INFORMATION LAW REVISITED / INFORMATIONSRECHT – NOCH EINMAL

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Abstract: *It is no accident that the society we live in today is called the Network Society: indeed, we are very much prisoners of networks and the digital environment in which we live and work. In everything we do, we often use – and are expected to use – IT. This being the case, it is no surprise that digitalization has become a key concept in social policy in many countries. As such this is a development we should welcome. For too many years, we looked upon IT with wonder, suspicion and even aversion. But are we ready for the change we see unfolding in the many societies that have embarked on ambitious digitalization projects? Is what we see uncontrolled chaos, a muddle of assorted projects? And does the avoidance of information as one part of the economy of information still pose an obstacle to beneficial digitalization? Looking at these developments in legal perspective, I would go so far as to suspect that the answer to the last two questions is «yes». It has become all too obvious that we are not yet ready to tap the full potential of IT. My reservations are based on four salient, unfortunate considerations. First, the prevailing view is still essentially that IT is no more than a tool that should be available as easily and cheaply as possible. The old office automation mind-set makes it difficult to embrace a new way of thinking. Secondly, to an astounding extent we are still using and buying information systems designed to be more technically than legally robust. Thirdly, a significant proportion of the data processing we see today still consists of efforts to make manual activities digital. To cite an example – a telling one – the use of expert systems in data processing has been negligible at best. The new EU General Data Protection Regulation is meant to apply to more advanced processing of personal data. Lastly, I submit that we would do well to ask whether our conception of Information Law is sophisticated enough to meet the needs of the modern information culture. My presentation will mostly focus on the kinds of general doctrines of Information Law we have – or should have – in today's Network Society, a society that is utterly reliant on information security, data protection and other important parts of the information culture.*

1. The legal toolbox and society

Like every profession, we lawyers have our own *method*. We have our systematics – or taxonomy – and special legal toolbox, which contain our concepts, theories and principles.[1] A good toolbox is fundamental in legal thinking and decision making.

[1] See Saarenpää, Does Legal Informatics have a method in the new Network Society?, pp. 51–75.

Earlier, legal systematics and the content of toolboxes were very much static. Once learned, particular principles and methods would guide the work of lawyers for decades.[2] And we are generally rather reluctant to abandon tried-and-true approaches.[3]

In recent decades, our conceptual world has changed radically. In legal life and the discipline of law, concepts are central elements in communicating: we use them to search for, process and pass on legal information. What is known as conceptual jurisprudence (Begriffsjurisprudenz) has been a positive force and was intended as such. To arrive at proper conclusions, we need the proper number of proper concepts properly applied.

Earlier, the legislator often avoided defining concepts. This was left for scholars in the discipline to do. Some sought to avoid unnecessary concepts, in particular adherents of schools such as *analytical jurisprudence* in the Nordic countries.

Today the situation is utterly different. Since the early 1990s we have witnessed nothing short of a deluge of new concepts in legislation. The principal driver of this change has been the European Union, where regulations and directives present us with a steady stream of new and increasingly refined concepts.

The new General Data Protection Regulation is one of the most illustrative examples: article 4 has a total of 26 different definitions. All in all, we find hundreds of new legislative concepts in the most recent EU legislation. Our conceptual world has indeed changed radically.

In a well-drafted law a clear conceptual framework is of course a welcome thing. It opens the door, as it were, for those reading the law – lawyer and layperson alike. Then again, concepts alone are not enough to make society work. We must also consider how they are interrelated as well as their relation to principles and theories. Needless to say, principles may be articulated in laws. The Data Protection Regulation is again a good example. In article 5 we can find some leading data protection principles written by legislators. Readers of the Regulation are provided with a picture of not only key concepts but certain important principles as well.

Yet it would be an oversimplification to think that defining concepts and setting out principles in legislation would be an effective approach to understanding the law and justice. Any conceptual taxonomy will open up and close perspectives and doors. It would be a very rare statute indeed that could be understood and applied unambiguously without reference to general legal principles and other legislation and society. We would quickly find ourselves back struggling with the shortcomings of conceptual jurisprudence – the constraints it imposes on interpreting the law. We need more tools and information if we are to understand law. Law is, as Ronald Dworkin has written, like literature.[4] We must have tools to show and understand what is important.

