

Employment Privacy Protection – Scandinavian Comparative Perspectives

Anders von Koskull

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1 Introduction

The legal concept of privacy and its notions of kin (private life, personal integrity) are linked to historically changing socio-economic conditions and these notions are related also to cultural values. The observation suggests rather a tendency than a mechanistic relation of dependence. This manifold context is often apt to have an impact on a legal analysis of employment privacy protection.

The German philosopher and sociologist *Jürgen Habermas* demonstrates in his well-known "Strukturwandel der Öffentlichkeit" how changing social, economic and cultural factors have shaped the categories of private and public and vice versa. *Jon Bing*, a Norwegian scholar specialized i.a. in legal telematics and privacy issues, has indicated that the very legal concept of privacy developed in Great Britain and in USA as a chain of reactions to exposure of the private life of royal persons and upper class celebrities. The distribution of information was made possible by technological and commercial innovations and patterns of exploitation of those innovations.¹ In the contemporary debate on privacy protection one characteristic is that the main focus is on every day situations that can concern anybody: the individual in relation to public administration or the employee in relation to the employer. *Spiros Simitis* for one has underlined the link between modern industry (Scientific Management, "Taylorism" and the Ford Industries) and employer control and surveillance.² New technology and systematic administration approaches are intertwined in a remaking of the borderline between the private and the semi-public workplace place with very concrete consequences for the privacy of the employees.

There are elements in legislation and legitimate corporate interests that motivates or even force the employer to collect and also in other respects process³ data about the employee. As an example one can mention some parts of the legislation about work environment protection or protection of motherhood and families. The employer's striving for efficiency under the strain of competition also motivates the quest for workers data. Control of employee performance quality, evaluation of candidates for jobs and security reasons are conducting the employers' need of knowledge towards areas that can be considered as private. On the other hand there are legal sources establishing a basis for privacy protection that restricts the employer prerogatives. Part of the picture is also that the personal attitudes towards privacy matters vary considerably.

To approach Scandinavian⁴ employment privacy protection with comparative perspectives involve many choices. The first one concerns the genre of comparison. One can register similarities and differences concerning

¹ Bing 1991, 14-21.

² Simitis 1991, 7-8.

³ According to the EC directive on personal data protection 95/46/EC, article 2(b), *data processing* covers every step of the data from collecting of the data to its destruction.

⁴ When speaking about Scandinavia I here refer to Denmark, Norway, Sweden and Finland. In earlier days it was not common to include Finland in the concept Scandinavia.

employment privacy protection in the legal orders of the Scandinavian countries. This would in itself demand quite a broad and detailed research. If we perceive *Scandinavian perspectives* in a certain way, those features in common should seem more important than the differences of which there certainly is no lack. And in addition one has to ask whether those characteristics that unite the Scandinavian employment privacy protection are “purely” Scandinavian in the sense that they are essentially different from other western legal orders? An answer to that question requires some sort of systematic comparison with other legal orders including insight in historical development.

Setting out on this journey of investigation I am not sure whether the Scandinavian employment privacy protection is definitely Scandinavian of character. To be frank with the reader, I will not be able to fulfil a journey of discovery covering enough terrain with enough of observations from short distance to bring up the answers to the questions embedded in the comments above. Nevertheless, with this essay I will try to give some characteristics on what there is in common in the Scandinavian employment privacy protection. Some differences in approaches in the legal dogmatics or the legal framework will be presented as well. And finally the theme about how Scandinavian the Scandinavian employment privacy protection is, will be confronted through a couple of examples.

2 A Scandinavian Tradition

The Scandinavian countries share a long tradition in the protection of personal information. There is however no definition of protection of privacy in common for the Scandinavian legal orders. On the other hand there are *points of view in common*⁵ and uniting attitudes in many respects. A unifying characteristic is the understanding of the need of protecting the individual with legal measures and their part in a wider consideration about shaping the “information society”. In this line one should remember the tradition of openness concerning access to official documents.⁶ This attitude has been clearly demonstrated in the Scandinavian approaches to the opening up of the administration of the European union.

The most systematic and elaborated form of the general principles of law concerning privacy and its protection within the Scandinavian countries is the *Norwegian privacy interest model*, also known as the Norwegian theory of privacy protection (personvern).⁷ The fundamental idea embedded in the model is a kind of human right thinking whether the scope of the interest falls within the realm of an established human right or not (for instance art. 8 of the Human

⁵ Blume 2001, 1.

⁶ Saarenpää 2001, 65-69, Seipel 2001, 121-122.

⁷ As sources in English one can mention Bing 1994, 24-38, Schartum 2001, 82-87. I have earlier presented and analyzed the Norwegian interest model and tried to demonstrate its connections with general concepts of Finnish labour law and Finnish labour law legislation, von Koskull 1996, 391-409, 427-429.

rights convention of the European Council). It refers to the idea that every human being should have a certain privacy protection. The weighing, balancing of totally or partially rival interests is another characteristic reminding of the situation with (other) human and constitutional rights. In the sphere of employment such interests could be the employers need of and interest in security versus the employers right to privacy. The privacy interest model is *decision orientated*. Personal data is regarded as a possible source for decision-making concerning that person. The basic concept of the model is also situational and relational. The balancing of interests has to take into account in which relation(s) and situation(s) the data can be a part.

The model covers different sorts of interests, individual and collective interests. These interests are used for criticism and for deliberation *de lege ferenda* and the model has played an important role in the making of the Norwegian data protection legislation. The Norwegian theory has by and by turned in to part of the “ideology” of the existing legislation and is nowadays an integrated part of the argumentation of courts and authorities.

