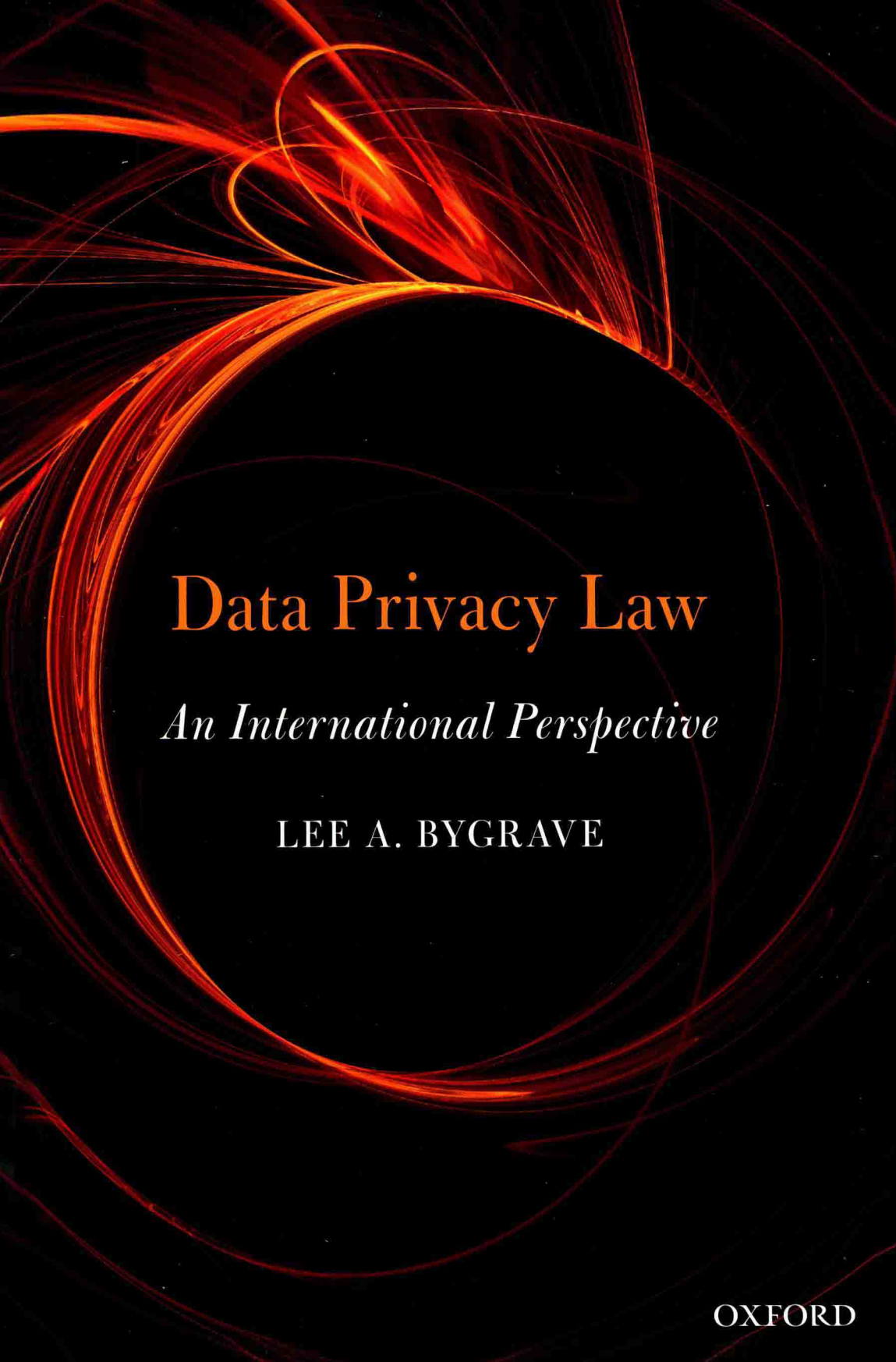
Data Privacy Law
An International Perspective
LEE A. BYGRAVE
OXFORD

