

Data Protection and Privacy – Basic Concepts in a Changing World

Peter Blume

1	Introductory Remarks	152
2	The Two Concepts	153
3	Social and Ideological Background	154
4	Privacy	155
5	Ideas of Privacy	156
6	Balancing	160
7	Issues from Current Law	161
8	The Future	163

1 Introductory Remarks

It is commonly assumed that in a society there is a private and a public sphere or space. They may be more or less separated from each other. Life and enjoyment for the citizens are connected with both spaces. The extent and the importance of the two spaces together with the relationship between them depend on the prevailing political and ideological opinions of the current society, the general standard of living, and the stage of technological development. Furthermore, as the public space is related to the state, at least today, it holds the strongest position and accordingly will tend to intervene in the private space and aim at influencing the interests and values that constitute this space.

These observations which are elaborated below form the background for the assessment of the meaning, value and importance attached to privacy and data protection. These two notions or concepts are not strictly legal in the sense that they may be understood and interpreted from the viewpoint of other modes of knowledge. Generally privacy and data protection are societal concepts that from the outset convey the idea that people are entitled to some kind of autonomy and protection with respect to their private and personal life. The leading idea is that a person is more than just an aspect of society and accordingly is something in his own right. Seen from a legal point of view the question is how such an understanding may be promoted and the answer to this question depends on what is actually meant by especially privacy.

Although it is possible in any case to a certain degree, to make a distinction between privacy and data protection it is the concept or idea of privacy that is fundamental. Accordingly, it is the concept of privacy that primarily has to be addressed. If it is possible to insert sufficiently clear meaning into this concept the ground has been prepared in order to understand what data protection entails.

This may at first glance seem as a fairly easy task as we all know what is meant by being private but to the contrary it is a complex and challenging task to determine privacy. It is not at all certain that it is possible in an unambiguous way to define privacy and it has also been questioned whether this is actually worth trying.¹ Maybe it is a fruitless task. Even though, everybody has some intuitive understanding of what privacy is, it is very difficult to articulate this understanding in a comprehensible and especially unambiguous way. Besides this fundamental problem it has to be acknowledged that privacy concerns many different aspects of personal life. A basic distinction, discussed below, is made between physical and psychological privacy, and although there are similarities and connections there are also important differences between these two notions. Maybe privacy is not one single concept but a cluster word covering many concepts. This is a major challenge facing us on the journey that starts just below.

If we are successful in defining or at least clearly understanding privacy, then we can try to understand data protection. This is from the outset a little bit easier because data protection more clearly is connected to a specific legal

¹ Raymond Wacks: *The Protection of Privacy* (London 1980) p.10: "The long search for a definition of "privacy" has produced a continuing debate that is often sterile and, ultimately, futile"

regulation that has been developed mainly to solve one specific problem, i.e. the challenge of modern information technology to private life and personal integrity. From the beginning this task looks rather simple, but this might not be true. In any case, we can now start our journey.

2 The Two Concepts

As already indicated there is a connection between the concepts of privacy and data protection. It may be observed that there have not always been two concepts as data protection is a newcomer and also because it traditionally was assumed that data protection referred to one of the many facets of privacy and in this sense was not an independent concept. Data protection may be translated to information privacy.

It is commonly assumed that privacy describes a situation that is related to either the physical or the psychological environment of an individual person. Privacy is concerned with the relationship between the individual and the collective, i.e. other people and traditionally in particular the state. Privacy is in this respect based on the assumption that the individual person has some kind of autonomy implying that the person is an independent being besides being a part of the actual community. This autonomy implies that the individual has a right to exercise some degree of control in respect to others. This assumption leads to restrictions on the community which is clearly phrased in the old dictum (Cooke) that my home is my castle and not even the King may trespass beyond its boundary. Privacy is something about independence and control; a right to make decisions concerning the role of the individual in the physical space. In this sense privacy is an old idea that is still viable today.

However, privacy does not merely concern the physical life of the individual. It is also related to the immaterial life of the individual. In this sense, privacy provides some kind of protection of the ideas and information that is related to the individual person. The individual may not own this information in the same way as he owns his house (castle) but the integrity of the person may be violated when others use information about him. Privacy with respect to information has especially in Europe been developed to the special legal regulation known as data protection.