The *individual interests* are most often described as three. The individual has an *interest in confidentiality*. This means an interest in control over collecting and other processing of data about him. The control aspect in this interest does not stand for total power, but in stead, for instance, the ideal of no collecting without consent. The second *interest* is having *adequate data* for a (possible) decision. When a decision concerning a person is made, the person should be able to be confident about the accuracy of the facts presented about him. There are two aspects of this interest in adequate data. The requirement of *relevance* means simply that information, which is not relevant for the decision (or the profile of a file), should not be included. The information may be incorrect, outdated or just outside the actual scope, for instance political opinions, gender and so on in most cases. The example shows the close connection between privacy protection and anti-discrimination legislation. The second element is the principle of adequacy. The facts should be correct. But a fact that is correct in itself may be misleading without presentation of other related facts. The third individual interest is *the interest in access*, namely the access of the data subject to the data relating to him- or herself.

It is obvious that the *interdependence* of these interests is crucial. If the data subject is to have some level of control over the data processing, he must be aware of the fact that there is some processing going on. Furthermore, if the person shall have a possibility to ensure that the data about him is adequate, he should have some right to demand for corrections.

We are confronted with another kind of interdependence when we turn to the later on developed *collective interests*. There is the interest in *controlling the surveillance level in society*. The second collective interest is the interest in a *robust society*. These imply considerations as a reaction to the vulnerable technological society as a memento when building data banks, networks and information highways. The third interest is that of *interest in a benevolent administration*. In our case the principle is easily married with administration within the private sphere and the labour law tradition of protecting the employee.

One can say that the collective interests cover themes that are familiar also in the discourse on the *Sicherheitsstaat*.

As the individual interests are linked to each other, so are the collective interests. But there are also relations between the collective and the individual interests. When creating statutes or making legal decisions were we materialize the interest of confidentiality, we may have to yield some ground because of the interest in a robust society or private corporation and so on.

If we examine the Norwegian model and compare it with writings in the other Scandinavian countries one might consider that there is nothing in the model that could not be presented as a general concept of law in the neighbor countries. The distinction comes with the ambition to systematize the interests and a specific combination of ideals and down to earth argumentation. Through the data protection legislation, case law and the praxis of the data protection authorities the model has gained considerable weight as a kind of legal source and not only as political goal setting.

One aspect of the developing of employment privacy protection is the role of the collective agreements. At least in Denmark, Norway and Sweden is it obvious, that the historical struggle concerning the employer's prerogative to supervise and control especially related to the effect of collective agreements has been crucial. As a question of law the prerogative and its limits were rooted this way. These limits have been drawn in a way that could be described as a requirement of proportionate actions related to reasonable objectives of surveillance. By and by the legal reasoning and statements in judgements and collective agreements have strengthened the view that it is not self evident that the right to supervision and surveillance can legitimize everything that the employer might consider as necessary. Proportionate measures, adequate measures, good labour market standards weighed against the needs of the employer have in many turns shaped the outlines of privacy protection.

3 Aspects of Constitutional and Human Rights

The Right to Privacy as a Constitutional right. All the Scandinavian countries have written constitutions and privacy is directly or indirectly protected according to them. In the Danish constitution the right to privacy is not included but there is to be found protection of a persons dignity.⁸ The *scope of protection* afforded by the constitutions regarding privacy matters varies. The probably most crucial differences with regard to our theme concerns the effects in the vertical and horizontal dimensions. Historically the fundamental rights safeguarded in a constitution were seen as protection (of the mighty and later on) of the citizens against the public power: vertical relation. In several countries this protection has by and by and with varying degrees been enlarged to cover also the relation between private parties: horizontal relation.

The discussion is more realistic when one considers that the concept of *horizontal effect of fundamental rights* can be understood as an umbrella notion

⁸ Blume 2001, 12.

covering several dimensions. Some of these effects can be present without the other ones.⁹ One of the horizontal effects is that the state is considered to have an obligation to prevent encroachment on the individual's constitutional rights, to legislate and create a basis for sanctions in this respect. This seems to be the case of all the Scandinavian countries whether there is a clear provision for it or not.

Nowadays in Scandinavia the horizontal effect of fundamental rights is strongest rooted in Finland because of the new Constitution of Finland 2000 (1999:731, into force 1.3.2000). In fact the fundamental rights were reformed with an amendment of the Finnish constitution in 1995 and these provisions were adapted to the Constitution 2000. The public power has an express obligation to "guarantee the observance of basic rights and liberties and human rights" (art. 22)¹⁰ and according to the preamble the duty also covers the horizontal relation. Furthermore, in the constitutional provision concerning protection of privacy and private life it is stipulated that more detailed provisions on the protection of personal data are laid down by an Act (Section 10.1). Judging from the *travaux préparatoires* the intention evidently was that these provisions should also embrace the horizontal relation.

Another dimension of horizontal effect is the question of *direct effect*. If direct effect is acknowledged, it means that a constitutional provision can be applied on a legal relationship between private parties. Since statutory law is so frequent there is seldom an evident need to apply constitutional provisions directly in horizontal relations. Another significant fact is that the constitutions do not in general include provisions on sanctions on behavior violating the constitutional provisions. However in the case of protection of privacy within confidential communication (mainly e-mail) there are examples both of convincing scholarly writing and reasoning of a data authority where the constitution and the penal law are combined. Because of the penal rule of law principle the crime has to be sufficiently described in the penal legislation.¹¹

In the preamble to the Finnish amendment 1995 it was declared that the basic rights could have horizontal effects. Combining different parts of the constitutional material – the provisions and the preamble with its general comments and comments on individual provisions and the practice of the Constitutional Committee – one can conclude that all the dimensions of horizontal effect mentioned above are presupposed or possible. The horizontal effect is also pointed out as an intended effect for several specific fundamental rights relevant for privacy matters.

