

'The Global Trajectory of Data Privacy Laws'

Graham Greenleaf

UNSW Faculty of Law

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Theme: 'Global trajectories'

- What patterns are there in the *global* development of data privacy laws?
- What implications (if any) do these developments have for how *Europe* should reform its own laws?
- What do they tell us about the prospects for a *global* data privacy Convention or treaty?

Quiz: A 'European thing'?

1. How many countries (+ independent jurisdictions) have a 'data privacy law' covering most of their private sector?
[Start of this research]
 - 40+ / 50+ / 60+ / 70+ / 80+ / 90+ / 100!!
2. How many outside Europe? Where?
 - 10+ / 20+ / 30+ / 40+ / 50!!
3. How many non-Europeans have laws comparable to 'European standards'?
 - None / A few / Most / All

Unexpected answers? (1)

- Q1 - **81** 'countries' have data privacy laws
 - [Global data privacy laws Table](#)
- By decade, the growth is accelerating
 - 1970s: 7
 - 1980s: 10
 - 1990s: 19
 - 2000s: 35
 - 2010s: 10 in 2 years (linear growth = 50)
 - A pessimistic (linear) projection, is 120 laws by 2020; an optimistic projection (continuing acceleration) is 170

Unexpected answers? (2)

- Q2: **31** jurisdictions outside Europe
 - EU: 27 (all); Other European jurisdictions: 23 (3 not: Turkey, Belarus & Georgia)
 - Asia: 8; Latin America: 8; Sub-Saharan Africa: 6; N.Africa + M-East: 3; Caribbean: 2; Australasia: 2; N. America: 1; Central Asia: 1
- Significant implications for Europe:
 - Most growth will now occur outside Europe
 - By 2020, the majority of laws will be outside Europe
 - Almost all the commercially significant world will have such laws, and the focus will not be European 'data exports'

Whose missing?

- Trade-significant absent countries:
 - Brazil; S.Africa; Indonesia; Nigeria; Turkey
 - Most have bills in various states of advancement
 - And of course China and the USA...
- China
 - No-one knows which way China will go
 - In 2007 an EU-style national law looked to be in favour
 - Since then a profusion of local and sectoral laws, guidelines, criminal laws, tort law etc

The USA - conclusions

1. There are no practical prospects of a comprehensive data privacy law passing the US Congress - lobbying against is too powerful
2. The sum total of US' sectoral laws probably don't even meet the OECD Guidelines, even if applied nationally
3. Constitutional necessity (mainly 1st Amendment) *may* prevent US laws ever meeting EU standards of restrictions on disclosure or collection (case law inconclusive)
4. Result is that Europe cannot compromise with US standards without capitulation
5. Europe has to politely accept that US laws are different, then politely enforce its own laws wherever it can

Q3: 'European standards'?

- Q3: We first have to answer 'what are *European* data privacy standards?'
- Approach: What requirements are in the Directive and CoE 108 but not in the OECD Guidelines or APEC Framework (even as recommendations)
 - These differences = distinctly European standards
 - Then identified the 10 key differences and ignored others

10 distinctive European requirements

1. Has an independent DPA;
2. Allows recourse to the courts;
3. 'Border control' restrictions on data exports;
4. 'Minimality' in collection (relative to purposes);
5. General 'Fair and lawful processing' requirement;
6. Must notify DPA, and allow some 'prior checking';
7. 'Deletion': Destruction or anonymisation after use;
8. Additional protections for sensitive data;
9. Limits on automated decision-making;
10. 'Opt-out' of direct marketing uses required.

Do non-European laws share these standards?

- **Method:** Examined 29/31 laws (with assistance) against these 10 criteria
- **Results:**
 - Each of the 10 elements is in at least 13 non-Euro laws
 - Most common are 'border control' data exports (25); sensitive data protection (25); deletion requirements (24); and a DPA (22)
 - Least common are automated decision-making controls (13); and prior checking (16)
 - The average occurrence of the 10 is 20.9/29 laws

Most and least European

- The laws with 8-10 Euro- features:
 - Peru; Uruguay; Burkina Faso; Senegal; Morocco; Angola; Argentina; Macau; S.Korea; Mauritius; Costa Rica; Benin; Cape Verde; Columbia; Tunisia
- The laws with 1-4 Euro-features:
 - India; Israel (out-of-date?); Bahamas; Japan; Chile; Vietnam
- 'Adequacy' is a different question:
 - Uruguay (10); Argentina (9); Canada (?); New Zealand (6); Israel (4?)

Implications

- Correlation is not causation (influence)
 - Repeated independent invention is logically possible
 - Raab shows indirect DPA networks of influence
 - Emulation of 'world standards' is powerful as 'adequacy'
- Does it create a rebuttable presumption?
 - **Likely that European standards have been the single most significant influence outside Europe**
- Says nothing about effectiveness of laws
 - Effectiveness is not a Q of 'law in the books'; investigation of actual enforcement is needed
 - No direct implications for 'adequacy' or CoE accession

Compare OECD & APEC

- The OECD Guidelines have nothing not found in the European instruments
 - But many OECD / CoE 108 principles are commonplace
- The APEC Framework has 3 principles which are different:
 - 'Preventing harm' (I); and 'Choice' (V) have not been adopted as principles in any non-Euro laws
 - 'Accountability' re data exports (IX) is adopted in Mexico, and recommended by law reform bodies in Australia and New Zealand; Canada's provision pre-dates APEC
- APEC principles have had minimal effect

Can CoE 108 be globalised?

