

How does Human Rights Law, especially the European Convention on Human Rights, influence online surveillance?

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The report summarises case law of the European Court of Human Rights (ECtHR) on the issue of secret surveillance and takes a critical stance as to its suitability for the legal assessment of new forms of mass surveillance.

With a particular focus on the decision recently handed down in the Big Brother case, the paper introduces the ECtHR's considerations on the compatibility of secret surveillance with the right to privacy under Art. 8 of the European Charter of Human Rights (ECHR). The analysis shows that the ECtHR focusses on two criteria: firstly, whether the impugned surveillance regime is based on a body of clear and detailed rules limiting the executive's discretion in the deployment of covert measures; and, secondly, whether sufficient safeguards exist to prevent the abuse of power. The report questions whether the established approach is consistent and fit for the challenges posed by new forms of surveillance, including online surveillance, that are featured by pre-emptive logic, mass collection of personal data and sophisticated techniques of automated data analysis.

The report identifies four deficiencies of the extant case law that, although of general nature, gain particular weight in cases of new forms of surveillance.

First, the ECtHR's concept of "informational privacy" as a subset of Art. 8 ECHR falls short of both, privacy and data protection. Inter alia, it results in what has been described the "proceduralisation" of privacy, leaving little room for a comprehensive proportionality test.

Second, the ECtHR grants a wide margin of appreciation to the respondent State as to the suitability and necessity of the measure impugned. Due to the logical complexity of the techniques deployed for purposes of contemporary surveillance and the secrecy of its operation, however, this assumption is far from self-explaining. Thus, the ECtHR's deference comes at the expense of the right to privacy by privileging the State's interest from the outset.

Third, the ECtHR's focus on the individual dimension of the right to privacy aggravates this tendency, whereas this report argues that the focus should be widened to the social function of privacy and the harm caused to democracy caused by secret surveillance. It is exactly this impact of the surveillance programmes revealed by Edward Snowden and subject to the *Big Brother* case that put the proceedings pending at the centre stage of Human Rights Law.

Fourth, in the context of Internet surveillance and international intelligence sharing, the Court still has to determine the conditions for extraterritorial applicability of art.8 ECHR. Here it is suggested that the ECtHR might learn from the Court of Justice of the European Union that submitted some remarkable considerations in its judgement in *Google Spain* and its opinion on the *EU-Canada PNR* cooperation. Whilst in the Big Brother case, the Court took the chance to briefly elaborate on the compliance of an intelligence sharing regime, its case law remains inconsistent as to the international dimension of surveillance.