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Rear view mirror, crystal ball: Predictions for the future of data protection law based on the history of environmental protection law

Michiel Rhoen *

eLaw@Leiden, Leiden University, Leiden, The Netherlands

A B S T R A C T

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Several authors have compared the impact of Big Data to the environmental impact of industrialisation (Kuneva, 2009, Schneier, 2013, Hirsch, 2006). This analogy seems useful: like the exhaust and use of chemical compounds, the omnipresent generation and subsequent use of personal data can impact individuals as well as society as a whole. Similarly to the effects of industrialisation, adverse side-effects of datafication on individuals, societies and ecosystems could manifest themselves only years later and in seemingly unrelated contexts.

Industrialised societies have enacted laws in response to the adverse environmental effects of industrialisation. Theories from modern sociology and public awareness have played a significant role in this process. Similarly, the European Union has enacted the General Data Protection Regulation to address the risks of processing of personal data. But laws tend to come only after any negative impact has become sufficiently apparent. This has spurred the introduction of precaution- and discourse-based management of unknown risks. The GDPR appears to implement these risk management mechanisms less extensively than current environmental protection laws.

As with the effects of industrialisation, the side-effects of datafication cannot be entirely known in advance. Privacy is currently a prime concern, but datafication can also affect entire societies if it results in a “digital panopticon”. Considering the influence of Risk Society Theory and Normal Accident Theory, two important social theories concerning industrial hazards, this article proposes a number of areas where future iterations of data protection law can be developed.

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1. Introduction: looking into the rear view mirror

Data protection law and environmental protection law are both a response to technological development. Environmental law

aims to mitigate the adverse effects of *industrialisation* and its origins can be traced back to nuisance law from Roman times.¹ These effects can manifest themselves at different levels, from the immediate surroundings of industrial activity, to the entire world. Similarly, data protection law is societies’ response to *automation*. The first legal response to the processing of personal

* eLaw@Leiden, Leiden University, P.O. Box 9520, 2300 RA Leiden, The Netherlands.

E-mail address: michiel.rhoen@gmail.com.

¹ Ulpianus 17 ad edictum, D. 8,5,8,5–7.

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data stems from the 1970s and 1980s.² Until now, data protection appears to have been treated mainly as an individual fundamental human right, whereas environmental law has become a means for protecting communities and societies.

Environmental law has been expanding towards human rights law. Environmental protection has been added to the EU catalog of fundamental rights in 2010. It is now not only a duty of care for societies but also an individual right.³ In contrast, expansion of the scope of data protection law towards protecting entire societies is not so easily visible. In the recently adopted General Data Protection Regulation (GDPR), the right to data protection is still mainly seen as an individual right, even though the advent of “big data” (resulting from the seemingly unstoppable trend of “datafication”)⁴ can be expected to have a serious impact on entire societies. An explanation may be that the risk to individual privacy is easily visible. Many of these risks occur when data subjects act as consumers: the permanent collection of metadata on telecommunications, shopping, media streaming and social networks all rely on consumer contracts for lawfulness, and can reveal many deeply personal aspects of one’s life.⁵ But the risk of large-scale surveillance to a free and democratic society may be equally or even more important. Datafication has been called “the pollution problem of the digital age.”⁶ Big data will cause power to shift from data subjects to data controllers, regardless of whether the controller is a government or a private party.⁷ Big data can increase or cement social inequalities.⁸ It risks re-introducing the chilling effects on personal freedoms historically associated with police states.

