Privacy in the Law

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Summary. This chapter addresses privacy and legislation. It explains common categories of legal protection in most jurisdictions and surveys the internationally accepted privacy principles which form the basis of the law in most countries. Next, the most important interpretation rules by the courts are given and their applications to technology are discussed. Finally, the chapter gives an outlook on the future of privacy law.

2.1 Introduction

All over the world, the right to privacy is considered a fundamental right, a constitutional right, a human right. It is found in international treaties such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the European Charter of Fundamental Rights. It can also be found in some form or another in the constitutions of many countries around the world, such as the Dutch constitution (art. 10: the right to privacy and data protection, art. 11: the right to integrity of body and mind, art. 12: the right to the privacy of the home, and art. 13: the right to confidentiality of correspondence and communications), the German constitution (art. 2: the right to self-determination), and the US constitution (amendment 14: protection against unwarranted searches and seizures).

From a historical point of view, these fundamental rights protect the citizens against intrusions into their private lives by the government. Already in the Middle Ages the law protected British citizens against the soldiers of the king entering their private homes. The right to privacy was defined for the first time by Warren and Brandeis in their article in the Harvard Law Review in 1890 as “the right to be let alone” [1]. The article was published after the list of invitees for the wedding of Samuel Warren’s daughter appeared on the society pages of the Boston newspapers. He then consulted his good friend and future US Supreme Court justice Louis Brandeis to see what could be done against such unreasonable intrusion into the private life of his family. In the
1960s and 1970s, the public debate over privacy resurfaced again when governments started surveying their countries’ population. Also, the first computers appeared, making the processing of these data simpler. Hence, the right to data protection was born.

Nowadays, the term “privacy” is applied to a wide variety of issues, ranging from the seclusion of the private home and garden, to the use of surveillance techniques by employers and law enforcement agencies, to the processing of personal data in large databases, and even to nuisance problems like spam and telemarketing. It also has close ties to issues like autonomy and self-determination and the right to family life.

### 2.2 Privacy Protection in the Law

The law protects privacy in many ways. The type of laws and the level of protection may differ between countries and jurisdictions. However, the following categories of legal protection can be identified in most jurisdictions:

- **Constitutional laws and international treaties** demonstrate the importance of the right to privacy. Legislators as well as the courts have to take these fundamental rights into account when drafting or interpreting the laws. In some countries, such as the United States and Germany, there are special courts to rule on potential conflicts between the law and the constitution. In other countries, such as The Netherlands, any court may invoke the fundamental right to privacy to annul a law when it is found contradictory to international obligations. In Europe, there is even a special European Court of Human Rights, based in Strasbourg, that may rule on privacy invasions as a violation of article 8 of the European Convention of Human Rights.

- **Criminal laws** define the minimum level of acceptable behavior by a society. All privacy-intrusive behavior below that threshold in punishable by society i.e. stalking, the use of hidden camera’s, illegal wire-tapping of somebody else’s telecommunications (such as spyware), hacking into a computer system, entering somebody’s home without permission.

- **Administrative laws**, such as the Personal Data Protection Acts in Europe, laws on criminal procedure or laws on background checking, give rules and procedures for allowing certain types of privacy-intrusive behavior. Sometimes the obligation to cooperate with privacy-intrusive actions is written into the law. In such cases the law prescribes the circumstances under which the privacy invasion is permitted (i.e. the obligation to cooperate with a search when boarding an airplane). In most cases however, the intrusive behavior is only permitted when a certain protective procedure has been followed, such as judicial review for a search warrant to search somebody’s home, the need for a permit to transfer personal data out of the European Union (EU), the need to ask parental consent for collecting