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European Courts, New Technologies and Fundamental Rights

Edited by Evangelia Psychogiopoulou
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Introduction

The Hellenic Foundation for European and Foreign Policy (ELIAMEP), in collaboration with the Norwegian Centre for Human Rights (NCHR) of the University of Oslo, organized a workshop on *'European Courts, New Technologies and Fundamental Rights'* on 9 December 2016.

The workshop brought together experts from Norway, Greece and other European countries. It was closed to the public but representatives of civil society and policy-makers were invited to attend it.

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The ambition of the Court of Justice of the European Union to be a Constitutional Court in the field of digital law

Oreste Pollicino, Professor, Bocconi University

This presentation aimed to show how the European Court of Justice in the specific field of digital law and especially in the field of data protection has been able to foster the ambition to be a constitutional court in the EU and to react to frustrations for not having been such a court until now. The presentation was divided in two parts.

The first part discussed the theoretical foundations of the Court's approach, addressing four distinct issues. The first was about the EU Court acting as the 'real' legislator in the EU and thus adopting a 'creative' role. The second was about judicial dialogue and the protection of fundamental rights on the Internet. The speaker also addressed the relationship between law, fundamental rights and new technologies and discussed the issue of 'judicial framing'.

The speaker noted that in the field of digital law, there is an amplification of judicial globalization for two main reasons. The first one is concerned with the legislative inertia of the member states, as it is clearly complicated to follow promptly the new technology. The second reason is that when it comes to technology, the courts tend to look for models in other jurisdictions, thus enabling fertilization in judicial reasoning. On the relationship between fundamental rights and new technology, the speaker stated that this is not a new issue and that judges need to adapt to a changing world. As to judicial framing, the speaker noted that judges engage in cognitive framing, often by using metaphors with a view to shifting from a familiar prototype of law to new content. Adopting a specific judicial frame can influence the final decision and especially the final balance struck between competing rights.

In what followed, the speaker elaborated on the ability of the Court of Justice of the EU to become a real constitutional court in the field of data privacy. The first point made was that the Court can finally count on a constitutional parameter, namely Articles 7 and 8 of the Charter of Fundamental Rights of the European Union. These can be used as a kind of benchmark in order to consider whether EU secondary constitutional is constitutional or not. The second point has to do with the legislative inertia of the European legislator. The third point is concerned with the reactive nature of the CJEU's approach to massive surveillance policy, illustrating a basic dilemma between two constitutional visions of privacy: the European one and the USA one.

Against this background, the speaker reviewed critically the data protection case law of the EU Court of Justice, focusing on *Google Spain*,[1] and *Schrem*,[2] taking the position that the CJEU's stance in these cases was not a matter of interpretation, but a matter of 'manipulation'.

The speaker concluded with some critical remarks on the effects of judicial 'manipulative' interpretation on the protection of fundamental rights, the extraterritorial

[1] Case C-131/12.
[2] Case C-362/14.

application of EU law, the privatization of the protection of fundamental rights and turning internet service providers to constitutional actors, among other issues.

Free speech and online publishing

Dr. Evangelia Psychogiopoulou, Research Fellow, Hellenic Foundation for European and Foreign Policy

The purpose of this presentation was to explore the case law of the European Court of Human Rights (ECtHR) on media and free speech online. The key research question guiding the analysis was the following: Has the ECHR jurisprudence adapted to the new communications environment and online publishing? What standards does the ECtHR apply in Internet cases?

In the offline environment, the ECtHR has developed a comprehensive body of legal standards concerning the traditional media – the press and broadcasting. The Court's case law has been based on Article 10 of the European Convention on Human Rights (ECHR) on free speech and its corollary, the freedom to receive and impart information and ideas. The ECtHR has stressed in several instances the essential function of the media in democratic societies. It has also recognized the right of the media to inform and their duty to impart information and ideas on matters of public interest. At the same time, the ECtHR has acknowledged that the public has a right to receive information and ideas on matters of public interest.

