

The European Data Protection Regimes: from Principles to Processes

Rotem Medzini

The entry into force of a new legal framework for data protection, and in its center the General Data Protection Regulation (GDPR), symbolizes a change in the European Internet policy and specifically its data protection regime. In fact, the legal framework requires implementation of data protection policies on three layers simultaneously: the supranational layer, the national layer, and the corporate layer. In this article I claim that rather than simply codifying existing practices into European law, the new legal framework represents a shift to process-based regulation regime implemented alongside the new and centric accountability principle. Primarily, The new process-based instruments represent a regulatory strategy in which managers are required to implement policies that promote social goals such as data protection. This shift is important due to the European data protection regime's extra-territoriality impact as well as data protection policy's importance in the age of big data, the Internet of things, and the global debate about the surveillance society. This paper identified the relevant regulatory instruments and categorizes them. In so doing, the paper assist in understanding how policymakers expect the different actors to act, and when these actors do not act as expected – how policymakers empower other actors to respond.

**“People who read this article also read...”:
on Privacy and Profiling**

Mickey Zar

Profiling data subjects is a common practice in the surveillance society. In a continuous process, personal data is collected, aggregated, analyzed and converted into a profile which is then projected to the data subject in ways that might affect her self-perception and future choices. Personalized practices, such as using a search engine or purchasing books online, modify, albeit quite subtly sometimes, the user’s understanding of the world. In so doing, such personalized practices affect her identity. This influence is often hidden from those affected, and is difficult to describe and conceptualize it in terms of the right to privacy.

This article argues that profiling practices undermine the identity of data subjects, and that the right to privacy is the appropriate legal tool to address the challenges of profiling, since it is intended, among other things, to protect individuals’ personal identity.

Individuals learn about their profiles’ content through inclusion or exclusion from personalized services and offers, and might try to assimilate their behavior to what they assume will be the most rewarding behavior. The individual is reinforced by her more “reasonable” preferences, thus being manipulated to behave in a particular way, usually without being aware of it. The result is a production of an obedient consumer-citizen, whose behavior follows lucratively predictable trajectories.

Dimensions of Time and Privacy in Online Social Networks

Oshrat Ayalon & Eran Toch

Users of Online social networks (OSNs) publish contents which remain there for an unlimited time. This article refers to this situation as *information eternity*. The easiness of searching and retrieving information creates a new condition, in which information is easily seen by others long after it was first published, thus affecting the data subject in unexpected ways. This condition is true for the Internet at large; however, OSNs have a unique social context which is their core idea. Accordingly, we argue that OSNs should be analyzed separately. We analyze information eternity through two prisms: the users' privacy management and self-presentation management. With privacy management, users are required to cope with a growing difficulty in controlling their personal data that might be disclosed to new social circles. With self-representation, users are required to consider the effect of new and old contents on their perceived representation by others. We analyze information eternity while referring to theories of privacy and self-representation, and to users' perceptions and behaviors, based on empirical studies. Lastly, we refer to technological and legislative solutions, and suggest focusing on solutions that enable control and create norms that help to manage information in a social context.

Privacy's "Identity" Crisis: Regulatory Strategies in the Age of De-Identification

Sharon Bar-Ziv & Tal Zarsky

Privacy regulation raises questions in various contexts and dimensions. Alongside the questions of substance, privacy regulation raises questions concerning the strategy and actual way these rights are to be regulated and enforced. This Article addresses the conundrum of privacy regulation strategy in Israel, while focusing on the innovative context of data transfers of personal data from public entities which apply de-identification and anonymization techniques. De-identification is a technological and administrative process which strives to transform protected personal information into one that is detached from any characteristic. However, there is a growing concern of successful re-identification attacks which will lead to the exposure of personal data.

Nations worldwide have already considered and even drawn out an overall strategy for de-identification. Yet Israel has thus far failed to do so. The Article demonstrates that Israel has seen the emergence of several separate and parallel de-identification regimes. Central examples of these regimes are those run by the Ministry of Health, the Central Bureau of Statistics and the Government's ICT Authority, as well as the way the laws are interpreted by the courts and applied by Israel's data protection authority. This Article presents and critically analyzes the development of regulatory strategies in this context.

