DAJV - Fachgruppentag 4. März 2016
Fachgruppe CLPL

Session I
A Rose by Another Name? „The comparative law of the NSA-Affair“

Professor Russel Miller began his presentation by recalling the scope of different reactions to the “NSA Affair” and the question of privacy and intelligence-gathering by the state. While in Germany Edward Snowden is viewed as a hero, being presented with honorary doctorates by different universities and having streets named after him, in the US, he is viewed as a criminal who has jeopardized US anti-terrorism programs.

According to an EMC-survey Germans are 20 % less willing to trade privacy for convenience. In the study, convenience did not consist only of social and economic benefits but also of more security against terrorist threats. Professor Miller gives various reasons for the differing views on privacy on both sides of the Atlantic: historical experiences as well as different constitutional regimes and the very understanding of privacy.

The different view on privacy is already evident on a linguistic level. The English word privacy does not have a direct translation but rather more differentiated meanings such as “Privatsphäre”, “Vertrautheit”, “informationelle Selbstbestimmung”, “Ruhe” or “Datenschutz”.

Miller recalls James Whitman’s 2004 article “The Two Western Cultures of Privacy: Dignity versus Liberty” which explains the different perspectives of privacy as follows: In German and French privacy laws, interpersonal respect, dignity and honor, namely the right to control one’s public image are at the core of these laws. In the US, privacy laws must accommodate and account for other values, including the free press and the free market. Therefore privacy laws are a means of protecting and controlling the individuals’ share of one’s property – enabling also a fair remuneration.

The particularity of the NSA Affair, which involves privacy protection against the actions of public authorities rather than private commercial actors can only be explained by comparing the constitutional laws of both countries, Russel Miller believes.

The reasons for the different reactions in the US and Germany towards the NSA-Affair can be explained by their very **different historical experiences**. While many Germans experienced the oppressive character of surveillance twice in history (Gestapo and Stasi), US citizens – after September 11 – were led by a feeling of a failed security system. Germans on the other hand have not experienced a recent terrorist trauma that would suggest the need to sacrifice privacy for more security.

Different legal traditions on both sides of the Atlantic can also explain the contrasting approaches to privacy and in particular the NSA Affair. Germany is ruled by a continental civil law system, which conceptualizes social phenomena as abstractions and is independent of any concrete circumstances. This leads to a regulatory culture in which everything is already legally framed in advance of any particular iteration of the anticipated events that are being regulated.

The common law tradition prevalent in the US typically works from the concrete facts of a particular case to identify the applicable rule. Problems in the common law system are addressed when they actually arise.

Consequently, in Germany the surveillance, intelligence-gathering and data collection are themselves a violation of the abstract rule protecting informational self-determination and can be brought to court without proving a direct infringement. The subject of the NSA-Affair was in fact the mere collection, not the use of data/intelligence. In the US on the other hand, the plaintiff has to prove an actual abuse of personal information data and the ensuing damages.

The German Constitutional Court has been conscious already of the distinct harm to privacy that could result from the accumulation of personal information data by use of contemporary telecommunication technologies. The metadata produced by modern technologies enables the state to form a personal portrait according to this data. This **"mosaic" theory of privacy** is accepted by German jurisprudence, but not yet by US courts.

Another indication of the different views of privacy are the **constitutional texts themselves.** The German constitutional text uses the term "privacy" in Art. 10 of the basic law (the privacy of correspondence, posts and telecommunications shall be inviolable) while the US Constitution does not address this topic (although liberty protections in general are addressed in Amendment 3 and 4 of the US constitution). Art. 10 of the basic law is significant because it establishes a concrete constitutional protection for the exact activities involved in the NSA-Affair.

Germany's constitution furthermore pursues the prominent objective to integrate Germany into a cosmopolitan normative order and is thus more outward looking, whereas the US constitution declares national goals to be "domestic tranquility" and "common defense".

Miller concludes that the knowledge and appreciation for the different approaches to privacy in Germany and the US should foster an understanding and tolerance on both sides of the Atlantic, which is necessary to continue the essential transatlantic dialogue. Miller also believes that the notion of the West or the western Ideals need to be newly defined and discussed in distinction to China and Russia as well as newly formed societal groups such as Pegida (= Patriotische Europäer gegen die Islamisierung des Abendlandes).

Katharina Wunderlich