Article 10 ECHR has been construed as imposing a negative duty of non-interference on state authorities. Moreover, the ECtHR has recognized that effective protection of free speech may require state authorities to take positive measures in order to guarantee effective pluralism. However, protection of freedom of expression is not absolute: according to Article 10(2) ECHR, the state can restrict free speech on specified grounds which are considered to be legitimate, provided that relevant restrictions are 'prescribed by law' and they are 'necessary in a democratic society'. The Court has also acknowledged that journalists must act in line with the 'duties and responsibilities' that are inherent in the exercise of free speech.

The ECtHR has ruled on a number of cases involving a balancing exercise between free speech and the right to respect for private life. This is protected under Article 8 ECHR and covers the protection of one's reputation and data protection. The Court has noted that the right to freedom of expression and the right to respect for private life enjoy equal respect. Its role has accordingly been to verify whether domestic judicial authorities struck a fair balance between them and it has developed a set of specific criteria for that purpose.

Concerning the online environment, the cases adjudicated by the ECtHR can be divided in two categories: the cases involving media content and the cases involving user-generated content. Important cases of the first category include: *Mosley v the United Kingdom* (2011), *Pravoye Delo and Shtekel v Ukraine* (2011), *Times Newspapers Ltd v the UK* (nos 1 and 2) (2009) and *Węgrzynowskiand Smolczewskiv v Poland* (2013). According to relevant case law, existing standards remain highly relevant in the online environment. Under certain circumstances, however, the standards that apply online may become stricter (for instance the accuracy requirements imposed on a publisher for past news items that remain available online through Internet archives).

Turning to cases on user-generated content, the ECtHR bases its reasoning on the premise that "because of the particular nature of the Internet, the 'duties and responsibilities' that are to be conferred on an Internet news portal for the purposes of Article 10 may differ to some degree from those of a traditional publisher, as regards third-party content". (*Delfi v Estonia*, para. 113).

In the seminar *Delfi v Estonia* case (2013, 2015), concerning an Internet news portal which was found liable by domestic courts for defamatory comments made by users, despite their prompt removal upon request, the ECtHR used four criteria to assess whether the interference with the news portal's freedom of expression was "necessary in a democratic society": the context of the comments; the liability of the actual authors of the comments as an alternative to the news portal's liability; the measures applied by the news portal to prevent or remove defamatory comments; and the consequences of the domestic proceedings for the news portal. The ECtHR's assessment appears to have been substantially influenced by: a) "the ease, scope and speed of the dissemination of information on the Internet, and the persistence of the information once disclosed, which may considerably aggravate the effects of unlawful speech on the Internet compared to traditional media" (para. 147); and b) the precise nature of the obligations incumbent on the news portal under the Estonian legislation, as construed by the Estonian judiciary. Concerning the latter, it is unclear whether the news portal was under an obligation to prevent the uploading of unlawful comments on its website or whether it was under an obligation to remove the unlawful comments without delay after publication on its own initiative (and thus without notice). Considering that in the case of comments amounting to hate speech and incitement to violence (as were deemed to be the comments at issue), an obligation to remove them, without delay after publication, even without notice, does not amount to a disproportionate interference with freedom of expression, the ECtHR found no breach of Article 10 ECHR. *MTE and Index.hu Zrt v Hungary* (2016) confirmed the *Delfi* reasoning, even if the opposite conclusion was actually reached, with the ECtHR declaring breach of Article 10 ECHR. This is because the comments at hand were offensive and vulgar – not an incitement to hatred or violence

To conclude, the speaker noted that although it is too early to draw generalized conclusions concerning the ECtHR's approach in cases involving free speech online, some adjustment of the Court's reasoning to the specificities of the online environment appears to be taking place. However, such an adjustment does not call into question – at least for the time being – the 'traditional' ECtHR understanding that free speech and the right to respect for private life are neither absolute nor in any hierarchical order.

Fair balance in European intermediary liability

Christina Angelopoulos, Lecturer, University of Cambridge

The presentation was about the notion of a 'fair balance' between conflicting fundamental rights as this has been developed as a solution to the problem of intermediary reliability in the case law of Europe's two highest courts, the ECtHR and the Court of Justice of the EU.