Although data protection from the start was related to privacy² it has only on a general level been developed on this basis and is accordingly in many ways not closely attached to the right of privacy and the legal interpretation of this right. Data protection became something in itself with its own laws and even its own legal institutions. Data protection is specifically related to the legal rules that regulate to which extent and under which conditions information related to individual physical persons may be used. The ideas that determine these rules derive from the privacy discourse but they are made precise with respect to the specific regulatory purpose. Data protection law is in a sense a more technical,

2 It is in this respect interesting to notice that the Council of Europe Convention 108 which is one of the first international legal instruments originally should have been a protocol to the European Convention on Human Rights.

detailed, and detached kind of law than privacy law. This legal regime concerns processing of personal data and even though its aim is to protect private information it also serves other aims. It is not the sole purpose to protect individuals as general societal interests related to the use of personal data also play an important role. Data protection rules should make it possible to use personal data in a manner acceptable to society. In this way it should sustain the possibilities of utilizing modern information technology.

In contrast to traditional privacy regulation, it is furthermore characteristic of current data protection that it from the outset does not make a distinction between the private and the public sector. It is a basic assumption that personal information has to be protected both in respect to the state and other public authorities and in respect to private enterprises and private persons. In principle anybody may misuse personal data and all relationships ought to be regulated. Data protection is not only a limitation on the state.

Even though there are differences, privacy and data protection for many years have formed some kind of unity. In this respect it has been important that on the highest level of law, human rights, it has only been privacy that has been recognized as a basic or fundamental right. No mention is made of data protection in human rights conventions. This state of affairs is perhaps changing and there is a tendency to a higher degree to recognize data protection as an independent fundamental right without however breaking the bond to privacy. The pros and cons of this development will be discussed below in 7.

In general it may here be concluded that privacy and data protection are related and both strive to ensure the autonomy and integrity of the person. They share the same goals and they are both aware of the fact that neither privacy nor data protection can be absolute but to some extent have to be adjusted to societal necessity. The rights and the legal protection are meant to sustain the individual but at the same time it is recognized that the individual is part of society and it is not desirable that the individual fully withdraws from society.

3 Social and Ideological Background

Privacy and data protection have to be balanced against other legitimate considerations in order to ensure a good society, as it will be elaborated below in 6. They are not absolute rights and they both have a societal and ideological background. This is important to keep in mind. It is not self evident that a person should enjoy privacy and have data protection. This basically depends on how society in general is organized and perceived.

Against this background it is not surprising that the state of being private and privacy as a right have not been viewed in the same way through history. The private space has not always been seen as important and in reality it is only in modern times that all people have had the possibility of having such a space. Housing conditions form a fundamental background for viewing privacy as something desirable. It ought not to be forgotten that there still are many parts of the world where privacy and data protection have little meaning or is a luxury only available for the rich and privileged. Technological development also plays an important role in regard to the perception of privacy. The available

technology may provide good possibilities of protecting the private sphere and at the same time make it more likely that this sphere is invaded. New kinds of communication may lead to new kinds of privacy.

Furthermore, privacy also depends on the political ideology that dominates a specific society. This is in particular relevant with respect to the relationship between state and citizen. Privacy has little or no value in a society that stresses the collective good and sees this as materialised in the state. In such a state only that which has no importance for society may be private.

Privacy and data protection are basically founded on liberal political thinking and it is not obvious or a given fact that these rights should exist. Although this today is taken almost for granted in western countries it is still relevant to be aware of the political background as this may play a role when determining specific issues.

4 Privacy

In order to more precisely determine the contents of the two concepts it is, as mentioned above, expedient at the beginning to focus on privacy. As already mentioned, it may be assumed that privacy concerns different facets of the life of an individual. Before going further it must be emphasized that privacy concerns physical persons. This means that collective entities such as corporations and public authorities do not have a right to privacy. It has been discussed whether this is expedient due to the fact that also corporations can be placed in situations where their reputation and integrity are challenged.³ However, this experience is different from the feelings of human beings and is best dealt with in other parts of the legal system. This is also the case with respect to animals and plants which when protected are protected as reflections of human beings. It is the physical person that may enjoy privacy. The starting point is that this is the case with respect to all persons regardless of age, gender and position in society. This is not obvious as some persons are more able to protect their privacy than others but it is difficult anyway in legal rules to make clear distinctions. Also foetuses and deceased people have a right to privacy although it differs in national law to which extent these are included. Modern biotechnology may in the years to come influence the scope of privacy while enhancing or revising the concept of a person. This technology has made the person more transparent.

