



CHANGING PRIVACY LANDSCAPE

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Privacy Law Has Two Foundations

- Privacy law in most of the world encompasses individual autonomy (privacy as a value) and fair processing
- European law is more explicit
 - Privacy is a fundamental constitutional right to assure individual freedom, dignity, and protection of family life
 - Data protection, with the GDPR, is a constitutional and statutory right to fair processing to protect privacy but also assures the full range of “rights and freedoms”
 - This is a slight change from the past implementation of the Directive via local laws
 - The full range of rights impacted by data, include health, education, and economics
- As professionals, it is useful to differentiate between privacy and fair processing

Technology Has Made Privacy As Autonomy More Difficult

- First web browser - 1993
- Fixing Y2K problems with common processing modules – 2000
- RFID expanding automated observation beyond the Internet – 2004
- Precursors to Big Data - 2006
- iPhone released – 2007
- Internet of Things – 2010
- Term big data coined by “Economist” - 2010
- Wearables becomes a thing – 2013
- Cloud dominant anchor for services - 2015
- Bluetooth beacons – 2015
- Analytics the basis for innovation - 2017

Concepts of Dignity Come Into Play

- In human rights context, dignity is “the innate right to be valued”
- United States dictionaries define dignity “as being worthy of honor”
- This has ramifications for advanced analytics
 - Does labeling based on analytics deplete our innate right to be valued, or
 - Is it a reflection of our actions to enhance or diminish our individual honor
- This impacts how we think about big data and the profiles that are its products

The Regulatory Environment

- Globally, we are in a privacy regulatory bear market
 - European Court of Justice – Independent regulators should empower individuals by investigating their complaints
 - 2018 - EU fines of up to 4% global turnover
 - Colombia, Canada, and other locations discussing granting of fining power directly to regulators or increasing fines
 - UN report: facilitate global data flows by harmonizing enforcement at a higher level
 - Courts everywhere becoming more activist
- OECD individual participation principle is more and more about the ability to go to a regulator

Nature of Today's Data Use Creates a Dilemma

- Privacy feels best when individuals have control
 - But even the best notices are long, complicated, layered
 - With created data how does one even inform?
- Advanced analytics is, if we are honest, a repurposing for “thinking with data”
 - But not “thinking with data” impacts individuals and society
- So, how do we create a protection system?
- That is where concepts such as legitimate interests comes into play

European Law Requires Using the Right Legal Permission

- (a) the data subject has unambiguously given his **consent**; or
- (b) processing is necessary for the **performance of a contract** to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or
- (c) processing is necessary for **compliance with a legal obligation** to which the controller is subject; or
- (d) processing is necessary in order to **protect the vital interests** of the data subject; or
- (e) processing is necessary for the performance of a **task carried out in the public interest** or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or
- (f) processing is necessary for the purposes of the **legitimate interests** pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1).

Balancing Process

- Controller legitimate interests versus the full interests of the individual
 - WP29 paper reminds us it is a data protection issue, i.e., full range of fundamental rights
- End of the day, the issue is fairness as it relates:
 - To the full range of individual's interests
 - The risks from not using the data as well as those that come from the processing
- “Unified Ethical Frame for Big Data Analysis” established the concept of using the full range of interests for assessments

Key Governance Concepts

- Data protection assures the full range of individual interests, not just privacy
- Reticence risk is meaningful, real, and creates harms
- A fair and just assessment is necessary – what is the cost of not processing?
- This takes us beyond compliance to ethics