From a practical point of view the most important effect of a fundamental right with relevance for privacy matters is probably the possible *effect on interpretation* of statutory provisions and other legal material. The effects on the legislation are another story. *In legislative matters* the Finnish constitutional

⁹ For an analysis of horizontal effect of constitutional fundamental rights, see for instance Alexy 1986, 484-493.

¹⁰ Citation from the semiofficial translation by the Finnish Department of justice, at "www.om.fi/perustuslaki".

¹¹ The Finnish Data Protection Ombudsman 5.10.1999. Kiviniemi 2000 and Lehtonen 2001. See also section 5.3 of this article.

provisions regarding privacy have clearly had an impact on the making of several acts concerning privacy issues. A closer study of the practice of the Constitutional Committee in this regard shows that the constitutional protection of privacy is understood as creating qualitative requirements on legislation also for the horizontal relations including employment relations.¹²

One can conclude that *the constitutional protection* of privacy and employment privacy is stronger in Finland than in the rest of the Scandinavian countries. But it would be hasty to state that this implicitly means that Finland is the leading country regarding the actual protection and respect of employment privacy.

Legal culture. Blume has characterized the Danish legal “climate” in the following way.

“In Danish legal culture it is well recognized that citizens should have legal protection in their relationship both with the state, i.e. central and local government, and with private bodies. (...) The rules on data protection are based on the assumption that the individual has personal autonomy, but that this may be infringed if the citizen is in a weak position either in relation to the public or private sector. One of the general functions of the law is thus to restrict the freedom of the state and of private enterprises.”¹³

This, I believe, is a picture valid for any of the Scandinavian countries. However there are reasons in the development of contemporary legal history that puts Norway in a special category. Above the interest model was briefly described. Not surprisingly, the model was preceded by some pioneer law cases.

Beginning in the early fifties, there is a series of judgements by the Norwegian Supreme Court with a firm standing in favor of privacy protection. The remarkable feature is that the court founded its rulings on a *non-statutory principle of privacy*.¹⁴ The fact that the legal system of Norway (and the rest of the Scandinavian countries) is clearly dominated by a statutory law makes the rulings all the more worthy of notice. Furthermore, one of those cases concerned employers right to secret camera monitoring of an employee. The employer suspected the employee of embezzling money from the cash register. Based on the above mentioned unwritten law rule of privacy protection the Norwegian Supreme Court concluded that the employer did not have a right to proceed in the described way and therefore the video tape was not admissible evidence in court.¹⁵

¹² The Constitutional Committee is an organism of the Finnish Parliament. The committee examines the projects of law and considers whether they are compatible with the constitution. The projects of law studied are the preambles 49/1986, 85/1998, 96/1998, 121/1998 and 75/2000. The study is under work and will be published as an article in a legal journal in Swedish.

¹³ Blume Nordic 2001, 11-12, Kristiansen 2001, 2.

¹⁴ Retstidende 1952, 1217, RT 1967, 1373 and 1977, 1073, commented by Bing 1994, 25-26, Jakhelln 2000, 1172 ff.

¹⁵ Retstidende 1991, 616 and commented by Bing 1994 b, 88-91 and Jakhelln 2000, 1173-1174.

The European Convention of Human Rights (ECHR). All the Scandinavian countries have incorporated the European Convention of Human Rights. It means that the convention has the status of ordinary statutory law in these countries. The national legislation is supposed to meet with the standards of the convention and the convention and the case law of the Human Rights Court also gives indications of the interpretation of the national legislation. In Finland also the new Constitution is trimmed to match the convention with the idea that there should be no conflict between the two sets of provisions. Above I mentioned the express clause of the Finish Constitution according to which the public power has to guarantee the observance of basic rights and liberties and human rights. According to the ECHR art. 8.1 everyone “has the right to respect for his private and family life, his home and his correspondence”. As known the convention has not been considered to have a full horizontal effect for all the rights. Considering our theme it is interesting to notice a recent judgement of the French Supreme Court. The *Cour de Cassation* made use of *i.a.* article 8 as the basis for a rule expressing that an employee during his work time and at his work has a right to respect for his intimate life. This implies especially the respect for his correspondence. There are a couple of interesting points in this reading of article 8. *Pro primo*, the provision in question is given horizontal effect. *Pro secundo*, the provision is applied on a workplace and used in a way to limit basic employer prerogatives.¹⁶

4 Privacy and the Employment Relation

4.1 *Employer Surveillance as a Basic Element of the Employment Relationship*

In Scandinavian labour law the employer’s *right to supervise and control the employee is a basic element* of the employment relation.¹⁷ These employer prerogatives express an inequality between the parties with roots reaching beyond the formation of the modern employment relation. The changing in actual supervision and control are due to movements within a complex of social-economic factors. This is perhaps one of the reasons why the legal foundations for these employer prerogatives seldom are discussed.

One of the exceptions is *Martti Kairinen* who sums up his theoretical analysis with the result that the legal basis is the implicit consent from the employee. The model of consent includes also the thought of limitations. One cannot reasonably assume that the employee consents to all forms of supervising and surveillance and among the limiting factors are reasonable expectations and legality, good labour market standards as well.¹⁸ Within the aspect of legality you can in Finland point at the limitations implied in constitutional fundamental rights and human rights (for an example, see section 5.3 of this article). Bearing them in

¹⁶ Cour de Cassation, arrêt n° 4164. Also other provisions of French statutory law were evoked.

¹⁷ Kristiansen 2000, 102.

¹⁸ Kairinen 1983.

mind and also thinking of for instance the personal data directive and the implementing legislation you will end up with a problem concerning eventual requirements for a binding consent. The qualities of Kairinen's approach are not depending on how the limitations are motivated within "law in action". We can however, from a practical point of view, notice that the implied consent seldom is the turning point of privacy protection in Scandinavian case law.