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OXFORD
UNIVERSITY PRESS

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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 2014

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2013946837

ISBN 978–0–19–967555–5

Printed in Great Britain by
CPI Group (UK) Ltd, Croydon, CR0 4YY

DATA PRIVACY LAW

Preface

Almost 25 years have passed since I began conducting research in the field of data privacy law. During that period, the field has burgeoned in multiple respects—the number of regulatory instruments embraced by it, their global spread, level of density, normative status, and practical impact on organizational processes. Data privacy law is no longer a niche subject attracting the interest of a small number of scholars, policy entrepreneurs, and legal practitioners. It now boasts a large amount of jurisprudence and scholarship, and forms a staple of many practitioners' professed competence. These developments reflect the continuing maturation of our 'information society' in which personal data is increasingly regarded as a valuable resource in itself and exploited accordingly.

The field's growth has been especially pronounced over the last ten years. My earlier monograph in the field—*Data Protection Law: Approaching Its Rationale, Logic and Limits*—was published in 2002. While its depiction of the origins, purposes, and mechanics of data privacy law is still fairly accurate, it fails to take adequate account of the numerous developments in the field during the last decade. Surprisingly, no other book has been published—at least in English—taking account of those developments and offering the same transnational overview of the field as offered by my earlier book. I hope that this new book will go a substantial way towards filling this gap.

The book is primarily intended for legal practitioners and scholars who wish to acquire understanding of the core principles and mechanics of data privacy law from a cross-jurisdictional perspective. It is not intended to be a handbook for practitioners. Thus, it does not provide, for instance, detailed advice on compliance strategies. It tackles, nonetheless, many points of law that trouble practitioners as much as legal scholars. An example is the meaning of 'personal data'—a festering issue that is crucial for determining the application of most data privacy law.

The book is also intended to be suitable as a textbook for teaching university students. It ought to function more suitably as a general introduction to the field than my 2002 book does. The latter bears the bane of having been closely based on a doctoral thesis and devoting a large number of pages to the issue of whether or not data privacy law ought to cover data on collective entities. Although far from trivial in principle, that issue is usually of marginal interest to newcomers to the field and, indeed, to those already working in it.

In this book, I have tried to keep the presentation succinct yet sensitive to the intricacies of the field. Thus, the text presents the basic bones of the regulatory framework supplemented by references to more elaborate analyses of, say, fissures in those bones. At the same time, the book does not have any large 'bone to pick'. In other words, it does not have the advancement of a particular argument as its basic remit. Its broad thrust is descriptive. This does not mean that it steers clear of controversy or that its descriptive endeavour is free of bias. I am sympathetic to the primary aims of data privacy law. I believe that the privacy-related interests it is intended to protect are far from being anachronisms. Yet I am critical of its potential for regulatory overreaching—that is, its potential for being applied so broadly that it stands scant chance of being enforced. My stance on these matters colours the book's presentation of the field.

Revised editions of the book are planned for publication at regular intervals. The intention is to establish an international standard text that remains reasonably current. The currency of this edition is likely to be short-lived. Significant changes to the legal landscape are afoot, particularly with the European Union in the throes of revising its regulatory framework for data privacy. As this book is being finalized, some of the general contours of the Union's revised framework have become visible but consensus has yet to be reached on many of the details. I have tried to take some account of the revision by referring where appropriate to the proposal for a new Regulation on data privacy issued by the European Commission in 2012. Yet the legislative process is highly contentious and likely to be protracted, as has frequently been the case with other data privacy legislation. Once the dust is settled, this book will be issued in a fresh edition that pays due consideration to the changed landscape.

