Privacy – An Elusive Concept

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Editorial

Privacy—an elusive concept

Christopher Kuner*, Fred H. Cate**, Christopher Millard**, and Dan Jerker B. Svantesson***

It is interesting to consider how difficult it is to describe what ‘privacy’ is. Attempts at defining privacy date back, at least, to Warren and Brandeis’ 1890’s description of it as the ‘right to be let alone’.1 Another, more recent, definition is that privacy is ‘The interest of a person in sheltering his or her life from unwanted interference or public scrutiny.’2 Perhaps an even more sophisticated definition would be to say that privacy relates to ‘[m]aterial that so closely pertains to a person to his/her innermost thoughts, actions and relationships that he/she may legitimately claim the prerogative of deciding whether, with whom and under what circumstances he/she will share it.’3 None of these definitions could necessarily be said to be more correct than the others, but taken together they provide a useful composite view of what we mean when we talk about privacy.

While it is notoriously difficult to define ‘privacy’, the other side of the coin is that virtually everyone thinks they know what privacy is, or instinctively has ideas as to what it entails. Privacy is also often described in terms of its tension with other objectives or interests, in particular the following three types of tension:

The tension between privacy as a human right and data as a commercial commodity

The right of privacy is well established in international human rights law. Already in 1948, the Universal Declaration of Human Rights (UDHR) recognized such a right. It is therefore only logical that when the UDHR inspired the development of the International Covenant on Civil and Political Rights (ICCPR) in 1966, the right of privacy was included (see Article 17). Privacy is also considered a human right in a number of regional and national legal systems (eg in the European Union).

At the same time, one of the most important things protected by privacy law is personal data, which has become a valuable commercial commodity. And it is here that we observe the tension between the dual nature of privacy as a human right and a subject of commercial interest.

This tension between the two views of privacy may cause courts specializing in human rights questions to fail to recognize the commercial implications of their decisions, while at the same time, courts not specializing in human rights matters may fail to fully appreciate the delicate nature of the fundamental right at stake.

Perhaps it could be suggested that, as currently structured, most legal systems are not particularly well equipped to deal with clashes between a fundamental human right and competing commercial interests?

The tension between privacy and governmental interests

Governments have a long history of recognizing the value of good record-keeping, and many countries today carry out privacy-invasive population surveys on a regular basis. Indeed, the Norman government’s survey of Anglo-Saxon England, completed in 1086 (almost a thousand years ago!), was felt to be so intrusive that the resulting records have been referred to as the Domesday book.

Today, many, but far from all, countries impose restrictions on their governments’ data collection. Such restrictions are only natural, considering the powers governments have to compel data disclosure from their citizens.

The tension between privacy and security

One of the most prominent examples of the tensions between privacy and the interest of the government is

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found in the context of public security. While public security has always been on the governmental radar, the issue gained unprecedented attention following the 9/11 terrorist attack and the subsequent acts of terrorism in Europe and the Asia-Pacific region. Expanded powers were provided to law enforcement agencies, resulting in concern amongst civil libertarians and privacy advocates.

This clash is natural, predictable, and incredibly difficult to balance. On the one hand there are the demands of the security agencies—which are often vague and complex, as it is virtually impossible to predict in detail what types of information may become of relevance in the hunt for terrorists—and on the other hand there is the elusive concept of privacy, including concerns about governments’ data use, ranging from the outright paranoid to the appropriately sceptical.

The reality is that this clash of interests can never be balanced in the abstract, but only on a case-by-case basis. Put differently, one cannot know whether a certain security concern justifies the sacrifice of privacy, without knowing a great deal about the nature of the security concern as such. Again, this is something that the legal system is ill-equipped to deal with, as such a case-by-case approach comes at the cost of predictability and consistency.

**Accepting the elusiveness and moving forward**

The above discussion has highlighted that privacy is a difficult right to define, and that privacy interests often compete directly with other interests. However, it is important that we do not allow uncertainties about what privacy is to get in our way of protect-}

ing it, both domestically and in the international arena.

Those sceptical of international cooperation on privacy may object that harmonization of national laws has little hope of success until we agree on what we are protecting. But irrespective of which definition of privacy is used, a sufficient number of states agree on some core elements that need protection. Thus, while the debate over exactly what privacy means is important, there are certainly some core conceptions that almost all societies share, and yet do precious little to enforce.

So whatever we do at the margins, an important step would be to strengthen protection around at least those core understandings, such as freedom from government surveillance without some appropriate oversight and legitimate purpose.

**Privacy as the flavour of the month and beyond**

Finally, it is also interesting to consider what the publication of a journal such as ours says about privacy law.

First, and most obviously, the fact that there is a market for a journal specifically on data privacy highlights the prominence that privacy law has gained in recent times. In addition, the Journal’s existence suggests that data privacy law is a sufficiently distinct, and identifiable, area of law to be treated separately from other related areas. In other words, data privacy law is not merely a sub-specialty of human rights law, administrative law, or Internet law, but is a separate discipline.

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