

Privacy by procedure

Liberals and communitarians on the institutional protection of privacy in the state-citizen relationship

Abstract

Liberals and communitarians may have shared as well as differing demands for the protection of personal data. This paper explores the various motives for protection and enumerates six of them: the prevention of information harm, the ability to participate in politics, the protection of communities' internal structure, moral autonomy, conventional privacy and various social functions. Standard majority voting seems appropriate for some of the shared goals, but new institutional demands arise when either group wants to ensure its specific demands. Strong majority voting and new constitutional safeguards may be valuable, but only in the interest of one group. Using the principle of proportionality may be beneficial for both ideological blocks, as it creates stability and protects against external and internal irrationality.

1. Introduction

In the past decades, the balance between individual privacy and the common good has shifted several times. After the Second World War, caution about the devastating power of the state dominated the thinking on these issues in Western Europe. George Orwell's Nineteen Eighty-Four sketched a dystopia, approached by some communist countries like Eastern Germany and the Soviet Union. Nevertheless, in the past years a movement away from the protection of individual privacy rights and in favour of the common good is visible (Nelson, 2002, Vedder et al., 2007).

Triggered by the recent swing towards common interests, we ask ourselves the question whether the protection of privacy requires certain special institutional guarantees. More specifically, our central question is: *Which demands do liberals and communitarians have with regard to privacy protection and which institutions are needed to ensure the safeguarding of those demands?* We delimit protection to the state-citizen relationship, so we focus on the public realm only. Only information that may be collected by the government for the common good is taken into account.

This question will be answered in two parts. First, we will outline the visions on the value of privacy from both a liberal and a communitarian viewpoint and detail the various reasons for privacy protection. Secondly, we will discuss whether standard democratic voting principles like majority voting are a sufficient institutional protection with regard to these concerns and suggest improvements. Again, both the liberal and the communitarian perspective will be taken into account.

More insight into the philosophical demands and the need for institutional mechanisms may reveal shared support for changes towards the current situation. Where differences exist, this paper may shed light on the reasons behind, so that both liberals and communitarians can formulate their arguments more precisely.

We will argue that six reasons underlie the need to protect privacy. Some of these reasons are shared between liberals and communitarians, others are not. For most purposes, the privacy protection in the status quo is sufficient for both camps. However, for some reasons liberals or communitarians may want to use strong majority voting or better constitutional guarantees.

2. Motives for data protection and disclosure

If this paper would have been on the definition of privacy in the academic literature, it would be massive. It is clear that no consensus exists (Introna, 1997). In this paper, we do not need to take a firm stance in this debate, as the broad discussion of both liberal and communitarian viewpoints is tied to implicit and different notions. Constantly referring to the explicit underlying definition would not make much sense, as the commonalities between the definitions often outshine the differences and the context reveals the meaning without further explanation. However, we confine our discussion to data

protection. We make use of the recent definition of the Article 29 Data Protection Working Party, an advisory body to the European Commission:

“Personal data shall mean any information relating to an identified or identifiable natural person (“data subject”); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.” (Article 29 Data Protection Working Party, 2007)

2.1. Motives for protection

From the literature, we have identified six arguments for data protection that may be invoked by liberals or communitarians.

2.1.1. Harm by making using of information

A first reason is that one should prevent people from being harmed by others misusing their personal information (van den Hoven, 1998). A classical example is the professional secret in the medical sector. General practitioners could seriously harm a girl living in a conservative family when telling her parents about a requested prescription for the contraceptive pill. Numerous similar situations can be envisaged, especially in the financial and judicial sector. Communitarians and liberals generally do not disagree on the need to prevent this type of harm. It is important to recognise that the determination of ‘misuse’ may be dependent on the political view. Communitarians may find the exchange of information about the sexual behaviour of children between medical staff and parents a good idea. However, if one agreed not to use the information for this purpose, misusing it with the result of harming people would be equally unacceptable for communitarians as it is for liberals. This simply is a matter of the ‘rule of law’ and general social norms on accepted behaviour.

The causal link between privacy protection and information misuse runs through the intermediating variable of risk. The more people have access to more information, the higher the risk of misusing it and causing harm.

2.1.2. Political participation

Based on citizenship theory, both liberals and communitarians can contend that it is essential to allow people to develop and articulate a viewpoint (Nissenbaum, 2004). This holds true when political participation is seen as a civic virtue. Although liberals will leave more room for divergent opinions, communitarians may want to ensure a basic protection, too, for the very reason that the members of a certain community may well be the ones with the deviant opinions in need of against conformance. Nissenbaum gives the example of a voting booth, in which people must be entirely free to make their own choice.