A basic facet is the physical space occupied by the individual. Privacy originally focussed on space and in old days mainly on permanent space. The home was the most important and privacy was a restriction on the right of public authorities to enter the home. In most legal regimes it is a basic idea that the individual has a right to be let alone in his own home unless strong legitimate reasons make an intrusion necessary. Today, space has many more and diversified dimensions. It is linked to the work place and more importantly to the

3 This point of view is at least to some degree taken by Lee Bygrave, *Data Protection Law: Approaching its rationale, logic and limits* (The Hague 2002), e.g. p.243-252. – The EU data protection directive leaves it to the member states to decide whether legal persons should be covered by the rules.

movements an individual makes. There are many situations in which the individual is vulnerable and in all cases privacy provides the individual with some kind of control and furthermore implies a right of seclusion from other people. Spaces are different with respect to legal status. Some spaces are private in the sense that there has to be legal authority to enter the space while other spaces are public and not private unless legal rules constitute some kind of privacy.

As mentioned, privacy also concerns information, and is linked to data protection law. The idea is that information linked to the person is private, to a larger or lesser degree. All personal data may be viewed as private and its misuse may lead to an invasion of privacy. However, some personal data is categorized as sensitive implying that misuse regardless of the factual situation constitutes an infringement of privacy while other data is viewed as ordinary and for this reason usage of this data may not always violate privacy. In general privacy law this will depend on the situation while in data protection law all personal data as a starting point is protected. Data protection provides in this sense a more extensive regulation and seen from the legal perspective, this is a main difference between the two concepts.

Privacy also relates to communication as it protects the right to communicate in confidentiality and without surveillance. Technology has advanced the importance of this kind of privacy as it is especially the ability to communicate without being in the same physical place that makes privacy invasions possible. The invention of the telephone is a good example of this phenomenon. It is evident that on line communication today is a major field for privacy protection.

5 Ideas of Privacy

Privacy is related to many different social situations but this does not make us wiser with respect to what privacy actually is. It is interesting to notice that there is no commonly agreed definition of privacy which in general may be seen as an imprecise notion. Many definitions have been proposed and many of them point towards important features of privacy and for this reason they inspire our understanding of what privacy actually is.

Maybe the most famous explanation of privacy was presented in 1890 in an article by Louis Brandeis and Samuel Warren.⁴ According to them a right to privacy means a right to be let alone. Privacy is the right to have a secluded place where no other persons have access unless they are permitted such access. Even though there may be societal reasons that legitimize exemptions from the right to be let alone this is still the basic and fundamental right that must be respected by everyone. The phrase “to be let alone” was borrowed from torts law where it meant not to be touched and in the privacy context means not to be viewed in any way. Privacy is the ability to be yourself.

Brandeis and Warren were inspired by many different kinds of legal reasoning and it has among other things been discussed whether their theory should be interpreted as a theory of ownership, implying that people own the

⁴ *The Right to Privacy*, 4 Harvard Law Review p.193-220.

data that relates to them. This is not a true interpretation of the theory but the question of ownership is important and has often been discussed in the privacy discourse especially in respect to information. It may be seen as tempting to view especially personal data as property and the person as owner since this seems to provide the strongest protection. However, physical and immaterial goods are not the same, and even though the idea of intellectual property is well known there are difficulties linked to the notion of personal information being property.

First of all it is in practice difficult to sustain such a protection. One reason is the fact that information can be many different places at the same time. It is not fenced in as for example real estate is. Furthermore, even though a property right is a strong right it may provide more power than most individuals are able to use in their own interest. It may place too much emphasis on the individual's ability to act. Property may be sold and this means that personal data may be sold and when this is the case the seller loses control and has in reality no knowledge of what the information is used for. It cannot be ensured that the information is not used in a way that invades the privacy of the seller.⁵ Against this background the idea of property as a means to ensure privacy in many situations is dubious even though it is well known that personal data is traded on the internet. Additionally viewing personal information as property may also lead to situations in which this information is withdrawn from society even when it has societal interest. Even though there are basic setbacks, property thinking has a place in privacy. The idea of individual control is sustained by viewing the private as property, and especially for this reason the idea of information as property as elaborated below is important in privacy discourse.