Here we enter the realm of general systematics. Given the importance for society of information and information processing, we might do well to ask what the significance of *Information Law* as a legal discipline is today. What does it look like and where do we see it in the lawyer's toolbox in today's Network Society?

2. Information Law: a jigsaw puzzle?

One cannot speak of Information Law as an academic discipline without mentioning Herbert Fiedler and Jon Bing, two scholars who have figured most prominently in the development of Legal Informatics. In their pioneering works, they approached the subject in two very much different but equally important ways.

As most of us know, Professor Fiedler put forward the fundamental and still crucial distinction between the narrow and broad senses of Legal Informatics. In the broader sense, the field was referred to as Information

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2 In Finland, *Risto Heiskala*, a well-known professor of sociology, has recently pointed out, and most aptly, that as teachers we should carefully consider what we say in our teaching given that those words will impact society for the next 30 or 40 years through our students. See Heiskala, Yhteiskuntatutkimuksen vaikuttavuus ja uusi uljas maailma, pp. 27–33 (in Finnish).

3 When the Rovaniemi Court of Appeal turned ten in 1989, one way the event was marked was an essay contest. One of the entries described lawyers who used computers as «keyboard lawyers». This was by way of questioning their professional legal skills; real lawyers and keyboard lawyers did not belong to the same professional family.

4 Dworkin, A Matter of Principle, pp. 146–166.

Law. This was something other than data processing – informatics. We had entered an age that saw interpretations of provisions relating to, as well as new legislation on, data processing. We are talking about the 1970s.[5]

For his part, some years later – the early 1980s – Professor Bing realized that the changing role of information in society was a significant legal factor. We began speaking of the Information Society, so it was time we spoke of Information Law too.[6] Although Jon Bing is often remembered primarily for his research on legal information and information retrieval, a significant part of his work was research on Information Law.

Producing a detailed description of what Information Law comprises posed a number of difficulties and continues to do so. Nowhere is this clearer than in the Nordic debate, which, as Professor Peter Seipel has noted, through the 2000s hindered progress in the field with claims that it is hard to find anything that is not linked to information.[7] This in turn would make it difficult to determine what the general principles of the field are. Many principles could be found relating to information in the different fields of law, and some clashed. Critics claimed it was difficult, perhaps impossible, to fitting these pieces into the same puzzle.[8] The legal importance of information, it is had any, was to be determined on a statute-by-statute basis.

I will not go into further detail on the many and varied trends in the development of Information Law to date. There are many histories internationally. Rather, I will present and assess my own views on the development in recent years. In my own work, I have considered Information Law to be one of the key areas within Legal Informatics.[9] And I have presented what I feel are its central principles. It is easy to speak of Information Law. It is rather more difficult to talk about the defining principles of the field.

3. Towards Information Law in the Network Society

Salient discussion of this topic in Finland originated with the 1999 doctoral dissertation of Tuomas Pöysti, a student of mine. His work examined the effectiveness of law in Europe, in particular the European Union, and Information Law took on a crucial role in the research.[10]

During the same year I also published my opinion in the Finnish Legal Encyclopaedia EIF[11]. Later in a Finnish textbook on Legal Informatics and in a number of international publications as well, I have, drawing on Pöysti's work to some extent, tried to elaborate a more modern conception of Information Law and its principles.

In *Legal Privacy*, published in 2008, I put forward the following legal principles – meta-rights of sorts – as the fundamental principles of Information Law:[12]

1. The right to know
2. The right to information
3. The right to communication
4. Freedom of information
5. The free flow of information

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5 See generally, for example, Tagungsbericht «Informationsrecht. Geschichte und Zukunft einer neuen Disziplin», http://www.uni-muenster.de/Jura.itm/hoeren/legacy/forschung/tagungsberichtgreifswald.pdf (all Internet sources accessed on 3 February 2017).

6 Bing, Information law. Journal of Media Law and Practice, p. 219.

7 For example, Seipel, Juridik och IT, pp. 268–269 (in Swedish).

8 Even nowadays in Sweden, Professor Cecilia Magnusson-Sjöberg does not use the concept «Information Law» in her introduction to Legal Informatics. She is more like Fiedler in using the division between the methodological and the material parts of legal informatics. See Magnusson-Sjörberg, Om rättsinformatik, pp. 23–30.