In Scandinavian case law there are established guidelines limiting the employer's prerogatives of surveillance and control. These guidelines are often balanced against other principles for the protection of the employees. For instance the Swedish Data Ombudsman states that when processing data the employer cannot use his right to supervise and control in a random or infringing manner, or against good labour market standards.¹⁹

In Denmark, Norway and Sweden the limitations of the employers right to control is often discussed in relation to collective agreements and case law related to them. Namely, in these countries the evolution of the system of collective agreement goes hand in hand with the legal development of the employers right to supervision and surveillance. The employers were eager on having these prerogatives included in the collective agreement and thereby covered by the peace obligation. The beginning of this evolution goes back to the last years of the 19th century. The content of the employer prerogatives developed in the collective system as a "Ping-Pong" movement between agreements and case law. However the reasoning on the prerogatives and their limitations have been adopted as general principles of law, as an unwritten condition also in the individual contract of employment.²⁰

With a bold generalization one can summarize the case law on the employers' right to supervise, to survey and the employment privacy as follows. The privacy and the dignity of the employees are to be respected by the employer. The measures of control shall be reasonably motivated, used in an objective manner, not excessive and acceptable according to good labour market practice. The measures of control shall be proportionate to the need of control and the harm or nuisance caused to the employees. It is important to observe that an employer's behavior in conflict with these guidelines can constitute a breach of the collective agreement or the employment contract.

The Finnish pattern follows in some respects the picture drawn above. There is no explicit statutory regulation of the prerogative of supervising and surveillance. Case law seems to be scarcer, but indicates the same kind of legal reasoning as in the Scandinavian neighbour countries. The principles of privacy limiting the employee prerogatives are not, or at least not to the same degree, historically developed through collective agreements and interpretation of them in court. - In section 5 some specific issues of employment privacy will be dealt with and thereby some aspects will be added to the theme of employment privacy protection.

¹⁹ Personuppgifter 2001, 13.

²⁰ About Denmark Kristiansen 2001, 2-3, Norway Jakhelln 2000, 1168 ff.

4.2 *Legislation Specifying the Prerogative of Surveillance and Protection of Privacy*

The Scandinavian countries are all bound by the EC Personal Data Protection Directive 95/46/EC and have implemented it through legislation.²¹ The legislation on personal data protection has an impact on many issues of surveillance. As soon as the activity in question involves automatic processing of personal data or other processing related to a personal data filing system (existing or to be created) the law (directive) is applicable. Occasionally the applicability can cause trouble for instance regarding the criterion for manual processing of personal data. Are some written job applications on a desk in a secretary's room a structured set of data in the meaning of article 2(c)? Is it necessary that we have data on several persons before we perceive them as a personal data filing system? Here I only mention the problem and notice that different attitudes in this respect occur.²² If you stress the aim to seriously protect privacy, you might use an embracing concept of a structured file system. If you on the other hand underline the political process how and why the provision concerning manual files came about, you might find reasons to argue in the opposite direction.

Another example of questions of implementation and applicability is the relationship between the personal data protection acts and the acts implementing the privacy directive for the telecom sector (the Telecommunications Data Protection Directive 97/66/EC). It appears that the relation between these two directives and the normative outcome of that is so far a somewhat neglected area in the whole Union.²³

The recent developments in the *Finnish legislation* are evidently of importance for the theme of this essay. The above mentioned new Constitution and the in many ways strengthened fundamental rights adds to the potentials of arguments in favor of privacy protection. It is nevertheless too soon to evaluate the possible effects on "daily life". In addition we notice that Finland quite recently got a new Act on the Contract of Employment (2001:55 brought into force 1.7.2001).

This act is best characterized as a codification of the former law and thirty years of case law – with a new systematization. There are few material novelties in the act and that was probably due to political reasons in the three partite negotiations.

The employer's right to surveillance is still an express criterion of the employment contract and the applicability of the act. The law does not include any specific detailed provision on monitoring and surveillance. According to the tradition the non-statutory legal rule is that the surveillance must be fair and motivated by acceptable needs of the employer. This can also be supported with

²¹ Peter Blume (ed) *Nordic Data Protection*. Copenhagen 2001 is an anthology on these Scandinavian personal data laws.

²² Öman – Lindblom 2001, 72-75 compared with Raatikainen 1999, 42-43.

²³ This was an outcome of a round table conference of legal experts chaired by professor Frank 4-5 October 2001.

the provision giving the employer an obligation to promote the employee possibilities to develop his skills and the employer's relations to the employees. In addition one could refer to the provision forbidding the employer of discrimination based on age, health, national or ethnic origin, sexual orientation, language, religion, opinion, family conditions, trade union activity, political activity or any comparable ground. Discrimination based on gender is prohibited by a separate act on gender equality. The employer is also supposed to treat the employees without bias. There are statute provisions forbidding discrimination in the other Scandinavian countries too. The legislation forbidding discrimination is a "spiritual relative" to employment privacy regulations and the fields are to a certain degree overlapping each other. One can for instance consider filing data on sexual orientation and using it in decisions concerning the employee in question.

In Finland the implementation of the EC directive on personal data protection has moved on with the *Act on Protection of Privacy in Working Life* (hereafter PPWLA (2001:477, into force 1.10.2001.)). In the preamble the need to go further with the implementation of the personal data protection directive is mentioned. The idea is that the general Personal Data Act did not fully meet the *special needs of regulation* in the labour market. The new act, PPWLA, is meant to supplement the PDA and the PPWLA has priority in case of conflict with the PDA.