The analysis began with an examination of the EU situation. The heart of the current EU legal framework for intermediary liability can be found in the so-called 'safe harbours' of the E-Commerce Directive (ECD). These provide immunity for intermediaries, i.e. defend them from liability. In particular, Article 12 ECD protects intermediaries against liability in the provision of "mere conduit" services, Article 13 ECD in the provision of "caching" services and Article 14 ECD in the provision of "hosting" services. However, the normative power of these safe harbours is limited: first, the safe harbours only apply to protect intermediaries against liability in the provision of the three listed services and say nothing about other services (e.g. search); second, the safe harbours are conditional, meaning that they do not always protect intermediaries from liability even in the provision of the three listed services; thirdly, the safe harbours are negatively-stated, meaning that they only inform Member States when they cannot impose liability on intermediaries, but say nothing about when such liability must be imposed; and finally, the safe harbours only protect intermediaries against liability in the strict sense of the word, i.e. for damages, as opposed to injunctive relief. In that regard, a complementary provision to the safe harbours should also be kept in mind: Article 15(1) ECD states that Member States must not impose a general obligation on providers to monitor the information which they transmit or store nor a general obligation actively to seek facts or circumstances indicating illegal activity. Again however, as with the safe harbours themselves, Article 15 only protects intermediaries when providing the services covered by Articles 12, 13 and 14 ECD.

In order to overcome these limitations and further develop the EU rules on intermediary liability, the CJEU has turned from the secondary provisions of the directives to primary EU law. In particular, it has focused on the Charter of Fundamental Rights of the European Union (the 'Charter'). The relevant case law of the CJEU has to date primarily concerned intellectual property. In this regard, the Court has recognised that the right to intellectual property is enshrined in Article 17(2) of the Charter (*Scarlet Extended* (Case C-70/10)). It has also however emphasised that this does not mean that this right is inviolable and must be absolutely protected. Instead, in *Promusicae* (Case C-275/06), the Court declared that the Member States must, when transposing EU directives, take care to rely on an interpretation which allows for what it called a 'fair balance' to be struck between all relevant fundamental rights. The exact configuration of such rights will differ from case to case, however the usual schematic identified by the CJEU has opposed the right to intellectual property (Article 17(2) of the Charter) on one hand with, on the other hand, the freedom of the intermediary itself to conduct a business (Article 16 of the Charter) and the rights of the users of the intermediary to their privacy (Article 7 of the Charter), the protection of their personal data (Article 8 of the Charter) and their freedom of expression (Article 11 of the Charter). Problems exist in this regard however: although the application of fundamental rights law overcomes the limitations posed by the ECD, the

notion of a 'fair balance' is hard to apply. It has therefore been accused of being an empty slogan, too vague a notion to provide real answers to intermediary liability. The question therefore presents itself: how can this problem be overcome? How can balancing be made to work?

The speaker turned for inspiration to two intermediary liability cases recently decided by the ECtHR: *Delfi v Estonia* (application no. 64569/09, Grand Chamber, 16 June 2015) and *MTE & Index.hu Zrt v Hungary* (application no. 22947/13, 2 February 2016). Contrary to the cases that have come before the CJEU, both of these concerned, not intellectual property, but hate speech and the protection of the right to one's reputation. At the same time, like the CJEU, the ECtHR approached the cases as clashes between rights, in this case Article 8 of the ECHR on the right to private life and Article 10 ECHR on freedom of expression. Also like the CJEU, the ECtHR applied a 'fair balance' analysis to resolving these clashes.

The speaker acknowledged that there is much to criticize in the judgements of the ECtHR in these two cases, especially *Delfi*. At the same time, she observed that the case law of ECtHR on intermediary liability has demonstrated one major advantage over that of the CJEU: the Strasbourg court approaching the notion of fair balance in intermediary liability through the identification of balancing criteria, i.e. benchmarks that can guide us through the balancing process. In *Delfi*, those were identified as the following: the context of the relevant comments, the measures applied by the intermediary in order to prevent or remove the comments, the liability of the actual authors of the comments as an alternative to the intermediary's liability and the consequences of liability for the intermediary. In *MTE*, two more criteria were added: the content of the comments and their consequences for the injured party.