9 Saarenpää, Legal Informatics Today – the View from the University of Lapland, Finland, p. 13.

10 Pöysti, Tehokkuus, informaatio ja eurooppalainen oikeusalue (in Finnish). See later for example Pöysti, ICT and Legal Principles: Sources and Paradigm of Information Law, pp. 560–600.

11 Saarenpää, Informaatio-oikeus, pp. 206–215 (in Finnish).

12 Saarenpää, Perspectives on Privacy, p. 59.

6. The informational right to self-determination
7. The right to information security

Each of these was a fundamental meta-right in the constitutional state; that is, they are goal-oriented, moral rights on the level of social contracts. And, as we can see, information and the informational framework were really the keys elements of systematics. We can and we must find common information law principles. It is not enough to only say that information is generally connected to law and legal phenomena everywhere.

As the quantity of legislation increases, it is natural that the new provisions readily attract new commentators. This being the case, a lack or shortage of general doctrines (Allgemeine Lehren) in Information Law and poor knowledge of them easily become liabilities where achieving legal certainty is concerned. This is a formidable problem in the ever-evolving Network Society.

It is also time, as Professor Thomas Hoeren has appropriately noted, to speak about *information equality*. (*Informationsgerechtigkeit*)[13] This is – or at least should be – an important part of our modern information culture. And the point of departure we must keep in mind in all this is human rights, citizens» human rights.

Society is changing all the time. As I have written many times, we are now living in the Network Society, one where citizens must have access to societal information resources, where lawyers are increasingly digital lawyers and where government is information government, not e-government as its predecessor was known.[14] In this situation we have good reason to stop and try to determine whether my 2008 opinions about the principles of Information Law are still somehow valid.

Today my list of information law principles is a little bit longer.[15] I have added two important principles: the right to information government and the right to a balance of information. Both are important in the Network Society. A society in which government still operates using different rules and principles than its citizens and organizations is nothing short of a curiosity. And the increasing importance of information in our digital environment draws attention to the need for high-quality information and a balance between those who use it. Secrecy and monopolies must be reassessed. That is one part of the new information equality. And due to the role of the new information infrastructure information security is more fundamental than some years ago.

Likewise, we should remember that today we are talking about and developing Information Law in the new European constitutional state, where the importance of human and fundamental rights is growing by the day. Information law principles play a crucial role when assessing the need to enact new and reform old legislation. With access to information networks beginning to be seen as a human right, even in the UN, it is high time to determine how that right can be implemented legislatively.

This in turn means not only that principles are becoming more important but that we face an increasingly compelling need to reconcile them. The resulting jigsaw puzzle is not a simple one. The Network Society is a more demanding one where both law (the rules) and Law (the discipline) are concerned.[16]

I will take the example of personal data processing. As we enter a new age with the coming into force of the General Data Protection Regulation, we find ourselves once again in a «Bermuda Triangle» of sorts formed by transparency, freedom of expression and the protection of personal data. The new Regulation has set out to clarify the relation between private and public. Accordingly, in keeping with aims put forward by the Nordic countries, the principle of public access to official documents was elevated from recital to article. Articles 85 and 86 articulate, as indeed the legislation should, the possibility and obligation to give due consideration to freedom of expression and public access to official documents in the processing of personal data. However, the articles and related recitals provide precious little guidance on how these rights are to be reconciled. The

13 See for example Hoeren, Eine kontraktualistische Konzeption der Informationsgerechtigkeit, pp. 333–345.
14 See for example Saarenpää, The Digital Lawyer. What skills are required of the lawyer in the Network Society?, pp. 73–85.
15 See Saarenpää, Oikeusinformatiikka, pp. 162–163 (in Finnish).
16 See also Burkert, From Discipline to Method, p. 399.

harmonisation of data protection in Europe will be difficult. For this we need principles and a discussion of principles. We also need high-quality information systems. The age of linear, printed law texts only must be declared over.

4. Conclusions

When thinking about our modern network society, I would like to say that Information Law must become a fundamental component of our legal systematics. It has, as we can see, deep-going implications for human and constitutional rights.