It seems that the PPWLA is a unique attempt within the European Union – so far. No other member state has special employment privacy legislation with such a broad scope. On the other hand the scope of the Finnish act is not as broad as its title suggests. In the European Union there is some activity for steering the development of employment privacy protection.²⁴ In Sweden there is an investigation studying the eventual need of legislation or other measures for protecting personal integrity in working life. The investigation has delivered its report just at the time this manuscript is handed over to the editor of this volume.²⁵ It seems that the proposed act covers about the same questions as the Finnish PPWLA. There is considerable leeway for the social partners to specify rights and duties by collective agreements.

The PPWLA has provisions for *collecting employee data*. Furthermore there are provisions about *personality and evaluation tests, medical tests* including alcohol and drug testing, and genetic testing. Finally there are provisions about *technical surveillance, monitoring* of e-mail and other telecommunications.

The approaches of the provisions differ remarkably from each other. Concrete material regulation of the employer's rights to survey and monitor and direct protection of the employee's interests in privacy do not dominate the set of rules.

²⁴ Simitis 1999, 51-53, for instance has strongly suggested an advancement in privacy protection by a sector approach. For instance, Article 29 – Data Protection Working Party Opinion 8/2001 on the processing of personal data in the employment context. Brussels, 13 September 2001 and the Social Policy Agenda of the Commission (COM2000/379final, 28.6.2000) refers to development and respect of fundamental social rights as a key component of an equitable society and of respect for human dignity, including the protection of personal data of individuals in the employment relationship.

²⁵ The report SOU 2000:18 was delivered the 5th of March.

On the contrary the rules are mostly rules on qualitative standards on permissible employer behavior and rules on procedure. For instance there are provisions on the permissible sources for collecting employee data, but there are no material rules for technical surveillance, only rules on information and negotiation. This regulation is to a vast extent a supplement to provisions in other legislation and custom approved by case law. It seems that the described approach of regulation partly depends on the nature of the object of regulation and partly on the possibilities to find a political solution.²⁶

Penal law. I restrict myself just to mention the role of penal law. There are definitions of crimes that affect for instance technical surveillance. Monitoring e-mails can for instance be the crime of encroachment of communication secrecy (Finnish Penal Code 38:3). The issue is briefly discussed also in section 5.3 of this essay. On the other hand, we have the crucial and perhaps banal facts, that every act that is not permitted in labour law does not necessarily form a crime. And when there are crimes you have the threshold of proof, of daring and the needed capacity (knowledge or financial) to pursue the offender for the crime.

5 Privacy Protection in Working Life – Some Specific Issues

5.1 Recruiting Workforce

In the employment relationship the employer's right to surveillance is considered as an inherent part of that relationship. At least formally the same argument cannot be used for the recruiting phase, since that relationship is not established yet. One might emphasize the (formal) autonomy of the parties interacting and conclude that they are able to choose their road of conduct. But then one can also underline the asymmetry between the parties reminding of the unequal employment relationship. If you stress the inequality in the latter constellation, you can also motivate the need of protection for the job applicant. The limitations set upon the recruiting employers are derived from legislation on fair treatment, discrimination, and gender equality, protection of personal data and often, the non-statutory legal principle on good labour market practices. In the case of Finland you might add the effects of the constitutional privacy provisions, but the concrete arguments are still to be developed.

Throughout the Scandinavian countries the statute limitations of the employer's prerogative of surveillance during the employment relationship have entered the scene before limitations within the phase of recruiting. There is more of the former ones than of the latter ones. It seems that the difference is getting smaller. This would be due to the effects of personal data protection and other legislation mentioned in the paragraph just above. There are also special provisions that affect both the recruiting phase and the employment relation as in the case of Denmark and Finland.

²⁶ Complements to the PPWLA are under preparation. They concern a more detailed regulation of drug testing and i.a. monitoring of e-mails.

When recruiting work force it is a typical feature that the employer collects and in other ways processes data on potential employees. Once again we have to consider the manner in which the data is collected and otherwise processed in order to see whether the process is covered by the data protection laws (the directive). If the mode of recruiting brings the data collection under the data law in question, all the qualitative requirements on processing are in principle applicable. Since the Scandinavian laws are closely made according to the pattern of the directive I will refrain from developing this item.

In Denmark broader leeway has traditionally been recognized for the employer when recruiting compared with the prerogatives of surveillance within the employment relation. The normative notions of undue influences and considerations have been limiting the employer's control activity in recruitment. The principle is linked above all to the freedom of organizing. Legislation relevant for limiting the employer prerogatives in recruiting has by and by become more important. *Kristiansen* points here i.a. at the personal data legislation. As mentioned all the Scandinavian countries have implemented the EC directive with national data protection laws. He wonders how the requirement of purpose and relevance will be understood in relation to the traditional employer prerogatives of recruiting.²⁷

True to the directive the *Finnish Act on Personal Data* requires that the controller can process data only when for instance the principles relating to data quality are fulfilled, that is the relevance requirement and the accuracy requirement. The employment privacy act (PPWLA) goes a step further requiring *direct relevance* for processing personal data on a job applicant (or an employee). According to the preamble this is meant as a slightly tightened requirement compared with the data protection law and the directive. However this qualitative step in favor of privacy protection is not elaborated in the travaux préparatoires.

In the *Norwegian act on work environment* (section 55 A, law of 04.02.1977 nr. 4) there are explicit restrictions on what an employer is allowed to ask during a process of recruiting. The employer is not allowed to ask about attitudes towards political, cultural or religious questions or about trade union membership. Accordingly it is also forbidden for the employer to ask about the job applicant's eventually homosexual orientation. The employer cannot try to have this kind of information in another way. There is of course the exception for the case that a type of above-mentioned data is legitimately of relevance for the job in question.²⁸

In Sweden there is no statute provisions limiting the scope of admissible questions when the employer collects information from a potential employee. The Swedish constitution could have an impact through its protection of the freedom of organizing. The effect is restricted due to many reasons like the wording of the constitution and the general attitude against horizontal effect.

