After the Law, What's Next? The Cause of Privacy

Gus Hosein*

The past five years have been astounding for privacy and law. European Court of Justice rulings. European Court of Human Rights rulings. An Indian Supreme Court ruling. US Supreme Court rulings. A High Court of Kenya ruling. *Zhakarov*¹, *Riley*², *Digital Rights Ireland*³, *Kelin*, *Schrems*⁴, *Szabo*⁵, *Watson*⁶, *Puttaswamey*⁷.

Now we are on the eve of the General Data Protection Regulation. And so from those complaints leading to cases, and consultations leading to law, for the foreseeable future we will have more legal clarity.

We had the whistleblowing act of Edward Snowden, the incredible media coverage and public debate, parliamentary debates across the world. What is often forgotten is that we also had Snowden himself, who has become one of the most articulate standards-bearers we have had as a field.

Most fields would kill for the developments, attention, and level of reform that privacy has seen globally.

In the background of this period of time we had the rise of ISIS and economic crises. We moved from a focus around 'metadata' as revealing to a recognition that it could kill you. From the marketing push that was 'big data' to the application of artificial intelligence to address all society's woes. We have gone from 'a Western right' that was meaningless to the developing world to 'Sustainable Development Goals' requiring identity for all.

But at least we have the law. That is, we may be forgiven if we assumed we weathered the storms and made it through to the other side because at least our laws, their regulators, and the other institutions of the liberal democratic order made it through.

DOI: 10.21552/edpl/2018/2/4

* Dr Gus Hosein, Executive Director, Privacy International. For correspondence: <executivedirector@privacyinternational.org>.

1 *Roman Zakharov v Russia* App no 47143/06 (ECtHR, 4 December 2015).

2 *Riley v California*, 134 US S Ct 2473 (2014).

3 Cases C-293/12 and C-594/12 *Digital Rights Ireland v Minister for Communications & Others* [2014] ECLI:EU:C:2014:238.

4 Case C-362/14 *Maximilian Schrems v Data Protection Commissioner* [2015] ECLI:EU:C:2015:650.

5 *Szabó and Vissy v Hungary* App no 37138/14 (ECtHR, 12 January 2016).

6 Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post-och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others* [2016] ECLI:EU:C:2016:970.

7 *Justice KS Puttaswamy v Union of India* [2017] 10 SCC 1.

And the people reading this piece, along with only a few thousand more across the world, did this all without having widespread support of powerful institutions nor necessarily a public movement or even widespread awareness.

So what's next for us all?

Privacy advocates are not advocates for laws. Sure, we use the laws and often call for legal protections and safeguards.

But the law is an institution and we are glad we have it but we can never take it for granted. We have seen laws across the world, and yes within the EU, be on the books but inadequately enforced. We have seen countries that have developed the very notion of rule of law accept secret laws. We have seen in Privacy International's report from September 2017 that EU Member States were ignoring the European Court of Justice's decisions on communications data retention.

The defence of liberty requires so much more than just laws and court decisions. Ultimately being a privacy advocate is not a job, it is a way of looking at the world.

We do not see technology as something to fear. We do not see the use of personal data as something to prevent.

Rather we look at the world through a lens that, like so many others, sees the law as integral to the protection of rights. We see the importance of values and peoples' actions. We see the value of commerce and trade. We see the value of data. Where we differ from others, and what makes us relatively unique is that we have two additional and simultaneous perspectives in this 'lens': that technological implementations matter and are contingent and are deterministic all at the same time; and at the centre of the worlds we are building, individuals must be empowered and their rights protected.

So as we deal with the controversies that keep on swirling in our midst, and at this time it is the exploitation of data done by Cambridge Analytica and Facebook, and just a few months ago it was fake news, and in the next years it may be AI profiling for law enforcement and national security, or the dozens of other issues coming at us in the next five years...

We must maintain our interest and fascination and critical faculties that help us see how innovations can develop and permeate societies. We must continue to understand these technologies in detail, and look at how technologies are a force and yet also contingent and defined. And how often they are selected by the powerful, and are generators of power.

We must continue to maintain our excitement and scepticism over a data-driven world. We are well aware of how data can represent and shape and even define and speak for individuals, groups, societies and markets.

We must continue to be agnostic to the religions that focus on either governments or the private sector as the one and true risks to liberty.

So we are not surprised when elections are shaped by data. We are not surprised when intelligence agencies operate across borders in secret. We are not surprised when identity is used to segment and target. We are not surprised when a new system overly includes some people, excludes others, and discriminates while creating new inequalities.

It is not that we are geniuses. Nor is it because we are rocket scientists. We are not.

We have seen all these things before. And we will see them again.

And more and more people will come to see the world in the ways we do, through our lens.

The challenge that we face as privacy advocates is that we have had a few more years of thinking about how to change the world. Some of this will involve using the law as it is. Some of it will be about bending the law to our needs. We must even build upon it and extend it, test our regulators' and courts' patience and willingness and mandates.

But we must not be limited to the laws. With new people in our fold we must learn from them the kinds of changes that are needed. It has taken us years to get this far. We do not have as long to shape the future that is being institutionalised in practices, policies, and business models. We must maintain, and evangelise, our critical focus. We must trust our instincts. And we must be heard. So much is at stake.