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The Right to Privacy 2.0

The public / private dichotomy

"Public" and "Private" have served as organizing categories in Western academic discourse, legal practice and policy debates since classical antiquity (Weintraub 1997). Different versions of the public / private distinction are at play in e.g. the discourses of the "transformations of private life", "privatizations of public services" or "public choice", "public goods", "public spheres", "public life and sociability" or current debates around media regulation, thus the rights and obligations attached to public and private communication respectively. The distinction public / private may be used to describe a number of distinctions, e.g. a boundary between the private world of intimacy and the public world of sociability, or the public (visible, open for all) character of processes as opposed to private processes (closed, limited entry), or particular interests (economic or individual) as different from general (public) interest.
Often the notions are used in an implicit way without reflection on the meaning and implications of the conceptual framing, thus opening up a blurred landscape of assumptions and implications. Following Weintraub at least four major organizing types of public / private distinctions operate under the surface of current scholarly as well as political debate, representing different theoretical and sociohistorical roots.

- A liberal-economic model that defines the public as state administration and the private as market economy.
- A republican virtue model (Habermas), which stresses the public sphere as distinct from both state sovereignty and economy.
- A sociability model, which emphasizes fluid and polymorphous sociability but has little to do with collective decision-making or state power.
- A feminist approach, which opposes a privacy defined largely as the domestic to a publicness defined largely as the economy of wage earners.

Unclear framing of the Internet

In many current policy debates, conflicts and paradoxes are linked to unclear or unresolved claims and expectations with regard to how this thing, "the Internet", is to be understood as a public good, public domain, public sphere vis à vis private or commercial values and interests. While participating in Internet policy debates, both at national, regional and global level, I noticed time and again how the various actors have different public / private approaches when framing the Internet. Some refer to it as a new, though different, (mass) media and thus look to media regulation when approaching the Internet as a field of policy regulation. Others have a more technical angle, and approach it primarily as a new telecom service provided by private parties. Others stress the resemblance to a global library, a new global village, an alternative cyber world etc.
At present, the Internet as a communicative space/medium/network is a blurred mixture of public and private identity, practice and regulation. Many of the acclaimed potentials for the Internet era, such as empowerment of civil society, fostering development, advancing human rights etc., are presumably linked to the net's public features, e.g. increased access to information and to communication, new potentials for diversity and citizen participation. It therefore

becomes crucial how the Internet is used, framed and regulated as public and private sphere, respectively. The framing is not least central when discussing standards of human rights protection online.

Let me illustrate some of the unclear or unresolved claims and expectations by a couple of current Internet policy examples:

Current public / private policy debates

Is Internet governance a public or private affair?
The Internet Governance Forum (IGF) has been established as a global policy platform to provide a way forward for the unresolved battlefield of the World Summit on the Information Society (WSIS) concerning who should govern the Internet. The IGF currently includes state, industry, technical experts and/or civil society actors, and at its first meeting in Athens in October 2006 tried to address practically any issue related to the Internet, without changing the current governance structures of the Internet (US government and the Internet Corporation for Assigned Names and Numbers / ICANN). The debate on Internet governance illustrates a number of contesting visions related to public interest, public good, and the role, duties and obligations of the technical community.

Is the Internet a public good, to which governments must secure reasonable access?
Access to technical infrastructure ("financing for development"), especially in the developing world, was recognized as a top priority issue in the WSIS process. However, there has so far been no political will to redesign the (northern) regulatory model for the distribution of costs, despite pressure from the South and from civil society groups involved in WSIS, throughout the process. The current design of interconnection costs is unbalanced in favor of the northern countries, and represents a blurry mix of public and private interests.

Should information be regulated as a commodity or as a cultural resource?
The importance of a rich public domain of knowledge and access to this information to foster development at all levels has been stressed time and again in the WSIS process. At the same time northern copyright regimes have been expanded and increasingly exported to developing countries.
The issue of access to knowledge vis à vis copyright regimes has been raised especially by US scholars and activists over the past ten years (Lessig 2004), with the claim that this is the cultural battle of our time concerning the sustainability and development of our common cultural heritage. Also European academics and activists have raised concern regarding the resource base for the public sphere. They have stressed that the structures of public communication are undergoing changes, which reinforce the market, on behalf of public service, and that this implies a shift in the dominant definition of public information from that of a public good to that of a privately appropriable commodity (Garnham 2000). The topic touches on a core aspect of the public / private dichotomy, namely whether to perceive information as a commodity vis à vis a public domain resource.

Is the notion of a private (personal) sphere still valid?
Under the pretext of the so-called fight against terrorism, states have increasingly introduced

regulation, which extends the surveillance power of the state over its citizens, not least in online space. From civil society groups around the globe, there have been several calls stressing that privacy is a fundamental human right, which is closely related to personal integrity and freedom, and that this right is increasingly being challenged by regulatory, technical and commercial practices. At the same time, some scholars have argued that privacy is a lost cause in our current 2.0 web environment, and that people increasingly seek exposure rather than privacy (Brin 1998). The debate around privacy is extremely broad, touching on new schemes for identity management, state retention and exchange of personal data, surveillance and wiretapping, behavioral mapping, RFID (radio frequency identification devices) and so forth.