On this basis, the speaker moved on to consider whether the CJEU might also be in the process of developing similar balancing benchmarks. The most relevant CJEU case in this regard has been *Telekabel* (C-314/12). This concerned a clash between copyright and the freedom to conduct a business, in combination with freedom of expression. After a detailed analysis, the CJEU concluded that an intermediary may be ordered to take reasonable measures for the enforcement of copyright. Such measures cannot be considered to be incompatible with the requirement of a 'fair balance', provided that: (i) they **do not unnecessarily deprive internet users of the possibility of lawfully accessing** the information available and; (ii) that they **have the effect of preventing** unauthorised access to protected subject-matter or, at least, of **making it difficult to achieve and of seriously discouraging internet users** who are using the services of the intermediary from accessing infringing material. Very similar conclusions were later applied in the more recent *McFadden* case (C-484/14). As the speaker stated, this analysis could be an indication that the CJEU – much like the ECtHR – is also moving towards a criteria-driven approach to balancing, although its criteria are at the moment far less well-developed.

The speaker rounded off the presentation by examining 6 possible measures that could be imposed on intermediaries as duties of care determining their liability: warning systems; notification to the authorities; the blocking and removal of infringing content, including notice-and-take-down; the suspension of the perpetrator of the infringement; measures for the identification of the perpetrator; and the monitoring of content, including filtering. Based on more detailed analysis engaged in other work, the speaker considered

whether these measures could be said to strike a ‘fair balance’ or not. She concluded that notification to the authorities and the monitoring of content would not pass such a test. The remaining measures however might, depending on the circumstances of the individual case.

The role of the CJEU in the Europeanization of copyright law

Ana Ramalho, Assistant Professor, Maastricht University

The CJEU has ruled on several key aspects of copyright law, such as the conditions for protection of works or economic rights. Some of these rulings have de facto harmonized certain copyright concepts that were not harmonized by legislation. This is the case, for instance, as regards the notion of originality as the author's own intellectual creation or the definition of the essential characteristics of parody. These and other examples give rise to accusations of judicial activism.

However, relying on claims of judicial activism has several shortcomings. There is no accepted definition of "judicial activism". In addition, the Court is not bound to use a specific set of criteria or method of interpretation when deciding a case, which in turn means that it is not possible to define a scientific reasoning for evaluating the Court's rulings. What is more, there is a circularity inherent to judicial activism: independently of the criteria adopted to detect judicial activism, its definition ultimately amounts to courts going beyond the law. It is thus necessary to first define what the law is, a task which often falls on the courts themselves. Within the EU, Article 19(1) of the Treaty on European Union (TEU) illustrates this paradox.

It is thus much more useful to discuss the effects or the binding force of the CJEU case law, and here, the central concept is the notion of precedent. The concept of binding force of precedents can be presented as a matter of scale, rather than the binary formula binding-non-binding. If we focus on the question of precedent in EU judicial practice we can say that the justifications for the use of precedent are the principle of non-discrimination, the questions of legal certainty and consistency and the ratio of article 267 TFEU (to promote the consistent application of EU law in Europe). But in EU law authors do not agree on the existence of a formally binding precedent. In the field of copyright some formulas have helped the CJEU establish the idea of a binding precedent. It is the case of the notion of "autonomous concepts of EU law", under which the CJEU has fleshed out certain concepts contained in Directives that ought to be interpreted uniformly throughout the EU. By resorting to the notion of "autonomous concept of EU law", the Court harmonizes certain concepts thereby giving them a precedential strength. Another formula is the self-reference of the Court, using expressions such as "according to the established case law" or "as the Court has consistently held." Another practice that can be observed is the increasing tendency of the court to resort to EU-level normative content, such as the Charter, supporting its decisions based on certain norms. It is therefore useful to conceptualize the impact of CJEU precedents. What is suggested is that the impact and normativity of precedents varies according to the actor at stake (CJEU, national courts, EU legislator).