Privacy, Control and Oversight in an Era of Big Data Analytics: Adopting A right to Explanation for Israeli Data Protection Law

Maayan Perel

Big data analytics score and predict human behavior: who will pay her debts on time; which applicant will better meet the employer's business needs; who is likely to commit a crime. Many decisions that strongly implicate our lives increasingly rely on privately-developed predictions, including our housing, consumption, education and job opportunities. Are these algorithmic predictions subject to adequate oversight? This article suggests that big data analytics suffer from insufficient checks. Data subjects do not understand the reasoning behind decisions that shape their lives because these decisions rely on complicated, dynamic and non-transparent analytics in their data. Consequently, they do not have the ability to contest erroneous or biased predictions about them. To enable better oversight, this paper explores the possibility of adopting a right to explanation under Israel's privacy protection legislation, using the framework of *privacy as control* and building on the model recently adopted in the General Data Protection Regulation.

The Right to Financial Privacy: A Disappearing Era

Ruth Plato-Shinar

An important characteristic of the banking system is the principle of banking secrecy, which prohibits the bank from disclosing to third parties financial information relating to its customers. With the expansion of the financial sector and the entry of additional entities into the fields of financial activity, a broader concept of “right to financial privacy” is emerging, which reflects on the duty of secrecy imposed on all the financial entities towards their customers.

Despite the importance of the right to financial privacy, it is not an absolute right. Alongside the prohibition on disclosing the information, a recognition of certain exceptions under which the financial institution is permitted – and sometimes even obliged – to disclose the information, has been established. The main exception in this context is the duty of disclosure by virtue of law. In recent years – in Israel as in other countries – this exception is increasingly expanding, thereby significantly reducing the right to financial privacy.

The article contends that despite the great importance of the right to financial privacy, other interests may sometimes override it and justify the disclosure of information regarding customers. As long as the balance between the right to privacy and those interests is a proper balance that meets the requirements of the Basic Law: Human Dignity and Liberty, the duty of disclosure should be preferred, despite the severe injury to financial privacy.

Analyzing Discourse on Israel's Biometric Project in the Mainstream Israeli Press

Avi Marciano

This study examines discourse on Israel's Biometric Project in three leading newspapers – Israel Hayom, Haaretz, and Ynet. Drawing on a growing body of research that addresses media representations of surveillance, it aimed at illuminating the ways in which the Israeli press narrates the project in different contexts. The analysis points to two competing sub-discourses: the first relies on national security and technologism to support the project, while the second employs a critical-civil line to emphasize its adverse ramifications. The difference between the Israeli discourse – which is more critical than supportive – and its parallels worldwide is explained. This study assumes that media discourse constitutes an important cultural resource whereby the Israeli society imagines the project and associated ideas such as surveillance, security, nationality, citizenship, identity, embodiment, technology and more.

Childhood spaces? – Privacy, surveillance and the minimization of minor's private space in the digital age

Sunny Kalev

The article discusses the phenomenon of minor's private space minimization in the digital age. First, the article defines the importance of privacy and private space for minors, based on theories of developmental psychology. Then, the article conceptualizes minor's main childhood spaces – the home sphere; the educational sphere; the public sphere and the virtual sphere. The article discusses the factors influencing the reduction of minor's private space, their interests, and the role of the law in this matter.

The main argument of the article is that Israeli law plays a major role in the minimization of minor's private space. Based on the model developed by Lawrence Lessig, the article shows that technological development, economic interests, and social norms in Israel, combined with the neutrality of the law regarding the issue, leads to the intensification of the phenomenon. The article analyzes the implications of the phenomenon and offers several suggestions for dealing with it.

Beyond Communitarism and Individualism: The Complex Conception of the Family and the Right to Privacy in the Family

Yael Braudo-Bahat

The right to privacy in the family (i.e., vis-a-vis other family members) is still underdeveloped. One of the major reasons for this relates to the common approaches to the family: the individualistic and communitarian approaches. Both, each in its own way, limits the ability to promote the right to privacy in the family. The communitarian approach abstains from laws' and state's intervention in the family, and more specifically from applying individualistic rights — such as the right to privacy — within the family. The individualistic approach conceives the spouses as distinct, equal and autonomous individuals; consequently, it also advocates for a minimal intervention of the law and state in the family. Contrary, during the last two decades, a third, more complex approach to the family has been developed. This approach combines between individualistic and communitarian aspects and principles and attributes to the law a major part in promoting the rights of family members within the family. The complex approach enables the development of a new perception of privacy in the family, as both enhancing the individuality and distinctiveness of family members and at the same time strengthening the family as a community. The article reviews the common approaches to the family and the feminist critiques on them; addresses the limitations cast by those approaches on the promotion of the right to privacy in the family; stresses the new, complex approach to the family and the promise it holds for promoting privacy in the family; and analyses two Israeli cases that demonstrate both the difficulty to promote privacy in the family under the prevailing approaches and the ability to develop a new, complex conceptions of family and privacy.

