Let's Not Kill All the Privacy Laws (and Lawyers)

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Let’s not kill all the privacy laws (and lawyers)

Christopher Kuner,*, Fred H. Cate,**, Christopher Millard,**, and Dan Jerker B. Svantesson***

One of the most famous quotes from Shakespeare is ‘The first thing we do, let’s kill all the lawyers’.1 Judging by comments one reads and hears, this sentiment is shared by many who are frustrated with the limitations of data protection and privacy law. It is often stated that lawyers have made privacy law and regulation too bureaucratic, and that they are responsible for much of the unintelligible verbiage (such as dense privacy policies) that annoy and confuse individuals. The law also stands accused of constantly falling behind technological developments; of using terminology that is overly bureaucratic and formalistic (a favourite example is the use of the term ‘data subject’, rather than the more understandable ‘individual’, in Article 2 of the EU Data Protection Directive 95/46); and of providing ineffective protection for privacy as compared to technological solutions.2

To many of these accusations, the lawyer must plead ‘guilty as charged’. Lawyers drafting privacy and data protection legislation often use language that is verbose and obscure, and pay more attention to legal niceties than to how the rules will impact the way that data are actually processed in practice. The inability of many lawyers to communicate with and understand computer scientists, who have developed the technologies that process personal data online, has become almost legendary. Thus, lawyers have a lot to answer for regarding the current deficiencies of legal rules governing data protection and privacy.

However, it is important to recall the benefits of data protection and privacy law. To begin with, the law provides a mechanism by which individual rights and expectations are protected in a normative way. The law is also enforceable by the state (as well as being enforceable against it), and thus has a protective force that goes beyond that provided by, for example, software tools or company privacy policies and redress mechanisms, the workings of which are often murky and subject to unilateral change. Perhaps most importantly, individuals increasingly expect the law to protect them against the misuse of their personal data, making privacy and data protection law indispensible for the development of confidence in data processing and the growth of the Internet.

As the agents that draft data protection and privacy legislation and advise on its application in practice, lawyers have a crucial role to play in ensuring that the promise of the law is effectively realized. While the law alone cannot protect privacy, technical solutions and self-regulatory mechanisms also cannot do so without a legal framework backing them up. In addition it should be remembered that much of the unclear verbiage that plagues data protection and privacy law is not only the work of lawyers, but is introduced by non-lawyers at various stages (for example, when preparing unclear and sometimes contradictory translations of legislation and other key materials; and when designing and implementing complex and confusing products, business processes, and technical environments).

In fact, many of the charges brought against data protection and privacy law are manifestations of more general tensions between the law and various social factors, such as the rapid pace of technological development, the globalization of the economy, and the constant development of new products and services online that require the processing of personal data. In many cases, frustration with privacy law reflects the fact that legal structures have difficulty keeping up with the rapid pace of technological and legal change. But this difficulty is not in itself a sufficient reason for downplaying the role of the law in regulating how personal data may be processed. Of course, this does not mean that lawyers should not do much more to produce drafting that is intelligible to the average citizen, to make a greater attempt to communicate

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1 William Shakespeare, Henry VI, Part 2, Act IV, Scene ii.
better with technologists, and to take into consideration the real-world implications of the legal rules they create. But lawyers and the law are often a convenient scapegoat for problems that are much more complex than they seem on the surface.

Those whose frustration with the limitations of data protection and privacy law leads them to repeat the Shakespearean quote about killing the lawyers should remember that it was uttered by a character (Dick the butcher) who wanted to create anarchy and do away with the rule of law. And they should also remember a quote from the play *A Man for All Seasons*, in which the character of Sir Thomas More responds as follows to a character who states that ‘I’d cut down every tree in England to get to the devil’:

When the last law was down and the devil turned on you where would you hide, all the laws being flat? This country is planted thick with laws from coast to coast, man’s laws not God’s, and if you cut them down do you really think that you could stand upright in the winds that would blow then? Yes, I’d give the devil the benefit of the law, for my own safety’s sake.\(^3\)

By all means make data protection and privacy law more intelligible and transparent, and have lawyers do a better job explaining and implementing it. And the law will only be effective if supplemented by privacy-enhancing technologies, trustmarks, self-regulatory mechanisms, and other non-legal tools. But the law must play a fundamental and irreplaceable role in protecting personal data, for all of our sakes.

\(^3\) Robert Bolt, *A Man for All Seasons*, Act I.