The CJEU has no system of formally binding precedent but the Court tries to be consistent with previous decisions (self-citation). There are only very few cases of reversal. The selective referencing of the court leads to a discretionary power to control judicial policy orientation and can reinforce future policy choices from law makers (the so-called "cumulative authority"). This can in turn lead to a policy "lock-in". The CJEU can however counteract this scenario by using distinguishing and departing techniques.

With regard to national courts, the CJEU has emphasized that their relationship is one of reciprocal nature. According to Article 267 TFEU, it is up to lower national courts to decide whether to request a preliminary ruling from the CJEU, but national courts of last instance have the obligation to refer. The latter courts can however be exempted from the obligation to refer if "it has been established that the question raised is irrelevant or that the (…) provision in question has already been interpreted by the Court of Justice or that the correct application of Community [now EU] law is so obvious as to leave no scope for any reasonable doubt".

The second criterion – whether the question has already been interpreted by the CJEU – leads to the creation of precedents. However, the existence of such "precedents" does not preclude a national court from referring the same question (see the *ICC* case). We do need however to distinguish the normativity of precedent according to the court. The referring courts in principle, must apply the ruling (ratio of art. 267 TFEU; *Benedetii v Murani*) although there are some cases of rebellion (*Solange I*; *Roquette*).Regarding non-referring courts, the binding nature of the decision is still subject to much academic controversy. In the case C-46/93, *Brasserie du Pecheur*, the CJEU expressly extended the binding force of its case law to all national courts (and not only to the referring court). But here again some courts have refused to follow preliminary rulings (for example, with regard to the definition of originality, it has taken UK courts a few decisions to internalize the EU threshold of "author's own intellectual creation" as advanced by the CJEU in *Infopaq*). There are thus different degrees of bindingness according to the court at stake and different degrees of resistance from the part of different courts.

Regarding the EU legislature, there are three Directives based on CJEU decisions. However, the Commission is not always a blind follower and the relationship between negative and positive integration is not regulated. It should also be borne in mind here that political factors might come into play, such as e.g. a need to justify legislative choices.

To sum up, while de facto there are many cases of policy lock-in because of "precedents", de jure precedents are not formally binding, or at least we can say that they have different force for different actors. So this means that there is enough leeway to put copyright policy on the right track, if need be.

Users as authors: protecting the intellectual property of Internet users

Milos Novovic, Doctoral Research Fellow, University of Oslo

When discussing about copyright online, the liability of internet intermediaries and the online use of service providers, one usually thinks about how to protect content. The speaker focused on the type of permissions given to online platforms and users' protection. He pointed to the limited literature on the issue of licensing and coined his presentation from the perspective of international law and the law governing online platforms.

Many online platforms are US companies which usually consider themselves to be subjected only to US law and jurisdiction. They often indicate for instance that their terms of service (and any other terms, policies, or guidelines that they provide) are only available in English. In the field of copyright licensing, there has been no harmonization at EU level. The Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) and its jurisdictional regime may offer online users protection only as consumers. To make use of this Regulation, it is therefore necessary to first prove that users are 'consumers' and then that the platform providers have the intention to target their country.

According to the speaker, limits to party autonomy in the choice of applicable law may stem from the characterization of the issue at hand, existing consumer protection safeguards in the choice of law (for instance, in the absence of choice, the law of the consumer's habitual residence will apply, whereas in the case of a choice-of law clause, this may not have the result of depriving a consumer of the protection afforded to him/her by mandatory provisions of the law of the consumer's residence). Mention should also be made of EU substantive consumer protection law safeguards in the Unfair Terms Directive (see for example Article in 6(2)) and the CJEU's case law on overriding mandatory requirements in relation to consumer protection.

To conclude, the speaker stressed that in the absence of harmonized rules on copyright licensing across the EU, the role of European courts essentially lies in securing the protections guaranteed to users by their national laws. As this system is however highly unpredictable, the speaker argued for harmonization, yet cautioned about the complexities of any such venture if all cross-cutting issues are factored in (i.e. copyright law, contract law, tort law, privacy law, consumer protection law, arbitration law and so on).

The Court of Justice of the EU: what to expect after the General Data Protection Regulation?