²⁷ Kristiansen 2000, 104-105.

²⁸ Aune-Jakhelln 2000, 139-140.

However the effects of the constitution is stronger on the public sector, when the state or a municipality is the employer.²⁹

About the Swedish situation *Källström* remarks that there seems to be no direct legal measures to prevent an employer to ask a job applicant questions about private life. On the other hand there can be no duty to answer according to the truth, in the case when the issues belong to the area covered by privacy protection. This seems to be valid also for factors that legally are irrelevant for recruiting like data about pregnancy and data related to legislation against discrimination based on factors like handicap, sexual orientation, race, skin color, national or ethnic origin or religion.³⁰

The Swedish Labour Court has on at least two occasions declared that there is no far reaching duty for the job applicant to volunteer information that is likely to negatively affect his situation (AD 1997:36 and 2000:81).³¹ There is a recent judgement by the EC Court (C-109/00, 4.10.2001) that declared the dismissal of a pregnant woman illegal. Also this case was about withholding information. The woman had been employed as a fixed time worker and when she was recruited she had not volunteered the fact that she was pregnant. The court concluded that this was no ground for a dismissal. The ruling was expressly based on EC legislation on gender equality. Because of the facts in the case it does not add anything about direct lying about sensitive data.

You might add two comments. If the asking about the applicants private life is part of collecting personal data under a data protection law, then this processing should pass the test of purpose, relevance and so on. And, related to the case above, you can also refer to the possibilities of the interpretation of a discrimination law. The Finnish Ombudsman for gender equality has stated that as a main rule questions about for example family planning are forbidden, since the recruiting employer cannot legally use the information. And, following *Källström's* argument about direct legal measures, one should explore what sanctions that could lead to and how direct and effective they could be.

– A couple of issues that can turn up both during recruitment and the employment relation will be dealt with in the next subsection.

5.2 *Health Data and Testing*

Health testing. Traditionally medical information about a person has been regarded as sensitive. This is also the basic principle of the directive with its prohibition of processing (and its list of exceptions). The medical data is also under the requirement of relevance and adequacy. The possible tension between different interests related to health information is evident. The job applicant or employee may be afraid that medical information about him is not interpreted

²⁹ *Källström* 2000, 94.

³⁰ *Op.cit.*, 94-95.

³¹ In the latter case the employer also claimed that the employee had lied. This behaviour was nevertheless not tried as a ground for dismissal, since the court did not find proof of the lying.

correctly or that it is misused. The employer has duties of work environment protection for instance where health data can be of relevance. In the Scandinavian countries special regulation on health data and different sort of testing in the labour market is frequent and some of the regulation covers also the recruiting phase.

In *Denmark* there is an act especially on health data in the labour market (1996:86)³² concerning what sort of health data and for what use an employer can collect and the manner in which the data can be collected. The main principle of the legislation is that the employer is allowed to collect only the sort of information on the applicants health concerning his or hers ability to manage with the job in question and only when it is clearly relevant for that purpose. It is the applicant himself who shall furnish the employer with the needed information (for instance a declaration by a physician). The employer is not allowed to get or use health information in order to be able to calculate the risk of the person in question to develop some sickness.³³

In the case of *Finland* the situation is alike with some additional features deriving from the new PPWLA. As stated above the important but vague message is that direct relevance in the PPLWA is to be understood as a somewhat more restrictive condition than the criterion of relevance.

The PPWLA introduces also a qualitative requirement defining the competence of testing and treating the samples. There is a reference to health care legislation and the required competence of the personnel established there. The rule is extended to concern also our following theme, namely testing for drugs.

The above mentioned Danish and Finnish legislation on health data in working life is more detailed about processing data than the corresponding parts of the personal data protection directive. This special legislation also has a broader scope of application than the directive. The directive (the implementing laws) is applicable on automatic processing of personal data or manual processing related to a system of files. If there is no automatic processing and if the processing of manual data is not considered to be related to a system of files, the processing falls outside of the scope of the directive and the implementing laws. The Danish and Finnish legislation about health information is not at all linked to these preconditions. Both the Danish and the Finnish acts have the same main rule: The job applicant provides the information about his or her health in the cases that it is permitted. The interests in discretion and access are well covered at this point.

Testing for drugs. Several general but partly competing principles are condensed in legal discussion on drugs and tests for drugs in the labour market. The employers' interest in security and efficiency is obvious and depending on the kind of jobs also outsiders may share this interest. Also the employees may have those interest in common with the employer, at least the interest concerning safety. But the individual might have a feeling that testing invades his privacy.

³² Lov om brug af helbredsoplysninger på arbejdsmarkedet m.v. (1996:86).

³³ Kristiansen 2000, 105-106.

Another issue is that it is obvious that all tests are not reliable. One can also figure that the samples can be used for screening other things than drugs.

At least in Sweden and Finland drug testing on the job has evoked vivid discussions. In *Finland* it has been more of a media debate focusing the employers need or right to test. One has seldom discussed what to do with the results, although that should have some bearing on the issue of privacy protection. In *Sweden* there has been more interest related to legal opinions and legal dogmatics with special reference to some cases from the Swedish Labour Court. There is still debate over the implications of these rulings. In Finland there is not cases to point at, but the new employment privacy legislation and its preamble brings some elements to the constellation. With the following brief sequence about the situation in Sweden and Finland one gets a concrete example of possible consequences of the different situations regarding constitutional fundamental rights.