In writing the book, I have benefited from the wonderful working environment of the Norwegian Research Centre for Computers and Law (NRCCL) and the Department of Private Law at the University of Oslo. The camaraderie of my colleagues there is deeply appreciated. I commend too Samson Yoseph Esayas and Francis Medeiros for diligent research assistance. Colleagues from elsewhere, particularly Graham Greenleaf and Chris Kuner, have also provided valuable input for which I am grateful. At Oxford University Press, thanks go to Ruth Anderson for sparking work on the book, and to Catherine Cotter and Emma Hawes for congenial assistance in finalizing it. Last but not least, I thank Toril, Sondre, and Tuva for their support and patience, especially during the last stage of the writing process.

References to legal instruments are to their amended state as of 15 September, 2013. Websites were last accessed on that same date.

Lee A. Bygrave
Oslo, 15 September, 2013

List of Abbreviations

A29WP	Article 29 Data Protection Working Party (EU)
AFSJ	Area of Freedom, Security and Justice (EU)
AGPS	Australian Government Publishing Service
APEC	Asia Pacific Economic Cooperation
ASEAN	Association of South East Asian Nations
CJEU	Court of Justice of the European Union
CLSR	Computer Law and Security Review (formerly Report)
CoE	Council of Europe
DPA	Data Privacy Agency
DPD	Data Protection Directive (95/46/EC)
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOWAS	Economic Community of West African States
ECR	European Court Reports
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
ETS	European Treaty Series
EU	European Union
FFS	Finlands författningssamling (Collection of Finnish Statutes)
GDPR	General Data Protection Regulation (EU)
HRLJ	Human Rights Law Journal
HMSO	Her Majesty's Stationery Office (UK)
ICCPR	International Covenant on Civil and Political Rights (UN)
ICT	information and communication technology
IDPL	International Data Privacy Law
ILO	International Labour Organisation
Intl	International
IP	Internet Protocol
ISP	Internet Service Provider
J	Journal
JILT	Journal of Information, Law & Technology
LJ	Law Journal
L Rev	Law Review
NOU	Norges Offentlige Utredninger (Official Reports to Government, Norway)

OECD	Organisation for Economic Cooperation and Development
OJ	Official Journal of the European Communities
PDRA	Personal Data Registers Act (Norway)
PLPR	Privacy Law and Policy Reporter
rev	revised
Rt	Norsk Retstidende (Norwegian Law Reports)
SFS	Svensk författningssamling (Collection of Swedish Statutes)
SOU	Statens Offentliga Utredningar (State Official Reports, Sweden)
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
USC	United States Code

Introduction

The subject matter of this book is a body of law that is specifically aimed at regulating the processing of data on individual natural/physical persons. Its rules stipulate the manner and purposes of such data processing, measures to ensure adequate quality of the data, and measures to ensure that the processing is capable of being influenced by the persons to whom the data relates (that is, the data subjects). A primary formal objective of the rules is to safeguard the privacy-related interests of those persons. In Europe, such law tends to be described as 'data protection law'. In North America, Australia, and New Zealand, the preferred nomenclature tends to be 'privacy law'. A third label, 'data privacy law', is increasingly used too.

The book's core remit is to give a concise explication of the aims and principles of this body of law, along with the mechanisms for its oversight and enforcement, from an international perspective. By 'international perspective' is meant, first, that the law is predominantly presented through the prism of international codes and, secondly, that account is taken of rules in a broad range of countries. The book omits a detailed description of data privacy codes across all of the jurisdictions in which they have been adopted. Approximately one hundred countries have now adopted fairly comprehensive data privacy legislation so such a description would necessitate a mammoth (and quite likely boring) text. The book instead canvasses norms in international instruments, then selected national implementations or variations of those norms. Legislation of the European Union (EU) receives special attention because it is a key point of departure for the development of national data privacy regimes in many regions of the world. As for national codes, these are mainly selected on the basis of their ability to elucidate how the international codes may be applied in more concrete contexts. In some cases, the book elaborates upon national regimes because they possess fairly unique, innovative, contrarian, or otherwise noteworthy qualities.

