



Around the concept of *Privacy*: Ethics and Human Rights in the information society ?

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1. Through ICT, people find the opportunity to freely explore the infinity of information resources available on the web, to communicate with whoever they like, to seek out information wherever they like, and also to express themselves freely.

The open dimension of the information society enables a break to be made with the controls traditionally related to the individual's membership of social groups, which used to 'normalize' the content of accessible information. The websurfer in front of his or her computer feels free of these types of constraint: cyberspace is the archetypal home of liberties.

2. In this space, the frontier between the public and private spheres becomes blurred. A visit to a blog, participation on a discussion site, etc. constitute private expressions in public spaces that are potentially accessible to all.

3. In place of control systems that are easily identifiable by individuals in traditional societies, new places of public or private control are being set up. These new places of control present themselves in a depersonalized way and function on the basis of data created through the use of the net and objectivized without direct contact with the individual (e.g.: email screening on the basis of key words, the drawing up of profiles on the basis of sites visited, etc.) This 'decontextualization' of the decision about individuals judged on 'abstract norms' (does this person correspond, a priori, to that profile ?) gives rise to concern about a society which encourages normalization (seeking to meet the criteria of the norm) and engenders discrimination.

4. Lastly, certain ITC applications (e.g. RFID implants in human bodies, or 'ambient intelligence' systems) are aimed at increasing the capacity or the quality of the individual's interaction with his or her environment. They conceive of the human being as an object in relation with other objects found in the environment, making human beings dependent on insertion into a network in a way that is irreversible.

5. It is customary to present the evolution of the concept of *privacy* in the jurisprudence of the European Court of Human Rights as being, firstly: protection against intrusions, the 'right to opacity' and, secondly, as the right to self-determination - the right to individual fulfilment.

6. These two meanings of the notion of *privacy* translate a shared objective: to enable the individual to fully participate in social life. The achievement of this objective presupposes, at once, the right to seclusion or rather the freedom not to be exposed (the 'right' not to participate in the information society) - which is a structural condition in human evolution insofar as it enables each person to define themselves and, thus to choose how they will live and what their relations with others will be. In this second meaning, 'private life' is nothing other than the right to fully participate in a democratic information society by controlling the circulation of

one's informational image and uses, as well as to dare express oneself and to construct relations with others as one sees fit. In this way, *privacy* does not seem to be a fundamental right among others, but rather the precondition for other freedoms. It should be added that this fundamental right does not concern purely individual rights, but rather draws its legitimacy and value from the fact that it is a structuring condition of the individual in society.

7. *Privacy* - or rather, the person's capacity for autonomous expression in the information society obviously presupposes universal access to the means of expression. This condition leads back to the debate on the universal access service, which is not conceived as a simple right of access to the communication infrastructure, or to certain basic services, but also covers the right to education in the use of media and access to essential informational resources that are necessary to the understanding of the right of societal environment.

8. According to the ideas of Lessig, it is important in the acknowledgement of *privacy* to take account of the architecture of the system in which *privacy* must intervene, and above all of its evolution. The rules laid down in 1970 to protect *privacy* in a society in which information processing was first appearing must be re-evaluated in the light of the way in which ITCs have become global, ubiquitous and interactive. It is in this new context that the two meanings of the concept must be understood.

9. Human beings are only able to construct themselves if they are provided with a place in which they are protected from the view of others, so as to be able to determine themselves freely. On this subject, each person notes that the frontiers of intrusion no longer stop at the front door, but penetrate inside the home (e.g.: control of the choice of television programmes). Protection now passes from protection of the *Physical Home* to protection of the *Virtual Home* e.g. (the mobile, the computer) and infers control by the individual of the essential functionalities of the terminal - such as the right to log off, use a pseudonym, and control the incoming and outgoing flows, etc.

10. Some of our acts - because they are trivial, or because they respond to an instantaneous request - are designed not to leave traces (unless these are collected, for a short period only, or not, consciously, or not, by a neighbour). Current technology enables the collection and processing of this information as well as the drawing up (in conjunction with other information, or not) of personality profiles allowing action to be taken in relation to the people concerned. It therefore destroys our *legitimate expectation of privacy* in the face of these events.

11. If self-determination is not a purely self-centred right, but a condition which represents a structural element in our participation in a democratic society, the approach in terms of ownership by the subject of one's own personal data

should be rejected. In the same way, consent cannot - as certain neoliberal theories claim - be a sufficient cause of legitimacy. This point is important, insofar as the technology creates the illusion in any case of a possible *user empowerment* (e.g. through PICS or P3P technologies) in which the websurfer would him or her self be capable of deciding upon which processes he or she authorises.

12. The rejection of the doctrine of consent as a sufficient ground for the processing of data fails to take into account either the question of *capabilities* in the information society - the fact that the necessities or advantages related to the sale of data can be attractive for people who are fragile in socio-economic terms - or the domino theory, which states that one person's release of personal data leads others to give out the same information, on pain of arousing suspicion about themselves.

13. Moreover, the technology enables *one-to-one* decision mechanisms to be developed in many sectors, founded on the accumulation of data which enables detailed profiling. This practice raises two questions. Firstly, is it possible to accept the taking into account of any data item at all, even if its use from the perspective of economic rationality justifies it (example: the situation of the battered woman in the context of the calculation of a life insurance premium) ? Shouldn't the decision-makers be made to be more explicit about their decision criteria, to enable collective negotiation, with arbitration by an authority if necessary and, in any event, to base the ultimate decision on the proportionality of systems set up ? The second question is that it is important to provide a reminder of the principle of the compatibility of processing, definitively founded on the question of contextual integrity - a person gives their information within a given context and reasonably expects that it will be used in that same context.

14. Which role should be assigned to the Law ? Firstly, to reaffirm the necessity of inviolable physical and virtual spaces in which the personality can be constructed (no panopticon), the setting up of the necessary procedures and institutions to allow *checks and balances* to be carried out (translation of the principle of proportionality), whilst making sure that the various *stakeholders* are able to express themselves (idea of participative democracy) and to gradually organise new contextual integrities. Secondly, to fight those dogmas that are presented as being absolute logics in the legitimating of processes, as well as public or private security and effectiveness or economic rationality. The essential debate led by *Privacy* concerns the place of the human being and its dignity, as we were reminded of by the recent German constitutional court ruling concerning the limits of police investigations and restoring these absolute logics to their relative framework. Right to security is not to be considered on equal footing with our liberties.