The employees' eventual duty to take a drug test in a private corporation has been the object of several disputes in the Swedish Labour Court. In a couple of cases the conclusion was that there was such an obligation. The reasons have varied: safety reasons when building of scaffoldings at a construction site; the special character of the employer's activity in the case of a nuclear plant and a cleaner working in a non classified protected area and in the case of a school.³⁴

In the school case some of the employees were former drug-addicts. They were considered as having good potential to prevent drug abuse if they were completely drug-free while employed at the school.

The Swedish Constitution is not considered to give a horizontal effect to privacy protection, but the Constitution has a visible effect on the employment relationship within the public power. Within the private sphere the acceptability of drug testing is based on a weighing of the employers need and the employees privacy protection. The measures employed must, also in this case, be in accordance with good labour market practice.

The Finnish PPWLA or any other statute provision does not (directly) regulate the general admissibility of drug tests at the work place. In the preamble of the PPWLA the constitutional protection of privacy is evoked and with a reference to the Constitution it is noticed that the employer has per se no right to make a job applicant or an employee to take a drug test. There should consequently be no harm for the applicant or the employee if he or she refuses a test. Nevertheless it is admitted in the preamble that the reality might be different. It is also stipulated that only persons who are authorized in health care can do testing for alcohol and narcotics. In addition there are provisions for safeguarding reliable analysis of the samples. As with health data one tries to keep the information in "right hands". - In my view the general debate has in its focus on tests neglected a thorough discussion concerning what ought, should and should not happen when somebody's test is positive.

³⁴ The selection of case law is based on Johansson 2001, 3: Swedish Labour Court 1991:45, 1998:97, and 2000:13.

5.3 Surveillance and Telecommunications

Employer surveillance of telecommunication at the workplace is an example of new techniques giving birth to new questions or modifying familiar ones. Concerning e-mail the argument in daily working life sometimes goes in the following manner. The equipment for data processing and telecommunication belong to the employer and the equipment is meant for working. From this and the employers general right to surveillance follows the employers right to control the telecommunications and possibly also its contents. At least in Finland I have observed thinking along these lines at some workplaces. However, at the same time you find totally different authoritative thinking with the Data Ombudsman and in scholarly writings. Regarding the conclusions they are at some points alike and at some points different from the views expressed in Denmark.

In *Denmark* the legal discourse has focused on penal law, on the personal data legislation and principles developed within collective labour law. There are no cases that would draw the basic lines. The employers resent the idea of agreeing upon restriction concerning monitoring rights. Kristiansen believes that questions on monitoring to an increasing extent are the object of negotiations in work councils.³⁵

The Danish Data Ombudsman has interpreted the personal data law in relation to supervision of e-mail traffic. One makes a difference between surveillance of a log mail and of monitoring the content of specific e-mails. The Data Ombudsman is more restrictive in the latter case, where an employer has the right to monitor only if a specific employee is suspected of having violated company rules or the law. There exist however additional criterions for this case as information about the employers monitoring policy. The opinion of the Danish Data Ombudsman is also that it is in no case permitted to monitor an e-mail if it appears to be of a private nature – even if private mails have been forbidden. Kristiansen states that such monitoring probably would be a crime according to the Danish Penal Law, depending on how the notion “closed message” is understood.³⁶

The *Finnish* PPWLA does not provide material regulation on the right of monitoring telecommunications. Its scope is limited to making the issue an object of information and negotiating. According to the Finnish Constitution “The secrecy of correspondence, telephony and other confidential communications is inviolable.” (Sec. 10)³⁷ The preamble makes it obvious that the protection was intended to cover confidential messages in modern telecommunication as well.³⁸ The argument that severely limits the right to surveillance of the employee’s e-mail is founded on the horizontal effect of the fundamental rights and on penal law.³⁹

³⁵ Kristiansen 2001, 8-9.

³⁶ *Op.cit.* 9-10.

³⁷ One should also pay attention to the protection of everyone’s private life, honor and the sanctity of the home, which are guaranteed in the same section as the communication rights.

³⁸ Preamble 309/1993, 53.

³⁹ Kiviniemi 2000, Lehtonen 2001.

Limitations on protection of confidential messages should follow the general qualitative requirements for constitutional rights. Furthermore they should be laid out in a Parliamentary Act. Any kind of limitations of the employees right to confidential communication cannot be made legal by reference to the employers right to surveillance or his rights as an owner of the equipment.

The protection of e-mails departs from the notion of a confidential message. With the tradition of protecting confidential messages in view it has been stated that the protection is not depending of the content of the message. The parties should have the possibility to freely express themselves without fear of intervention or of having “somebody reading over their shoulder”. What content should be given to the notion “confidential” in this legal surrounding? There is some possible confusion in the relation between the constitution (its words and its preamble) and the penal statutes on the one hand and the preamble for these statutes on the other hand. This conflict regards the data about the telecommunication and the scope of their protection.⁴⁰

The scope of the constitutional protection of a confidential message is not identical with the object of protection in the Penal Code. According to the constitution there is no need for the message to be protected in order to get protection by law as long as the message is confidential. However, the penal code is formulated as a protection for closed, protected messages. In view of the principle of legality in penal law it is not seen as possible to modify the penal rule by interpretation in a manner that would make identical with the wordings of the constitution.

The status of a confidential and protected message is depending of practical factors that cannot be dealt with on this occasion. Resuming with one example: if the normal way to read an e-mail is logging in with a personal password, then the letter is protected. The fact that the equipment is provided by the employer does not give him a right to read the content or to inform himself about the sender or the addressee. This rule is not altered by the fact that the equipment is used for personal private tasks in spite of an explicit prohibition. The employer can order the employee to stop the traffic and he can make sure the messages are taken away from the company server.