According to Baldwin, regulation can be seen as “being inherently about the control of risks”.⁹ Social theories about risk

appear to have influenced environmental law much more than data protection law. The EU’s recent data protection legislation efforts were almost completely focused on individual rights.¹⁰ But to achieve a balanced data protection policy, considering the risks and benefits of datafication to society is just as necessary. Like in environmental law, the rights of data subjects will always necessarily be weighed against the rights of other data subjects, data controllers and the interests of society as a whole.¹¹ Already in 2006, Hirsch indicated a number of analogies between environmental law and data protection law, mainly focusing on regulatory strategies.¹²

This article focuses on two theories from the social sciences that have discernibly influenced environmental law and policy: Beck’s theory of the risk society and Perrow’s theory of normal accidents. Because the risks of datafication and industrialisation both result from technological progress and both pose risks at the societal level, considering the application of these social theories to data protection seems appropriate. In this context, this contribution aims to answer the following question:

What avenues for the future development of consumer data protection law can be gleaned from the application of Risk Society Theory and Normal Accident Theory in environmental protection law?

This question will be approached through the following sub-questions:

- ◆ How is Risk Society Theory relevant to data protection law and policy?
- ◆ How is Normal Accident Theory relevant to data protection law and policy?
- ◆ To what extent does the General Data Protection Regulation apply both theories in its risk management model?
- ◆ What does this analysis indicate for the future of the consumer data protection debate?

The discussion will be limited to the jurisdiction of the European Union and will consider the text of the General Data Protection Regulation (GDPR), which will apply from May 25, 2018.¹³

¹⁰ See, for example, European Commission, ‘Impact Assessment, Accompanying the document “Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)” and “Directive of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data by Competent Authorities for the Purposes of Prevention, Investigation, Detection or Prosecution of Criminal Offences or the Execution of Criminal Penalties, and the Free Movement of Such Data”’ (European Commission 2012) Accompanying document SEC(2012) 72 final 29: ‘In a free and democratic society, the individual must have reassurance that fundamental rights are respected.’

¹¹ *Volkszählungsurteil* (n 2) under C II 1 b.

¹² Dennis D Hirsch, ‘Protecting the Inner Environment: What Privacy Regulation Can Learn from Environmental Law’ (2006) 41 Ga. L. Rev. 1.

¹³ Article 99(2), Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, p. 1, 4.5.2016.

² See, for example, the Hessische Datenschutzgesetz of 7 October 1970, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, done at Strasbourg (Strasbourg Convention), 28 January 1981 (articles 1 and 8) and *Volkszählungsurteil* (1983) BVerfGE 65,1 (Bundesverfassungsgericht).

³ Article 37, Charter of Fundamental Rights of the European Union, [2010] OJ C 83/02 (“the Charter”). Note that this right is stated in general terms and not in individual terms.

⁴ Viktor Mayer-Schönberger and Kenneth Cukier, ‘The Rise of Big Data: How It’s Changing the Way We Think about the World’ (2013) 92 *Foreign Affairs* 28, 29.

⁵ Neil M Richards and Jonathan H King, ‘Three Paradoxes of Big Data’ (2013) 66 (2013) *Stanford Law Review Online* 44.

⁶ Bruce Schneier, ‘Power in the Age of the Feudal Internet’ in Wolfgang Kleinwächter (ed), *Internet and Security* (Internet & Gesellschaft Collaboratory 2013) 19 <http://en.collaboratory.de/w/Power_in_the_Age_of_the_Feudal_Internet> accessed 15 November 2013.

⁷ See article 3(1), Strasbourg Convention; Bruce Schneier, ‘The Myth of the “Transparent Society”’ <<https://www.wired.com/2008/03/securitymatters-0306/>> accessed 30 September 2016; Michiel Rhoen, ‘Beyond Consent: Improving Data Protection through Consumer Protection Law’ (2016) 5 *Internet Policy Review* 3–4 <<http://policyreview.info/articles/analysis/beyond-consent-improving-data-protection-through-consumer-protection-law>> accessed 1 May 2016.

⁸ Cathy O’Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (Crown 2016) (passim); FJ Zuiderveen Borgesius, ‘Improving Privacy Protection in the Area of Behavioural Targeting’ (Universiteit van Amsterdam 2014) 118 <<http://hdl.handle.net/11245/1.434236>>.

⁹ *Understanding Regulation: Theory, Strategy, and Practice* (2nd edition, Oxford University Press 2013) 83.

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