The focus on international codes is justified because they embody the bulk of the central rules in national and sub-national codes. Furthermore, they provide templates for formulating the latter codes and govern the ability of individual states to determine data privacy policy on their own. Taken together, the international agreements described herein have exercised great influence on regulatory regimes at the national and sub-national level. This influence has gradually strengthened. Not only has the number of such agreements

grown but their provisions have become increasingly elaborate. At the same time, ever more detailed data privacy requirements have been teased out from the relatively terse texts of treaties dealing with fundamental human rights. The overall result of this growth in regulatory density is a decreasing capacity of states to adopt data privacy regimes as they alone see fit. This increasing weight of the world is part of a more general trend in which international regulatory instruments cut ever greater swathes through areas once largely the preserve of national policy. Yet the exercise of influence in the data privacy field has not only flowed from the international to the national plane; national regimes have also shaped many international initiatives.

When canvassing data privacy law across jurisdictions, I make some attempt to highlight similarities and differences between various codes. Thus, the book could be regarded as a work of comparative law. Its central goal, though, is not so much comparative as to delineate broad patterns of normative development. Moreover, the book does not extensively compare the various data privacy regimes with the aim of assessing which regime comes closest to 'best practice'. Some scholars claim that such assessment is virtually impossible in the data privacy field.[1] I disagree, though recognize that such analysis is very difficult to do without misconstruing some element(s) of the compared regimes. Complicating the assessment is that each country's data privacy regime consists of more than formal legal rules. While the latter, together with formal oversight mechanisms, are important constituents of a data privacy regime, they are supplemented by a complex array of other instruments and institutions (information systems, industry codes, standards, etc.) which concurrently influence the practical impact of the legal rules. The functioning of a data privacy regime (including, of course, the extent to which 'law in books' equates with 'law in practice') is also shaped by a myriad of relatively informal customs and attitudes in the country concerned—for example, the extent to which the country's administrative and corporate cultures are imbued with a respect for authority and respect for data privacy principles. These factors can be easily overlooked or misunderstood.[2]

As already indicated, the presentation of data privacy law in this book is far from exhaustive. This is particularly so for coverage of sectoral, national,

[1] See eg, KS Selmer, 'Realising Data Protection' in J Bing and O Torvund (eds), *25 Years Anniversary Anthology in Computers and Law* (TANO 1995) 41, 42.

[2] For further discussion on the difficulties of comparative assessment of data privacy regimes, see CJ Bennett and CD Raab, *The Governance of Privacy: Policy Instruments in Global Perspective* (2nd edn, MIT Press 2006) ch 9; CD Raab and CJ Bennett, 'Taking the Measure of Privacy: Can Data Protection Be Evaluated?' (1996) 62 Intl Rev of Administrative Sciences 535.

and sub-national regimes. The book leaves many of their nooks and crannies unexplored in the interests of presenting the wood, as it were, rather than numerous trees. Further, my limited language skills and familiarity with particular jurisdictions lead to certain regimes being given greater prominence in the book than others. Particular regimes are left largely unexamined. For example, the book pays scant attention to data privacy codes that have been specifically developed to govern the activities of government agencies engaged in law enforcement, immigration, and border control or preservation of national security—that is, activities that typically fall within the 'Area of Freedom, Security and Justice' (AFSJ), to use EU terminology.[3] The data privacy regimes for these activities are usually complex, dense, and intricate. Just taking due account of the EU's supranational regime on point (in addition to the other less sector-specific regimes) would require a massive text. At the same time, comprehensive, up-to-date analysis of that regime already exists, thus compensating for the superficial treatment provided by this book.[4]

In light of these limitations in coverage, some of the book's conclusions might not accurately take account of particular idiosyncrasies at the sectoral, national, or sub-national levels. From a methodological perspective, the conclusions are probably best treated as 'extrapolations' that are *tentatively* capable of generalization for the bulk of data privacy regimes.[5]

Two other factors also necessitate such tentativeness. First is the dynamic character of law in the field—data privacy regimes tend to be revised fairly frequently, as shown at numerous points in the book. A second factor is that determining the proper meaning or ambit of data privacy rules as a matter of *lex lata* is often difficult. This kind of difficulty strikes any attempt to construe rules in a broad range of countries. Underlying the difficulty

[3] See further, Treaty on the Functioning of the European Union (TFEU) [2010] OJ C83/47 Title V.

