IES Lecture Series

Constitutional Rights and New Technologies: (how to) keep the Constitution up-to-date

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Questions

• Where do we find constitutional rights?
• What are the most important constitutional rights?
  – As such
  – As affected by new technologies
Overview

• Intro to constitutional rights
• Freedom of expression
• Privacy and data protection
• Integrity of the body
• Integrity of the home
• Secrecy of communications
• Other constitutional rights
• Cyborgs: a look at the future
Constitutional rights

• Terminology
  – Constitutional rights
  – Human rights
  – Fundamental rights

• Sources
  – National Constitutions
  – Treaties
    • European Convention on Human Rights
    • European Charter of Human Rights
    • UN: ICCPR, Ecosoc, Rights of the Child, Rights of Women (& Universal Declaration of Human Rights)
    • Council of Europe: various conventions

• Character:
  – Traditionally: defensive right against government
  – More recent: socio-economic rights
  – Third-party effect (between citizens) (?)
Freedom of expression (1)

- Art. 7 DC (Gw):
  1. No one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law.
  2. Rules concerning radio and television shall be laid down by Act of Parliament. There shall be no prior supervision of the content of a radio or television broadcast.
  3. No one shall be required to submit thoughts or opinions for prior approval in order to disseminate them by means other than those mentioned in the preceding paragraphs, without prejudice to the responsibility of every person under the law. The holding of performances open to persons younger than sixteen years of age may be regulated by Act of Parliament in order to protect good morals.
  4. The preceding paragraphs do not apply to commercial advertising.
Freedom of expression (2)

- ‘the press’: Internet publishing?
  - blogs: is a blogger a journalist?
- ‘radio and television’: convergence of media?
  - Internet radio, Internet tv
- broadcast: what does that mean on the Internet?
  - One-to-many; many-to-many?
- performances open to…: what does that mean on the Internet?
- where are the rights to collect information, receive information, spread information?
Privacy and data protection (1)

- Art. 10 DC:
  1. Everyone shall have the right to respect for his privacy, without prejudice to restrictions laid down by or pursuant to Act of Parliament.
  2. Rules to protect privacy shall be laid down by Act of Parliament in connection with the recording and dissemination of personal data.
  3. Rules concerning the rights of persons to be informed of data recorded concerning them and of the use that is made thereof, and to have such data corrected shall be laid down by Act of Parliament.

- Dutch Data Protection Act (Wet bescherming persoonsgegevens)
Privacy and data protection (2)

- Right to privacy (para. 1) generally accepted as adequate in light of new technologies
  - However: privacy is gradually eroded through new technologies
  - Cf. US concept: “reasonable expectation of privacy”
- Relationship between privacy and data protection?
  - Cf. European Charter: separate rights
- Data-protection rights (para. 2) are only a few of the generally accepted catalogue of rights (Council of Europe Convention 108; Data Protection Directive 95/46/EC)
  - E.g. purpose-specification and purpose-limitations principles; supervision by a DP Authority
  - The problem of profiling
Integrity of the body (1)

• Art. 11 DC:
  Everyone shall have the right to inviolability of his body, without prejudice to restrictions laid down by or pursuant to Act of Parliament.

• Dual nature:
  – Right to resist infringements of the body
  – Right to self-determination of the body

• Includes integrity of the mind, but only in light of physical infringements

• Historically: covers physical infringements of body, but not information about the body
Integrity of the body (2)

- New technologies
  - Body scans
    - Pilot project at Schiphol
  - Biometrics
    - Fingerprinting; iris scans; face recognition
  - DNA mapping
  - Cyborgs
- With new technologies, more covert surveillance of the body is possible
  - Hence, a constitutional duty of notification is necessary
- Self-determination:
  - Internet and body mutilation?
  - Right to enhancement?
Integrity of the home

• Art. 12 DC:
  1. Entry into a home against the will of the occupant shall be permitted only in the cases laid down by or pursuant to Act of Parliament, by those designated for the purpose by or pursuant to Act of Parliament.