For now we return to Brandeis and Warren. A more reasonable interpretation of the right to be let alone is that it is derived from copyright law. In copyright, it is a basic idea that the author possesses full and unlimited rights to his work before he chooses to make it public. The work is truly private and the author may choose not to share it with anyone; he may even destroy it. This option may be identified with privacy implying that privacy is a right to secrecy. The private sphere may not be invaded by anyone and the person accordingly is let alone. Privacy is viewed as a right of seclusion. When e.g. information leaves this sphere then it is not private in the true sense of the word but this however does not necessarily imply that it may be freely used. Legal rules may determine the boundaries.

This theory has been very powerful and even though 120 years have now passed since its publication there are still many references to it. However, this does not imply that everybody acknowledges this way of viewing privacy as correct or expedient. First of all it has been observed that a right to be let alone implies that others may be kept away from the private sphere and especially from private information. This can be seen as problematic in a democratic society as it provides a possibility for the powerful and the rich to be secluded from society. The theory has from this perspective been seen as a theory that

5 This issue is discussed in detail by Pamela Samuelson, 52 Stanford Law Review (2000) p.1125-1173.

favours those persons who are better off in society.⁶ This criticism illustrates the political dimension attached to privacy. The extent to which privacy is recognized influences how societal affairs are conducted. From this perspective privacy is related to power and this is in particular significant with respect to restrictions to the freedom of information. When privacy shields personal information it restricts the press and the democratic discourse in general. In the age of the Internet where information sharing is widespread this is especially evident.

Although this criticism is too harsh it points towards a well known dilemma. Privacy and freedom of information are both fundamental human rights but they do not always exist in harmony. They have to be balanced and absolute privacy is not desirable in a modern open society. This question is discussed in a little more detail below and in 6.

Privacy as seclusion means that the individual person can withdraw from society and this is not acceptable in a democracy where everybody is expected to participate. In this connection it may be observed that privacy concerns the relationship between people and not the withdrawal from people. Privacy should to the contrary be seen as a right that makes it possible for the individual to make a contribution. It is the private sphere that makes it possible to foster new or critical ideas and thus form the basis of societal communication. The development of society depends on such ideas. While there with respect to specific situations may be a conflict between the two fundamental rights this is not generally the case and it may be argued that privacy constitutes the foundation for exercising freedom of information as well as several of the other basic rights such as freedom of religion and freedom of association.

All in all the article of Warren and Brandeis has laid the foundation for a rich and productive privacy discourse even though that the idea of privacy as being let alone has only relatively few supporters today.

An often invoked idea in the academic discourse is that privacy implies that the individual person has a right to control his private affairs and information. The person must have some kind of influence in this respect. Viewing privacy as a right of control is first of all evident in rules prescribing that private information may only be used when the person has given his consent. To which extent individuals should have a right of consent especially with respect to the processing of personal data and what legal requirements consent should meet in order to be valid and binding are some of the basic questions with respect to the legal regulation of privacy and data protection. Consent is the token of self-determination and the importance attached to consent in legal regulation to a large degree illustrates how privacy is conceived.

From the beginning it seems obvious that people should have a right of consent as the exercise of this right demonstrates how the individual views his privacy. Consent may accordingly be linked to the observation that privacy to a large degree is an individualistic notion in the sense that what is conceived as private differs from person to person. It is likely that there is core area which everybody perceives as private but there are many situations where opinions will differ and here consent is in particular helpful. Through consent the individual

6 See Alan Westin: *Privacy and Freedom* (New York 1967) p.348-49.

exercises control and this seems desirable. However, there are also arguments that point in another direction. First of all an absolute right of consent would mean that privacy becomes a dominating right sustaining the possibility of seclusion mentioned above. The necessity to obtain consent in all cases would not be in the interest of society and would mean that the running of a modern society would not be possible. Who would consent to provide personal information to the tax authorities? Such a rule would place the individual citizen above or outside society. For this reason consent cannot be the sole or exclusive ground for processing of personal information.