Irene Kamara, Tilburg Institute for Law, Technology, and Society (TILT), Tilburg University; Vrije Universiteit Brussel (LSTS)

The Court of Justice of the EU has published landmark cases in the field of data protection and informational privacy over the past years. Such case law and the CJEU taking on the role of gatekeeper for the right to protection of personal data was necessary for various reasons, which the speaker analyzed. The 'gatekeeper' role was welcome by many privacy advocates, but also criticized by others. The main argument of the presentation was that the role of CJEU in the recent data protection jurisprudence was a necessity for the purposes of safeguarding a fundamental right.

The first reason necessitating the CJEU's action was the 'obsolete' data protection legislation. Only recently has the new EU data protection legislation been published in the Official Journal of the EU. The General Data Protection Regulation (GDPR) 679/2016, which will apply from 2018, is a lengthy text of 99 articles and 173 Recitals. The GDPR aims to modernize the legal framework for the fundamental right to protection of personal data. The legislative process was concluded only earlier this year. The previous regime, the Data Protection Directive 95/46/EC, a law dating from 1995, was designed for offline data processing. As a result, the provisions of the Directive (and the national legislation transposing the Directive) were challenged by the rapid technological developments, which increased the collection and processing of personal data, such as online social media, data mining, behavioral tracking and others.

A second reason was that the existing data protection legislation was 'problematic', having an adverse impact on the rights of individuals. This was the case of the Data Retention Directive 2006/24/EC, which amended the ePrivacy Directive 2002/58/EC. The Data Retention Directive was adopted after the terroristic attacks in Madrid (2004) and London (2005). It imposed obligations on telecommunication operators and Internet service providers to retain certain types of data generated by individuals, such as traffic data, metadata and user identification data. The aim was to enable the work of 'competent authorities' in investigating, detecting and prosecuting serious crimes. The Directive did not provide a definition of 'serious crime' and it did not include scalability regarding the retention periods. At national level, several laws implementing the Data Retention Directive, were challenged in court and found unconstitutional.

The third reason for the need of the CJEU to take on the role of gatekeeper, was the 'constitutionalization' of the right to protection of personal data, which was upgraded to an autonomous fundamental right enshrined in article 8 of the Charter of Fundamental Rights and article 16 TFEU.

All the above reasons are summarized with the following quote by the former president of the Court of Justice of the European Union:

'*European justice is a fundamental guarantee for the application of the rule of law and democracy. But it is also a major factor of adjusting the legislative choices to ongoing societal changes. The institutional setup is such that calls for the European judge to make*

sure that legislative solutions adopted under given circumstances maintain their value even in view of novel phenomena. It was not rare in such a context that the Court was even brought to annul the legislative choices that contradicted fundamental texts or higher principles.'[3]

Consequently, the CJEU responded to the above challenges and changes with landmark cases such as the *Google Spain* case,[4] the *Digital Rights Ireland* case,[5] the *Schrems v Facebook* case,[6] and others.

In the case of *Google Spain*, the CJEU responded to the challenge of obsolete legislation. The CJEU had to interpret terms of data protection law, such as 'controller' and 'processing of personal data' in the context of search engines, which index information provided by third parties.

In the joined cases of *Digital Rights Ireland and Seitlinger*, the CJEU addressed the issue of legislation which was incompatible with the Charter of Fundamental Rights. The Court found that the Data Retention Directive interfered with the rights to respect for private life and protection of personal data in a disproportionate way and declared the Directive invalid.

After the adoption of the GDPR, a modern law, drafted with the aim to safeguard the fundamental right to protection of personal data, whilst taking into account various technological challenges, and following the annulment of the Data Retention Directive, a question regarding the future role of the CJEU as gatekeeper of the right to personal data protection arises. Is it still necessary for the CJEU to play such an active role in the field of data protection? The reply to this question should be affirmative.