• Entry means physical entry (including with an arm…)
• ‘New’ technologies:
  – Directional microphones
  – Cameras
  – Thermal imaging (infrared radiation)
• Hence, art. 12 should be formulated technology-neutrally (“The home is inviolable”)
  – And notification duty (para. 3) should be extended
• NB Will the house still be a ‘home’ in the future of Ambient Intelligence and ubiquitous networks?
Secrecy of communications (1)

- Art. 13 DC:
  1. The privacy of correspondence [briefgeheim] shall not be violated except in the cases laid down by Act of Parliament, by order of the courts.
  2. The privacy of the telephone and telegraph [telefoon-en telegraafgeheim] shall not be violated except in the cases laid down by Act of Parliament, by or with the authorisation of those designated for the purpose by Act of Parliament.

- The telegraph??
- Where is email?
- Is a distinction between letters and email/chatting/Internet communications acceptable in the Internet age?
Secrecy of communications (2)

• Several proposals for technology-neutral formulation: “right to communicate confidentially”
• What is the core of protection?
  a) The communication itself
    • Hence, also face-to-face communications
  b) The medium for communication
    • Hence, only during third-party transport
• Should traffic data (who communications when and where for how long) be protected by art. 13 DC (secrecy of communications) or art. 10 DC (data protection)?
Other rights

- Right to petition (art. 5 DC: “in writing”)
- Right of association and assembly (art. 8-9 DC)
  - E.g. virtual associations in games; electronic demonstrations (?)
- Secrecy of the vote (art. 53(2) DC)
  - Electronic voting machines
- New constitutional rights?
  - Right to anonymity
  - Right to access government information
Cyborgs: a look at the future

- Cyborg: man-machine combination
  - Chip implants connected to nervous system
    - For moving prostheses, or bionic limbs
    - For enhancing the mind
    - For communication through the brain
- Consequences for constitutional rights
  - Bodily integrity: includes implants? and external machine connections?
  - Does the right to bodily integrity end at death? What about frozen bodies (cryonics)? See e.g. http://www.alcor.org/
  - Non-discrimination (Art. 1 DC): will there be a divide between ‘new’ and ‘old’ humans?
  - Does a cyborg have constitutional (‘human’) rights? And androids (robots with human features)?
  - Right to non-enhancement? To grow old? To die?
How to keep the Constitution up-to-date (1)

• Do prospective research to anticipate new technologies (Technology assessment, scenario studies)
  Timely societal debates: what kind of society do we want to live in?

• Be smart when formulating constitutional rights
  – Swedish constitution uses enumerations with open-ended formulations:
    • “protection against the examination of mail or other confidential correspondence, and against eavesdropping and recording telephone conversations or other confidential communications”
  • Thus achieving both legal certainty for existing technologies, and scope for including (similar) future technologies
How to keep the Constitution up-to-date (2)

- Allow constitutional review by the courts
  - Which can keep interpretation up-to-date as technologies develop
  - Hence, abolish art. 120 DC (prohibition of constitutional review)
  - ECHR, Copland v. United Kingdom, 3 April 2007, par. 43 and 44
How to keep the Constitution up-to-date (3)

– 43. The Court recalls that the use of information relating to the date and length of telephone conversations and in particular the numbers dialled can give rise to an issue under Article 8 as such information constitutes an “integral element of the communications made by telephone” (see Malone v. the United Kingdom, judgment of 2 August 1984, Series A no. 82, § 84). The mere fact that these data may have been legitimately obtained by the College, in the form of telephone bills, is no bar to finding an interference with rights guaranteed under Article 8 (ibid). Moreover, storing of personal data relating to the private life of an individual also falls within the application of Article 8 § 1 (see Amann, cited above, § 65). Thus, it is irrelevant that the data held by the college were not disclosed or used against the applicant in disciplinary or other proceedings.

– 44. Accordingly, the Court considers that the collection and storage of personal information relating to the applicant's telephone, as well as to her e-mail and internet usage, without her knowledge, amounted to an interference with her right to respect for her private life and correspondence within the meaning of Article 8.
How to keep the Constitution up-to-date (4)

• Open ending: is the EU Charter on Fundamental rights with regard to technology smart?