[4] See F Boehm, *Information Sharing and Data Protection in the Area of Freedom, Security and Justice* (Springer 2012). For somewhat dated and less comprehensive analyses, see eg E de Busser, 'Purpose Limitation in EU–US Data Exchange in Criminal Matters: the Remains of the Day' in M Cools and others (eds), *Readings on Criminal Justice, Criminal Law & Policing* (Maklu 2009) 163–201; P de Hert and V Papakonstantinou, 'The Data Protection Framework Decision of 27 November 2008 Regarding Police and Judicial Cooperation in Criminal Matters—A Modest Achievement, However Not the Improvement Some Have Hoped for' (2009) 25 CLSR 403; SK Karanja, *Transparency and Proportionality in the Schengen Information System and Border Control Co-Operation* (Martinus Nijhoff 2008).

[5] See MQ Patton, *Qualitative Evaluation and Research Methods* (3rd edn, Sage 2002) 584 ('Extrapolations are modest speculations on the likely applicability of findings to other situations under similar, but not identical, conditions. Extrapolations are logical, thoughtful and problem oriented rather than statistical and probabilistic').

are cross-jurisdictional variations in legal dogmatic method, combined with the risk of miscalculating those variations' significance for determining valid law in a given context. In the data privacy field, the difficulty is exacerbated because much of the relevant legislation is diffusely formulated and accompanied by little authoritative source material for its interpretation. Commentary in the preparatory works and explanatory memoranda for the legislation is frequently sparse or nebulous. And in many jurisdictions, there is scant case law on point. Although there exists relatively extensive administrative practice pursuant to the legislation, not all of it is well documented. Nor can it be assumed as conforming to the views of the judiciary. Courts have occasionally overturned or questioned such practice.[6]

Finally, some words on the EU regulatory framework for data privacy are in order. As is well known, that framework is undergoing major reform. At the time of writing this book, the reform process is incomplete and considerable uncertainty attaches to its outcome. The first detailed reform proposals were issued by the European Commission in January 2012.[7] Just as the final touches were being put to this book, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs agreed on amended versions of the Commission proposals.[8] However, this book's account of the reform proposals remains based on those issued by the Commission in 2012. The versions recently agreed in the European Parliament will be subject to negotiation with the European Council with a view to finding a 'common position', and they are most likely to be changed—perhaps significantly—in that process. Moreover, they do not depart radically from the Commission's approach.

Up until June 2013, the reform process looked to be in serious danger of stalling. However, the revelations over the large-scale electronic surveillance programmes run by the US National Security Agency have since galvanized European legislators into trying to complete the reform quickly and largely in line with the Commission's original vision. At its summit in late October 2013, the European Council stated that '[t]he timely adoption of a strong

[6] See eg, the decision of 12 June 2001 by the Swedish Supreme Court (Högsta domstolen) in case B293-00 (overturning administrative practice in relation to application of s 7 of the Personal Data Act 1998 (*Personuppgiftslagen*, SFS 1998:204)). See further Ch 4 (n 110).

[7] See Proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (COM(2012) 11 final); Proposal for a Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data (COM(2012) 10 final).

[8] 'Civil Liberties MEPs pave the way for stronger data protection in the EU', European Parliament Press Release, 21 October 2013.

EU General Data Protection Framework ... is essential for the completion of the Digital Single Market by 2015'.[9] Indeed, there is a serious push to reach a final agreement on the new rules already by May 2014. Law reform, though, is often capricious, particularly when it concerns controversial matters. So any firm predictions as to the timing and outcome of the EU reform process ought to be taken with a grain of salt.

[9] Conclusions of the European Council 24/25 October 2013 (EUCO 169/13; 25 October 2013) para. 8; available at: <http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/139197.pdf>.

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