First, in the near future, there are several significant cases pending before the CJEU. The Digital Rights Ireland organization has already brought a complaint against the Privacy Shield,[7] the framework adopted by the European Commission and the Federal Trade Commission with the aim to enable an adequate level of protection for the personal data rights of Europeans in the US. Another pending case is a request from a Greek Court for a preliminary ruling regarding the national laws implementing the Data Retention Directive.[8] In the long-run, the CJEU should have as a significant role in safeguarding the right to protection of personal data as in the past. It has already been mentioned that the GDPR replaces the Data Protection Directive. The new Regulation maintains the basic concepts of the Directive (data processing principles, data subject rights etc.), but it also introduces novelties. Such novelties are for instance the right to data portability, the data protection impact assessment and data protection by design and by default. The GDPR is an elaborate text but there is a need for interpretation of the legal standards (e.g. the 'reasonable expectations', 'high risk', etc.) it contains, the principles it establishes in specific contexts, but also the novel provisions it introduces on obligations and data subjects' rights. Ultimately, it is in the nature of the right to protection of personal data to be challenged by

[3] Vasilios Skouris, 'After 12 Years', 23 MJ 2 (2016).
[4] Case C-131/12.
[5] Joined cases C-293/12 and C-594/12.
[6] Case C-362/14.
[7] Case T-670/16.
[8] Case C-475/16.

digitalization and technological developments. As was the case before the GDPR, the role of the CJEU to interpret the data protection legislation by adjusting concepts and principles in order to respond to risks posed by technologies and address societal challenges is expected to be as valuable, as it has been until today.

The ECtHR as constitutional court in the age of Big Data

Bart van der Sloot, Senior Researcher, University of Tilburg

There are signs that the ECtHR is partially becoming a constitutional court, no longer focusing merely on real and concrete human rights violations. For a long time, the ECtHR has held that the right to privacy (Article 8 ECHR) could only be invoked by natural persons who had been harmed directly, individually and significantly from a violation. The ECtHR in principle rejects legal persons as claimants with respect to article 8 ECHR. And with respect to individual interest, the Court rejects natural persons who submit an *in abstracto* claim, a-priori case, hypothetical complaints, claims about minimal harm (*de minimis rule*) and claims about societal interests. The ECtHR approaches privacy and societal interests as relative, so those interests are balanced and weighed in concrete cases.

This approach is becoming increasing difficult in the era of Big Data and mass surveillance because these types of processes aim at everyone, rather than specific individuals or small groups. Consequently, in the big data processes, it is often very difficult to specify individual harm or show how an individual right has been affected. The problem with the big data is that the gathering of mass data is about unidentified people, it is without any pre-established goal (looking afterwards for statistical correlations) and it is very difficult to specify the individual harm. The data subjects are unaware of many of the data processing initiatives. The real danger these processes pose do not relate to individual rights, but to the abuse of power (i.e. secret services) and overriding the minimum conditions for the use of power by the state.

Consequently, big data cases are different from the usual privacy and data protection cases. The Court is struggling and the question is how it should approach the cases revolving around mass surveillance and big data. Should it stick with its focus on the individual harm and subjective rights – in which case these complaints will need to be rejected – or should it – in order to accept chose matters - redefine its approach?

The ECtHR choses the second option. In exceptional cases, mainly, though not only, revolving around mass surveillance, it is prepared to relax its individualized approach to privacy. Although the Court has done so for years without explicitly acknowledging it, it has finally made this unequivocally clear in two recent cases, namely *Szabó & Vissy* and especially *Zakharov*. In *Zakharov*, the ECtHR stressed that it accepts that an applicant can claim to be the victim of a violation occasioned by the mere existence of secret surveillance measures, or legislation permitting secret surveillance measures, if certain conditions are satisfied.

In these types of cases, the Court does not assess a potential human rights violation, but merely checks whether a law of policy as such abides by the minimum principles of legality and legitimacy. This is a role a traditional constitutional court takes up, assessing the constitutionality of laws. In these types of cases, the Court is also explicitly using similar terms such as conventionality, convention-compatibility and convention-compliance.

