States*. According to Harlan, there are two standards to determine whether a person has a reasonable expectation of privacy. First, a person must have an actual (subjective) expectation of privacy in a certain situation. Second, society is prepared to recognise this (objective) expectation as reasonable.[3] A well-recognised great risk, and also rather obvious, is the development of new information and communication technologies, which seem to erode the reasonable expectations of privacy.

The European Court of Human Rights also used the 'reasonable expectations of privacy' test in the case of *Halford* v. *The United Kingdom*:[4]

> 'It is clear from its case-law that telephone calls made from business premises as well as from the home may be covered by the notions of "private life" and "correspondence" within the meaning of Article 8, paragraph 1 (...).
> There is no evidence of any warning having been given to Ms Halford, as a user of the internal telecommunications system that calls made on that system would be liable to interception. She would, the Court considers, have had a reasonable expectation of privacy for such calls ...'

However, in the case of *P.G. and J.H.* v. *The United Kingdom*, the Court moderated the usefulness of the 'reasonable expectation of privacy' test:[5]

> '57. There are a number of elements relevant to a consideration of whether a person's private life is concerned by measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor'.

In this case, the Court also referred to the Council of Europe's Convention of 28 January 1981 for the protection of individuals with regard to automatic processing

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[3] *Katz* v. *United States*, 389 U.S. 347 (1967), PN 2004-68. See also the contribution by Robert Gellman in this book.

[4] *Halford* v. *The United Kingdom*. ECHR, 25 June 1997, PN 2003-49. Reports 1997-III.

[5] *P.G. and J.H.* v. *The United Kingdom*. ECHR, 25 September 2001, PN 2004-199. Reports of Judgments and Decisions 2001-IX.

of personal data, which came into force on 1 October 1985 and whose purpose is 'to secure in the territory of each Party 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'.

Earlier, in 1992, the European Court of Human Rights acknowledged that employees have a right to privacy at the workplace in the case of *Niemietz* v. *Germany*:[6]

> 'Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. There appears, furthermore, to be no reason of principle why this understanding of the notion of private life should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world. This view is supported by the fact that, as was rightly pointed out by the Commission, it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not'.

Although we are tempted to compare the American and Canadian concept of 'reasonable expectations of privacy' with that of the Council of Europe, we must be cautious. When analysing the concept on the basis of international comparison, we must recognise that legal systems may be different and that this concept is not the only test that may lead to a judgment.

1.3 Contents of the Book

The aim of the project during the second phase of our research project is to combine an overview of the research topics based on a number of country reports. These reports should analyse: (1) the use of camera surveillance in general (CCTV) and, (2) workplace privacy, focusing on privacy and data protection issues. This analysis should be based on decisions by judges or by data protection and privacy commissioners. By collecting, analysing and publishing case law, we hope to distribute and disclose the contents of 'reasonable expectations of privacy' on this specific topic in several countries in the world.

In order to do so we invited the participants to draw up a report on: (1) the use of video surveillance in general (CCTV), or (2) a report on workplace privacy, or (3) a combination of both subjects. We requested these reports to focus in particular on case law. All of the case law used in these country reports has been published in the database on the project's web site at <www.privacynetwork.info>.[7]

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[6] *Niemietz* v. *Germany*. ECHR, 23 November 1992, Series A No. 251/B, PN 2004-200.

[7] In this book the case law is referred to the PrivacyNetwork database by a PN number.

We are delighted that a large number of PrivacyNetwork participants have accepted our invitation and have delivered a country report. Their reports are now published in this book. We found these reports to be very valuable and have used them to make our first analysis of the use and the importance of the concept of 'reasonable expectations of privacy'. This research will be continued and we do hope that, like us, privacy researchers will find our case law database both helpful and useful for further research on privacy and data protection.

This brief introduction will be followed by the worldwide country reports. First, *Robert Gellman* will present a general survey of camera surveillance law in the United States (Chapter 2). In Chapter 3, *David J. Phillips* will present several types of workplace activities that raise privacy concerns and the legal mechanisms in the United States. *Colin J. Bennett and Robin M. Bayley* will review the state of privacy law in Canada with respect to camera surveillance technologies in Chapter 4. In Chapter 5, *Lilian Edwards* reports on the legal regulation of CCTV from Europe's most closely watched society: The United Kingdom. In Chapter 6, *Sjaak Nouwt, Berend R. de Vries and Dorus van der Burgt* describe regulations and case law on camera surveillance in the Netherlands. *Frank Hendrickx* reports on privacy and data protection issues in the workplace in the Netherlands in Chapter 7. Chapter 8 has been written by *Paul de Hert and Mieke Loncke* on Belgium, where there is no culture of bringing privacy issues before the court. This has delivered an integrated report on two topics: camera surveillance and workplace privacy. *Thomas Hoeren's and Sonja Eustergerling's* report on privacy and data protection at the workplace in Germany is covered in Chapter 9. The German government announced the introduction of a specific bill to regulate workplace privacy. From a historical point of view, the country report in Chapter 10 by *Máté D. Szabó and Iván Székely* on privacy and data protection in the workplace in Hungary is also very interesting. Hungary became a new member of the European Union in May 2004. In Chapter 11, *Giusella Finocchiaro* reports from Italy about personal data protection in the workplace. In the following chapter *Paolo Balboni* describes the Italian experience with camera surveillance and the related privacy and data protection issues (Chapter 12).

An analysis of these country reports is given in Chapter 13. These reports give us a broad view of a citizen's reasonable expectation of privacy in Western Europe, Eastern Europe, Southern Europe, and outside Europe.

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