But formal placement in the systematics is not enough. We need a robust legal community – especially institutes for legal informatics – willing to discuss the relevant principles.[17] It is not enough that narrow specialists advocate freedom of speech, personal data protection or openness only. All those have their connections to the upper level of information law principles.[18] And it is not enough to leave problems occasionally to be solved later by the Court of Human Rights.

What Information Law first needs is an abstract scientific debate such as that between Professor Luigi Ferrajoli[19] and Professor Robert Alexy[20] on balancing constitutional rights. And it is our *legal informatics communities* that should take up this challenge.

In addition, we must remember that hand-made decisions are often things of the past in the digital environment. The legal Network Society must be ready to make increasing use of advanced expert systems that search for and offer acceptable questions, alarms and answers – traffic lights – in the correct legal framework[21]. When we all – lawyers and laypeople – have information avoidance as our psychological «middle names», this is really challenging.[22] When planning such legal information systems, we need updated principles of Information Law and legal traffic signs to show the importance of principle.

I would like to conclude by asking whether the European fundamental rights in the area of information law, rights which unfortunately have been so long in the drafting, are current any longer. They come partly from another society and they are linear, printed products only.

5. Zusammenfassung

Beim Nachdenken über unsere moderne vernetzte Gesellschaft komme ich zu der Feststellung, dass das Informationsrecht ein grundlegender Bestandteil unserer Rechtssystematik werden muss. Es hat, wie wir feststellen können, tiefgreifende Auswirkungen auf Menschenrechte und Verfassungsrechte.

Aber die formelle Eingliederung in die Systematik reicht nicht aus. Wir brauchen eine robuste Rechtsgemeinschaft – insbesondere Institute für Rechtsinformatik – die imstande und bereit sind, die relevanten Grundsätze zu diskutieren. Es genügt nicht, dass sich nur spezialisierte Fachleute für Redefreiheit, Datenschutz und Transparenz einsetzen. Aus ihnen allen ergeben sich Verbindungen zu einer darüber liegenden Ebene des Informationsrechts. Und es ist nicht genug, auftauchende Probleme gegebenenfalls der Lösung durch den Gerichtshof für Menschenrechte zu überlassen.

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17 It is important to notice that the institutes for Legal Informatics are – and should be – centres of competence. They should not be facilities dedicated to rivalry between and leverage for narrow schools of thought.

18 Cfr. for example Lynskey, The Foundations of EU Data Protection Law, pp. 254–273, where the balance between data protection and openness is left in the shadow of data protection.

19 See for example already Ferrajoli, Fundamental Rights.

20 See for example La Torre, Nine Critiques to Alexy´s Theory of Fundamental Rights, pp. 53–68.

21 Cfr. Schartum, From algorithmic law to automation friendly legislation, pp. 27–30.

22 See more in Golman/Hagmann/Loewenstein, Information Avoidance.

Was das Informationsrecht zunächst braucht, ist eine allgemeine wissenschaftliche Debatte, wie sie zwischen Prof. Luigi Ferrajoli und Prof. Robert Alexy über die Abwägung von Grundrechten geführt wird. Und es sind unsere Rechtsinformatikgemeinschaften, die diese Herausforderung annehmen sollten.

Weiter müssen wir uns bewusst sein, dass «handwerkliche» Entscheidungen oft ein Stück Vergangenheit sind in der digitalen Umgebung. Die rechtliche vernetzte Gesellschaft muss bereit sein, in steigendem Maße Expertensysteme zu nutzen, die akzeptable Fragestellungen, Warnungen und Antworten – Alarmzeichen – im zutreffenden juristischen Rahmen bieten. Wenn wir alle – Juristen und Laien – Informationsverdrängung als unseren psychologischen «middle name» führen, ist das wirklich eine Herausforderung. Wenn wir solche rechtlichen Informationssysteme planen, brauchen wir aktualisierte Prinzipien des Informationsrechts und rechtliche «Verkehrszeichen», um die Wichtigkeit von Prinzipien zu demonstrieren.

Ich möchte mit der Frage schließen, ob die Europäischen Grundrechte im Bereich des Informationsrechts, Rechte, die unglücklich lange in der Entwurfsphase waren, überhaupt noch Gültigkeit haben. Sie kommen teilweise aus der Zeit einer anderen Gesellschaft, und sie sind reine, lineare Printprodukte.

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