- Do ubiquitous data privacy laws make some global agreement either (I) possible or (II) useful?
 - Will see the answer to both (I) and (II) is 'Yes'
- Candidates:
 - (i) A new UN Treaty from scratch is unrealistic
 - (ii) Europe has no need to negotiate some OECD-Lite compromise with APEC and the USA
 - (iii) That leaves CoE data protection Convention 108 (2001) as the only realistic contender

CoE Convention 108

- Convention 108 + Additional Protocol = Directive (approx.)
 - 2001 Protocol added essential missing parts (DPA required; data export restrictions; access to courts)
 - Without Protocol, Conv 108 ≠ 'Euro standards'
- 43/47 CoE member states have ratified Conv 108 and have laws
 - 31 have also ratified Additional Protocol
 - This is a very good start for a global agreement

Decision to globalise 108

- A 23(1) has allowed accession by non-CoE-member-states since 1981
 - Requires unanimity of contracting states for a non-European state to be invited to accede
- 2008: Consultative Committee (CC) of Conv 108 finally decided to activate 23(1)
 - Agree to consider requests from countries 'with data protection legislation in accordance with Conv. 108'
 - Prompted by resolution of DPA meeting in Montreaux
 - 2009: EU's 'Stockholm Program' included world-wide promotion of Convention 108

Why the Additional Protocol is essential

- What if a non-European state is allowed to accede *only* to the Convention?
 - No obligation to have a DPA or provide access to the Courts
 - No obligation to prevent onward flows of data
 - All other members are still *obliged* to allow data exports to it, unless they explicitly derogate
- A 'back-door' defeat of Euro-standards
- Problem solved if country either (i) already has all of the Additional Protocol elements or (ii) accedes to Protocol as well

Accession procedures & standards

- 2011 brief Note from CoE Treaty Office:
 1. Non-Euro country should write requesting accession
 2. Euro Members are consulted first: unanimity
 3. Non-Euro Members (none yet) then given time to raise objections
 4. If no objections, invitation sent
 5. Non-Euro country must comply before acceding
- Most key questions remain unanswered...

Problems with accession procedures & standards

1. Clarity needed on compliance with Additional Protocol standards
 - § Bureau claims that compliance with both is necessary
2. What evidence is required that a country meets CoE standards?
 - § Purely formal or substantive assessment? Cannot be purely formal - some countries have DPAs in the laws but not in fact
 - § CoE is only used to dealing with 'normal' countries
3. How can EU 'adequacy' findings/ Opinions be used in accession procedures?
 - § Key difference is that 'adequacy' is aimed at protection of Europeans; CoE must be concerned with country's citizens

Problems with accession procedures & standards

4. What role will the Consultative Committee play in accession?
 - § Peers? (countries); Experts?; DPAs like WP29?
6. How can citizens of non-Euro countries enforce their rights?
 - § Non-Euro citizens cannot utilise A8 ECHR - powerless
 - § Could the CC be empowered to accept 'complaints'?
8. Procedures to enforce compliance over time?
 - § CoE 'modernisation' may include 'follow-up' procedures
 - Parliamentary Assembly of CoE resolved (Oct 2011) that globalisation of CoE 108 must not lower standards

The Uruguay accession

- July 2011: Council of Ministers invited Uruguay to accede
 - Did so on basis of a 2 page Opinion of Consultative Committee (CC)
 - CC Opinion was based materials sent to sent to 43 Member representative of CC: (i) favourable EU WP 29 Opinion; (ii) the Act; + (iii) request letter
 - Only 14 bothered to confirm 'no objection'; 29 silent
 - CC then adopted Opinion by written procedure
- Q: Will Uruguay accede to Additional Protocol as well? Does it already comply?
 - Not a condition. Not addressed in CC Opinion.

Unsatisfactory aspects of the Uruguay accession

- What procedures will be adopted when there is no WP29 Opinion to rely on?
 - Will Expert assessment be commissioned (as the EU Commission does, when a WP29 Opinion is absent?)
 - 'Adequacy' is not the correct standard for accession
- CC Opinion does not address *reality* of protection to Uruguay citizens
 - Fortunately WP29 Opinion does so to some extent
- No Civil Society or other non-State input
 - A CoE accession affects the citizens of all other countries that are Parties: they should have input

Advantages of accession to non-Euro countries

- Guarantees free flow of personal data from 43 Euro countries
 - Directive guarantees nothing; and only 27
- CoE (+AP) accession means EU adequacy is *unlikely* to be denied
 - It should be a higher standard than adequacy; and is an international commitment; also likely to be faster
- Avoids need to make decisions about exports to other countries (21/28 have data export laws)
- Voluntary entry into a treaty as an equal partner
 - Some non-Euro states resent 'adequacy' as an imposition

Advantages of non-Euro accession to Euro countries

- Creates free flow of personal data obligations on all non-Euro Parties
 - Adequacy doesn't create reciprocal obligations
 - 21/28 non-Euro laws have data export laws
- Consolidates global position of Euro standards
 - Increases consistency with Directive obligations
 - Advantages for Europe-based companies in consistent global standards
 - Improves capacity to resist pressure from USA

Will CoE 108 become a global standard?

- As yet, more promise than reality
 - CoE 108 Bureau is confident of 'a long list' of accessions
- A lot of things may go wrong
 - CoE 108 Bureau has done little to publicise advantages and 'sell' accession
 - Civil Society may strongly oppose accessions if standards are not kept high
- But getting it right has major benefits
 - The only realistic prospect of a (high) global standard
 - This would improve both trade and human rights

References

- Greenleaf, G
['The Influence of European Data Privacy Standards Outside Europe: Implications for Globalisation of Convention 108'](#) (forthcoming) *International Data Privacy Law*, Vol. 2, Issue 2, 2012
- Greenleaf,
[Global data privacy laws Table](#) (updated periodically) and
['Global Data Privacy Laws: Forty Years of](#)