6 Fragments of Yesterday, Today and Tomorrow as Conclusions

The employment contract presupposes the employer’s right to supervise and monitor the employee. With the actual legal framework with statutory legislation and a considerable weight on general principles you often have to investigate a question about the limits of employer prerogatives and employee privacy protection carefully. If we are not talking about easy cases, the varying situations and possible balancing between rights or interests should be taken in account.

Formerly the social position and the prerogative of supervision and surveillance gave the employer very far going rights. With the growth of the

⁴⁰ In detail, Kiviniemi 2000, 69-73.

protection function of labour law and the so-called juridification⁴¹ the leeway of the employer has grown smaller, but remains considerable. This development is related to many factors, but the role of the unions, their confrontations and co-operation with the employers' side is evidently decisive. Negotiating and compromises are marks of the Scandinavian Welfare State. However it seems that the role of the social partners in shaping employment privacy has been smaller in Finland than in the other Scandinavian countries. In Finland there has not been the same development of employment privacy through collective agreements. One can add that the social partners have not been the driving forces behind the new employment privacy legislation.

Apropos the social partners, I mention an important privacy protection area in working life, which however will not get any further attention within this article. As known the Scandinavian labour markets are highly organized. The unions' role as *i.a.* a lawyers office on the level of individual employees⁴² has raised the question about the employees' (member and not member) privacy protection in relation to the unions.

How Scandinavian is the Scandinavian. There are many attitudes towards privacy in common amongst state authorities and courts in Scandinavian countries. However there are also differences in the legal framework including general principles of law. In common is the readiness to legislate in the matter of privacy. This readiness was demonstrated by the process of legislating on personal data files before the EC directive sort of made this kind of legislation compulsory. The countries also have a common feature in the way to relate privacy aspects to the emanation of the data society and see the role of legislation in this light. This latter aspect is expressed at more length and consciously within the Norwegian tradition of privacy protection. At the same time you may find all or at least the most important themes of the model in the North American and European debate. The European directive on personal data and its requirement for implementing measures has had a strongly unifying effect on vast parts of the privacy legislation in Western Europe. In this crude meaning the Scandinavian features in this area are perhaps not so uniquely Scandinavian.

There is of course a long list of International documents adopted by the Scandinavian states that concern privacy protection and that also may affect employment privacy. I just point at the fact that some of them are influential. Another brief statement is about International soft law that may have influence as well. An important example is the ILO Code of practice on the protection of workers' personal data. The references to the ILO code are frequent in the preamble to the Finnish Act on Privacy Protection within Working Life. In that particular case the recommendation probably was a point of reference legitimating the proposals of the government. At that time the government was under some pressure since an earlier attempt to legislate in the matter had failed

⁴¹ Juridification stands here for the fact that more and more conflicts of interest are governed by legal instruments and thus turned into matters that can be solved in a procedure regulated by law, Bruun et al. 24-26.

⁴² Bruun et al. 1992, 18.

in an embarrassing way. Namely, the parliament had turned down the project although it was a cabinet with political majority in the parliament.

Focusing the new Finnish act on privacy protection within working life and the Danish law on treating health data one can also here see kin legislation in at least one other European country. I am referring to the so-called *Aubry laws* in France.⁴³ It is of course not the same thing to say that there are things alike and that there is influence from one legal order to another. Anyway the observation goes in the line that you have to study carefully before you in a meaningful way can state that a certain legal privacy phenomenon is typically Scandinavian or typically any Scandinavian country.

As we can see there are many features in Scandinavia that remind of legal phenomenon other countries, mainly North American and European. There are relations of influence to be found. The contrasts are clearer if we compare the Scandinavian Countries with the legal status of privacy questions in the USA. It is not possible to make a proper comparison here, but some outlines are sketched nevertheless. In the USA there is no over all federal legislation on privacy. There is a long and intense debate on the basis of privacy protection, whether it is in the constitution versus tort law. The thinking has been characterized as human rights thinking (which is prevailing in the Scandinavian and also characterizes the EC personal data directive) versus property thinking. The latter mode of thinking is more open for the thought that encroachment can be negotiated or, alternatively, and compensated with money. And finally the regulation in the states is marked by a sector approach and often embedded in legislation on discrimination.

The future legal framework. The mentioning of the sector approach can give the association to ask what will the future legal framework look like in the Scandinavian countries – and within the European Union. It is said that it is difficult to predict – especially the future. Anyway, several scholars have been bold enough to do so and here we meet the idea of sector approach. Peter Blume's idea is that the regulation of protection of personal data will consist of a web of different laws with a law on processing of personal data in the center (equivalent of the directive). In the directive a sector approach is foreseen and the Directive 97/66 already takes the first step. Blume considers that other special regulations will appear, for instance for credit reporting.⁴⁴ Spiros Simitis has strongly advocated advancing in privacy protection within the EU by a sector approach.⁴⁵ In the Commission there is for the moment considerations about how to advance protection and harmonization in working life. In this sector you can see some pioneer regulation in the Scandinavian countries. I am referring to the Danish act on employee health data, the described provision in the Norwegian act on labour environment.

⁴³ Several articles concerning recruiting under the chapter ("titre" V of the French labour law (code du travail; JO 1.1.1993).

⁴⁴ Blume *Nordic* 2001, 8 *and* Saarenpää 2001, 74-76 underlines an evolution with special legislation in the field and discusses its consequences.

⁴⁵ Simitis 1999, 51-53.

The Finnish act on employment privacy protection is special considering the ambition to have a more global approach to the privacy questions at the work place. The act also demonstrates some problems about the relationship between general legislation and special legislation. The result and its background also show the political difficulties in finding balanced solutions that are accepted in the three partite negotiations. It is close to the assumption that a possible development of a normative instrument in the European Union will have many and intricate phases.

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