A right of consent implies that it is the individual who has to make decisions. This is not only a benefit but may also be a burden. This is due to the fact that with the decision follows responsibility. The individual has to accept the consequences that follow from denying or giving consent. The right of consent may give rise to situations where the individual is let alone in another meaning of this phrase. This is a situation which is well known in health care and in some situations it implies that society does not take sufficient responsibility for its citizens. Consent may empower the individual but too strong emphasis on consent may also mean that society does not take a caring responsibility for its citizens.

From this line of thought arises the question of whether all citizens are able to use a right of consent. In many situations there is little doubt that some individuals better than others understand the consequences of consent and have the ability to decide whether personal data may be processed. It may be seen as strange that a person should not be able to make such a decision. However, there are also many situations in which it is doubtful whether the individual fully understands the implications and consequences of consent. This may be due to the intellectual or social competences that the individual possesses or it may more generally be due to age as in particular the young have difficulties with respect to the long term consequences attached to consent.

Another reason to hesitate may be the character of the situation in which data are being processed. In this connection it must be recognized that modern IT is very complex and that the internet creates circumstances that to many are difficult to comprehend. A well-known example is communication of personal data through social networks such as Facebook where consent or actions similar to consent often lead to data processing which in the long run is not to the benefit of the individual. These considerations are not presented in order to argue against self-determination with respect to personal data or the right to consent but they demonstrate that consent must be treated carefully and that it is not always through such a right that privacy is protected.

Another basic aspect of especially information privacy is transparency. The individual person must have a real possibility of knowing how personal data are being processed, for what purpose and by whom. Furthermore the individual must be informed about persons having access to the data and to whom data are being disclosed. All in all openness is seen as a goal in a regulation aimed at protecting privacy. Transparency may be viewed as a platform for a kind of passive control as it does not in itself provide the person the possibility of either accepting or rejecting data processing. As a contrast, modern information technology besides all its benefits has created complexity and has led to many

situations in which it is difficult for the individual person to know whether his data are being used. For this reason rules that promote transparency have gained increased importance. This is the case both when personal data are being processed lawfully and when this is not the case. Rules on transparency are an important part of the general data protection regulation. They mainly state that data subjects in most cases have to be notified when data is being collected.

The increased interest in transparency may furthermore be illustrated by the amendment of directive 02/58 EC concerning data protection with respect to public electronic communication. In this amendment, directive 09/136 EC, the idea of breach notification has been enhanced and it is expected that it will become a general data protection principle in the future. It is stated that when a security failure creates a risk of serious harm to the integrity or privacy of the person he must be informed of this fact in order to make it possible for him to protect his interests. The individual will seldom be aware of such breaches of security. Against this background, it is likely that such rules enhance transparency. This does not necessarily imply that the data subjects actually will be able to or want to act. They are merely given the opportunity.

6 Balancing

Privacy and data protection are not alone in the world. There are many other considerations that influence the running of society. Some of these considerations refer to basic rights but also more practical considerations have to be taken into account. It is a fundamental question how the different considerations that often do not lead to the same result are weighed or balanced against each other. From the perspective of privacy the answer to this question as a start depends on whether the opposing consideration represents a basic right as for example freedom of information or whether this is not the case as for example administrative efficiency.

With respect to other fundamental rights that in some way contradict privacy the situation is often difficult. This is due to the above described uncertainty as to what privacy entails and furthermore the reasons that precisely sustain privacy. Even though privacy as mentioned above may be viewed as a precondition for other rights such as freedom of information, freedom of religion and freedom of association, such rights will often be given priority in situations where a choice has to be made.

In practice, it is as already mentioned above first of all the relationship to the right of freedom of information that creates problems. This right implies that information, including personal data, may be made public and this is the opposite starting point to the one taken in privacy. Here publication is seen as one of the most disturbing practices. It is a common and widespread assumption that freedom of information is the most important political human right as open and free discourse is the birthmark of a democracy. From this perspective limitations of this discourse are unwanted. Although some exemptions are recognized in article 10(2) of The European Human Rights Convention and although probably all penal codes include rules on libel and defamation, it is only few selected utterances that fall within these rules.