Privacy in the Family

Ayelet Blecher-Prigat

This article develops a broad argument about the role of privacy in intimate relationship (that is a privacy right, which operates between parties to intimate relationships). It presents the significant role of privacy in cultivating and supporting intimate relationships, the difficulties in applying existing theories of privacy in the context of intimate relationships, and it outlines the beginning of a new theory of privacy that is more appropriate to the context of intimacy.

This article offers to understand the right to privacy between family members as a relational right, that is as an individual right of each family member, which protects their interest in safeguarding their intimate relationships. It then builds on Helen Nissenbaum's theory of contextual integrity, to offer a more detailed description of privacy as a relational right. According to Nissenbaum, the right to (informational) privacy is centers around ensuring that information flows in accordance with contextual information norms. This article submits that the values of trust and intimacy could serve as the normative values for determining the norms of information flows in the context of intimate relationships. Thus, surveillance cannot be considered as a standard means of gathering information about family members, including children, since monitoring stands in contrast to trust. Likewise, when thinking about disclosure of intimate information that concerns family members, norms that emphasize collaboration should govern, again because unilateral disclosure might be considered a betrayal of trust.

A question of privacy? Recording without the knowledge of the recorded side in labor relations

Idit Zimmerman

An obiter dictum given by the Supreme Court stating that the recording of a person without his knowledge is tainted by a moral flaw was adopted in the rulings of the Regional Labor Courts. The Courts relied on this obiter as a justification for a negative attitude towards the practice of recording in labor relations, and for ruling that the evidence of recorded conversations will be weighed accordingly in a legal proceeding.

The article seeks to replace this intuitive-value-based discussion with a legal discussion on privacy. I will examine whether said recording, which is a private case of monitoring and gathering information in the workplace, and serves mainly as a “counter-surveillance” force of workers vis-à-vis their employers, actually impair the right to privacy.

The discussion adopts the ‘privacy as control’ approach, and understanding of justifications for the right to privacy, against a background of existing social norms and technological developments, as well as the special characteristics and power gaps inherent to labor relations.

I conclude that, as a rule, recordings can be made in the workplace and submitted as evidence in the legal process. This is subject to maintaining the increased good faith that applies to the parties in labor relations, which I suggest examining based on the principle of proportionality, as a satisfactory solution to protect the relevant interests in this context.

Surveillance at Home: Privacy and condominium in the era of CCTV and residential skyscrapers

Dorit Garfunkel

The use of closed-circuit television (CCTV), also known as video surveillance, in residential condominiums is growing. The introduction of CCTVs parallels the shift to high-rise condominium living. This article examines the implications of installing CCTVs in the private-domestic space of Israeli condominiums. It points out to the changing relationship between privacy rights and property rights in condominiums, and to new legal challenges that arise.

The article argues that under the current legal framework, placing surveillance cameras in the condominium's common property, deriving from the owner's property right, prevails over the privacy right and reduces it. However, in the absence of adequate legal tools, reduction of privacy rights in the condominium might have adverse consequences and eventually also harm the private ownership.

The article points to new legal tensions that arise and suggests new regulation of condominium management and decision-making processes, management agents, the reasonability of the use of CCTVs, and data protection.

From Voyeurism to Intimacy: Ethics and reflexivity as developed and reflected in the films of Krzysztof Kieślowski: *Decalogue 6, Decalogue 9, Red*

Aner Preminger

This article deals with the reciprocal relationship between privacy and personal space, and voyeurism and intrusiveness, between the constant tension of guarding or relinquishing privacy, and the ability to create an intimate connection with another. The article examines how a dialectic interaction between invasion of the other's space, and intimacy and closeness between people, is an essential element in the definition and growth of an adult identity, as reflected in the cinema of Krzysztof Kieślowski. His examination of these issues, and the link he creates between them and the essence of the film medium, is brought out through his cinematic development in the films *Dekalog 6*, *Dekalog 9*, and *Red*. These films highlight and sharpen the ethical question raised by intrusive or invasive acts, personal or cinematic. Kieślowski's fascinating and unique choices aim at a cinematic representation of privacy and intimacy through a medium that is essentially intrusive, negates privacy, and eradicates it. The article examines Kieślowski's treatment of ethical issues against the background of legality. At the same time, the article examines the connection between voyeurism and invasiveness, and intimacy and the responsibility one bears for one's actions and one's life. It is a discussion of three reflexive films that explore the apparatus of cinema and deal with varied complex forms of visual and auditory voyeurism, tearing down its victims' walls of privacy and exposing them to intrusive stalking that threatens their very persona.