An important case for this regard is the interest of the *Vallianatos and Others* case, which is not a case about mass surveillance. The Grand Chamber performs an abstract

review of the "conventionality" of a Greek law, while acting as a court of first instance. The Grand Chamber not only reviews the Convention compliance of a law which has not been applied to the applicants, but furthermore does it without the benefit of prior scrutiny of that same legislation by the national courts. In other words, the Grand Chamber invests itself with the power to examine *in abstracto* the Convention compliance of laws without any prior national judicial review. The abstract review of "conventionality" is the review of the compatibility of a national law with the Convention independently of a specific case where this law has been applied.

The ECtHR leaves its own focus on individual rights and personal interests in order to be able to assess cases concerning mass surveillance under Article 8 of ECHR. In those cases specifically, the Court does accept hypothetical complaints, it does accept a-priori cases, chilling effect, and *in abstracto* claims, it declares legal persons and civil society organizations admissible, it does accept class actions and looks at societal interests. In those cases, the ECtHR assesses the intrinsic qualities of laws and policies as such. The question is how this approach as a constitutional court relates to its role as a human rights court.

Norwegian courts, new technologies and fundamental rights

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The presentation was a case review of some of the most relevant recent cases in Norwegian courts focusing on new technologies and fundamental rights.

Norwegian courts are still fairly new to discussing human rights issues in relation to new technologies. In many cases that relate to human rights, the human rights issues are not expressly discussed by the courts. Human rights norms are already consumed within the national legislation. In Norway there are only a few relevant cases in the Supreme Court, and it is difficult yet to identify a principled approach. Most of the relevant cases concern conduct on the Internet and have to do with issues such as the blocking of websites, 'liking', sharing or posting data on social media, abuse of personal photos, and so on.

The Norwegian court system has three levels of courts, consisting of: 65 district courts, 6 appeals courts and the Supreme Court. There is no separate constitutional court. One relevant point which is important to stress is that Norway is not a member of the EU and therefore not directly bound by the judgments of the Court of Justice of the EU. In what followed, the speaker presented five cases in Norwegian courts that had to do with new technologies and fundamental rights.

The first case concerned copyright on the Internet and the liability of Internet service providers. In 2013 the Norwegian Copyright Act was amended to strengthen the protection of electronic copyright protected information. In 2015, the Oslo District Court ordered Internet service providers to block access to eight piracy websites (e.g. The Pirate Bay). Additionally, in 2016 the Oslo District Court ordered blocking of access to eight streaming services. The requirement of the legislation is that websites can be blocked if they provide illegal access to a considerable scope of copyright protected materials.

The second case concerned social media and the «right to like». An anonymous Facebook profile posted a number of defamatory statements about an identified individual. The individual could not establish who was behind the profile, but pressed charges against another person who had pressed «like» to some of the posts. In 2014 the Oslo district court said that pressing «like» does not create criminal liability, but the sharing of posts might.

The third case concerned social media and the right to privacy (Supreme Court in 2016 (HR-2016-2263-A)). The case concerned young women who shared photos of an intimate nature on social media, particularly Snapchat. Through «Snapsave» and other services, screenshots were taken without the women's knowledge, and these photos were later shared through Bit Torrent technology. One person was sentenced to prison for downloading these photos on his computer. Human rights were not expressly discussed, but privacy considerations were used to justify an expansive interpretation of national legislation.

The next case concerned mobile phones and the right to privacy (Supreme Court in 2016 (HR-2016-1833-A)). A person was charged with aggravated violence, and the police requested access to his mobile phone to determine whether it had been used to photograph

or videotape the violent act. The charged person refused to give out his pin code. The Supreme Court decided that the police could not use force to unlock the phone with his finger print because of a lack of legal basis in national law. The Court based this conclusion on Article 8 of the European Convention on Human Rights (ECHR).

The last case concerned Facebook and to what extent it qualifies as a «public space». In 2015 statements on public Facebook walls were considered as having been made in a public space, satisfying a requirement in Norwegian legislation on hate speech. Preparatory works to the Norwegian legislation indicate that Facebook posts that are accessible to more than 20-30 people are considered «public». The Oslo District Court also made an explicit reference to «internet trolls» as limiting the freedom of expression of others.

The speaker concluded that Norwegian courts should continue to develop a more principled thinking about human rights implications of new technology.