In privacy and data protection regulation it is recognized that the general rules have to be modified in order to ensure democratic discourse. This is made clear in article 9 of Directive 95/46 although this rule is mainly a guideline and does not exactly make it clear to which extent a modification should be made. The general question concerning to which extent the freedom of information argument overrides the privacy argument is not settled and perhaps it cannot be settled except at a case to case level. It seems evident that not all personal information is relevant in social discourse but the designation of this information is very uncertain. As an example it may be considered whether it is possible to make a distinction between information related to persons who are known in society and persons who are not known, “ordinary people”. This distinction should sustain the idea that it is only data concerning well-known persons that is relevant in the democratic discourse. Publication of other personal data cannot be legitimized for this reason. This line of thought does not preclude that also famous and known persons have a right to privacy in the public sphere but it may be part of a framework that guides the balancing of the two fundamental rights.

This specific issue will not be discussed in any detail here. The general conclusion is that privacy has to be balanced against other fundamental rights. Privacy cannot be absolute. The result of the balancing to a large degree depends on the opposing right and the specific situation in which the rights are balanced.

As mentioned above another issue concerns the balancing of privacy and other considerations that do not represent a fundamental right. Article 8(2) of the European Human Rights Convention indicates that such balancing is legitimate but none the less it may be viewed as problematic. This is due to the observation that balancing two interests implies that these interests are on an equal footing. This may reduce the strength attached to privacy. However, regardless of this observation, such balancing is well known and cannot be avoided. Privacy is a right that functions in a community and it is obvious that privacy has to be recognized as something reasonable for the community. Within this framework privacy must be seen as beneficial even when it restricts the freedom to use information etc. and regardless of privacy restricting administrative efficiency, law enforcement, commercial marketing, etc. Due to the vagueness of the concept of privacy the constant balancing means that the determination of privacy at a certain time always is a legal policy issue. At times privacy may be high on the agenda of society and at other times it may be lowly placed. Generally, balancing is an integrated part of the privacy discourse. This is not always evident but is none the less the case.

7 Issues from Current Law

It is not the purpose of this article to describe current law but some of the features of the data protection regulation are helpful in enhancing the understanding of the basic concepts. They also are helpful in order to once more consider whether there is a difference between data protection and privacy. As it has been emphasized above privacy is a right that benefits individuals in order to

establish a legally acceptable community. This is also the case with respect to data protection.

Against this starting point it is reasonable to assume that the individual person, in data protection named the data subject, is given the main or leading role in the legal regulation. This is the case in ordinary privacy rules that normally are focussed on the individual in order to ensure that the provided rights are applied. Data protection legislation presents a somewhat different starting point. In the EU data protection directive and in the transposing national acts it is not the data subject but the controller that plays the leading role. The rights of the data subject are a reflection of the duties of the controller. This mode of drafting is not always noticed and it is not obvious how it should be interpreted. It seems to indicate the belief that the data subject cannot ensure data protection but has to depend on the lawful behaviour of the controller. It may also be observed that this method of drafting makes it evident that data protection in the same way as privacy may be understood as a restriction of freedom in order to protect the rights of the person. The controller cannot by himself decide when and how to process personal data but is obliged to do so in accordance with the principles and procedures stated in the data protection rules. Another way of putting this is that data protection is a price that the controller must pay in order to be able to process personal data. All in all, this method of drafting furthermore demonstrates that data protection has a more technical nature than traditional privacy. In particular, it makes it evident that data protection rules besides protecting personal integrity aim at making it sociable acceptable that personal data are processed. Although the controllers are restricted they in this way also benefit from the regulation.

Even though the individual as mentioned earlier does not own his data it is not self evident that others, including public authorities and private enterprise, may process this data. It seems likely that such processing in many situations will not be seen as acceptable unless it takes place within the framework of rules that ensure privacy protection. This is especially clear after the emergence of modern information technology which led to a fear of invasions of privacy and as it might be recalled many people thought that Big Brother was just around the corner. It is in this environment that data protection law is born on the basis of the assumption that general privacy rules do not sufficiently guarantee protection of the citizens. This to a large degree explains why these rules are addressed to the controller and not to the data subject. The purpose of making personal data processing legitimate is rarely expressly or completely phrased in the legislative documents but there is little doubt that this in reality is one of the main purposes of data protection law.