Let us now take a look at Internet regulation as a public / private battlefield in the EU policy domain.

European tendencies—decreased protection of privacy rights

Two models have underpinned debates on European media regulation—presenting media as public and private communication, respectively (Garnham 2000). The first model has seen mass media (broadcasting and press) as caretaker of public communication / public interest and thus subject to a varying degree of public policy intervention, while respecting the freedom of press. The other model, which has been applied to telecom operators, regulates according to standards of private communication. This implies that regulation of the networks (e.g. universal access) is legitimate, but that any interference with the content has been regarded as an illegitimate infringement in individual freedoms such as privacy and freedom of expression. The arguments for the two regulatory models thus derive from both sides of the public / private distinction.

With Internet these two regulatory models come into conflict, and it is therefore not surprising that the debates around Internet regulation show a mix of arguments based on both sides of the public / private distinction, depending on the topic in question. To give some examples from the European scene:

The protection of especially minors against harmful content on the Internet has been a policy issue for the last 10 years, not least at EU level. In the debate and initiatives flowing from it, the Internet is addressed as a public communication space in which states have an obligation to maintain a "clean and child friendly environment". Thus the public interest is the prevailing argument for policy intervention.

However, as we shall see below, the implementation of this measure is then delegated to private parties, who operate according to commercial codes, rather than the public interest.

Industry self-regulation has long been a favored component in Internet regulation in Europe. Self-regulatory measures e.g. notice and take down procedures for alleged illegal content or removal of supposedly harmful content more generally, have been criticized by civil liberty groups for installing privatized "rule of law", thus not complying with democratic and human rights standards. In these cases the policy response to the critics has stressed that the Internet and telecom service provider are private companies that may design their own services, and may set criteria in their customer contracts. Thus, when it comes to self- regulation as a measure to regulate content, the policy argument is no longer that of public interest (public sphere) which would imply no interference in freedom of expression except provided for by law and according to very specific criteria, but rather arguments related to the commercial sphere.

One last example concerns mandatory retention of communication data, which was adopted at EU level in February 2006. The policy intervention (directive) acknowledges that this is an interference with the privacy of communication, thus addressing email and other online communication services as communication taking place between private individuals / parties. At the same time, the intervention in this private sphere is justified by the public interest (public safety, effective law enforcement).

Other European policy tendencies related to privacy rights include:

- Increased exchange of data (Plüm Treaty, Principle of availability, Passenger Name Record, Biometric passports)
- Increased surveillance in the physical space
- Increased content regulation (filters at public access points, blocking schemes for child pornography)
- New extended roles for private parties (Internet and telecom service providers)
- Decreased safeguards for the individual
- Derogation from rule of law principles
- Political self-perception as human rights promoters (data protection directive, EU Charter of Fundamental Rights)

These examples all point to a decreasing level of privacy protection at EU level, and a lack of willingness to acknowledge privacy as a core human right. At a contrast to this development, let me briefly summarize the international privacy obligations.

The right to privacy—human rights basics

Privacy is a core human right; enshrined in the Universal Declaration of Human Rights in Article 12[1], and in Article 17 of the International Covenant of Political and Civil Rights, which is legally binding upon UN member states. Its importance as a basis for the development of a democratic society has been stressed time and again by the UN Human Rights Committee and by the UN High Commissioner for Human Rights. It has also been emphasized by regional instruments such as the European Court of Human Rights stressing that the right to privacy protects the essence of human rights: human dignity.

Thus as long as a zone of autonomy exists around the individual, the opportunities for abuse and oppression are lessened. Privacy is closely linked to other human rights such as freedom of expression and freedom of assembly as it enables societal participation and political engagement. In a digital context, where attributes of an individual can be known, interactions mapped, and intentions assumed based on records, the need for protection of privacy is crucial to retain a sense of freedom.

Despite the fact that privacy is a core human right and crucial to the economic, social and technological developments, which we call the "information society", it has proven very difficult to get it acknowledged and protected for instance as part of the global political vision for the information society. The WSIS Declaration of Principles contains only a minor reference to privacy in the section that deals with confidence and security in the use of information and communication technology.

Let me finally sketch out some of the challenges related to privacy in the Web 2.0 environment:

The right to privacy 2.0

- Limited communication between the communities of expertise and practice involved in human rights and Internet policy respectively.
- Limited case law related to Internet.
- The classical public—private distinction is increasingly blurred
- New social practices, which fall outside classical "private" or "public" categories
- A new private publicness?
- New demands for protecting privacy in a social space (identity management)
- Relatively limited understanding of online social behavior (the patterns and expectations related to privacy)
- Enforcement of the right to privacy; users might reveal personal information voluntarily but that does not alter the obligation to keep the collection and use of personal information to a legitimate minimum.

1 "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." Universal Declaration of Human Rights article 12.

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