This understanding of data protection law illustrates that it pursues a societal purpose. This is clearly illustrated by article 1 of the data protection directive. In this rule two purposes are highlighted; the protection of personal data due to privacy and the free flow of personal data within the EU. According to the Lindqvist judgment of the ECJ⁷ it is free data flow that is the primary purpose, i.e. the single information market. This might not be obvious but in our context the interesting point is that data protection rules are not merely drafted in order

7 C 101/01.

to satisfy the interest of the individual. This observation is important for the general understanding of data protection and against this background it may once again be considered whether data protection and privacy should be viewed as one or two concepts.

Regardless of the more evident societal purposes underlying data protection this regulation has traditionally been seen as a kind of privacy law that has emerged due to modern information technology. The data protection directive (Recital no.10) accordingly refers to article 8 of the human rights convention. Data protection is just one more of the many different facets that together constitute privacy. However, this approach is not favoured by everybody today. Some view data protection as an independent legal right, closely connected but not merely identical with privacy. This is in particular the case with respect to the protection of personal data in digital form and on the internet.

This line of thought appears to be sustained by the EU charter on fundamental rights which is now on treaty level due to article 6 of the Lissabon treaty. In the charter, data protection and privacy are in principle two independent rights and are separated in articles 7 and 8. This separation may be due to the existing EU regulation on data protection but it may also imply that the two kinds of rights are actually viewed as in some way independent of each other. It may be argued that data protection foremost is a cluster of rights that mainly refer to the virtual world (electronic data processing) and that although basic assumptions are shared with traditional privacy it constitutes an independent protection of individuals. If the human rights convention was drafted today data protection may have been a right in itself.

However, it seems doubtful whether it is expedient in this way to separate data protection from privacy. First of all such a separation could easily decrease the strength of data protection. Taking this idea to its logical conclusion it would mean that data protection was not covered by article 8 of the ECHR. In many situations this would probably have no practical consequences but there will be situations in which the citizen that insisted upon his protection as data subject would find himself in a less favourable position. Against this background it is not obvious that enhancing data protection as a right in its own is an expedient legal policy move. It seems better and also in accordance with the analysis presented earlier in this paper to maintain that data protection should be understood as information privacy and accordingly as one of the many aspects of privacy. The specific data protection rules thereby implement the right to information privacy.

8 The Future

The status of privacy, including information privacy, depends on society and the technology applied in society. In particular information privacy or data protection must be aware of this fact and adjust its position according to societal changes. This is fairly obvious but the challenge to data protection is that these changes happen very rapidly and sometimes in an unpredictable way; usage of cloud computing being a good example. In this respect it is helpful that data protection rules are often broadly drafted and apply legal standards which entails

that the regulation as such has a fairly high degree of flexibility. To a certain point changes can be absorbed without formally altering the rules.

However, new rules are sometimes necessary, and with respect to the general EU rules it may be observed that this up to now primarily has been the case at the technical level as Directive 02/58 concerning public telecommunication has been amended twice (06/24 and 09/136), while the basic directive (95/46) has been unchanged for 15 years which taking the development of the information society into account is a very long time. Due to the flexibility of this directive and the transposing national acts which also have been slightly adjusted this has not created a crisis, but none the less some concern.

Even though the Directive has functioned well, it is obvious that it to a certain degree is not suitable to current information technology.⁸ Among important issues are the question of a more practical regulation of transborder data flows and the question of a more efficient enforcement of the data protection rules. The Commission has indicated an intention to amend the Directive but it is very likely that this will take some time as the member states view privacy differently due to their independent legal tradition and their own legal culture. Accordingly, it is not possible at this stage to predict precisely which changes will actually be made.

At a general level it is sufficient to conclude that both privacy and in particular data protection have to conform with the current times in order to ensure that the fundamental protection of the citizen and his integrity is upheld in a way that is acceptable to society in general. This has been the mission and this is the mission in the years to come.

8 See on the need to amend the Directive, Article 29 working party, WP 168: *The Future of Privacy*.