2.1.3. Complex equality and the protection of communities

A more difficult notion of privacy can be derived from Walzer (1983). He defined the concept of complex equality, comparable to contextual integrity as it is called by Nissenbaum (2004) and information injustice, the label used by Van den Hoven (1998). Walzer recognizes the existence of different social spheres. He argues that the dominance of one type of good in one sphere should not lead to dominance in other spheres. Goods can be things like money, knowledge, social position and information. Walzer does not have see problems if one excels in the possession of a certain type of good and is dominant in one sphere, for the reason that people are simultaneously living in multiple spheres. Hence, no one will be able to dominate other people’s lives if the ‘Chinese walls’ with regard to the spread of dominance between the social spheres are kept in place. An example is that one may be loaded with money, but this still should not lead to a stronger position at elections time. A doctor may be near omniscient about the most intimate details of one’s personal life, but he should not be allowed to get a better position on the housing market by blackmailing his patient, residing in a marvellous villa at seaside.

If we limit the type of goods to information, Walzer’s notion of complex equality is turned into a very compact notion of privacy. Notwithstanding its appealing formulation, we believe there is no fundamental new type of privacy involved. The reason for a restriction of information dominance to one social sphere is simply to protect harm, which we already identified. A derivative goal, close to

Walzer's intentions, is that dominance across spheres violates community's orderings. It is not so much because a universal principle of justice is harmed in the free flow of dominance between the spheres, as it is the need to allow community's to organise themselves according to their own, endogenous principles. That argument is culturally relativist (Kymlicka, 2001) and sounds attractive for communitarians. That touches upon the stone-old universalism-relativism debate. Basic negative human rights have a universal character, but the softer, more ambiguous, more positive a right is formulated, the more relativism is accepted in contemporary societies, who combine elements from both views.

A different objection to the concept of complex equality exists on liberal side. Walzer has no problems with dominance within a single social sphere, as this has emanated from the internal organisation of that sphere. That would be something liberals would not agree on, as people are not completely free to alter their bindings in a social sphere and, within a sphere, should not be confronted with options that limit their freedom to choose. Given the situation that such dominance is present, liberals may agree that the flow of dominance to different spheres should be limited. However, they are more likely to fight dominance within a sphere. As liberals are more inclined to think from absolute, universal principles of justice to which each and every social sphere is subjected, the differences between the internal orderings of the social spheres are smaller. In the light of an open society, it is harder to prevent exchanges between social spheres.

It is important to note that spheres do not necessarily overlap with communities and that communitarians do not always want to protect the inner structure of a sphere. Think about the medical sphere, which is seen as serving communities instead of being an autonomous community. Another objection to the erection of information barriers between spheres is that some exchanges may be beneficial for the common good. An example is the exchange of security-related information. Here, it may be liberals instead of communitarians who oppose information sharing between spheres.

2.1.4. Moral autonomy

Communitarians and liberals clearly disagree on the value of moral autonomy. For liberals, it is essential to protect people against conformance. It is not sufficient to give people the formal right to make their own choices, they should also be exempt from social pressure and constant scrutiny. People must have the room for experimentation and revision. The ultimate dystopia of liberals in this sense is Bentham's panopticon. Foucault (1995) describes how a society could be structured, analogous to a special building, so that discipline is introduced on society. Control is pervasive, with people being conformed by means of transparency, which is a matter of information exchange. Inrona and Pouloudi (1999) build the argument that it is essential to allow people the freedom from judgment of others, because judgments are always entangled in interests and values. That means no neutral position exists from which actions and information can be judged. The availability of information can lead to the possibility of false judgments, since the other can never know our real interests and values when considering our actions and opinions. We would add that these misperceptions may lead to a certain conformance. The less diverging one behaves or thinks, the less like it is that he will be misinterpreted. Communitarians can have a completely different opinion on this matter. Kymlicka (2001) summarizes their side of the debate in three arguments. They do not regard freedom of choice as intrinsically valuable. They see the self as constituted by its ends, which may be predetermined. And finally, they hold forth that embeddedness in communal practices does not only give meaning to people's lives, but is also essential for participation in society.

2.1.5. Conventional privacy

Communitarians could add that conventional privacy must be protected. The way privacy is perceived and maintained in a community is part of the community's written and unwritten rules, which should be respected. This reasoning is very broad and not tied to information as such, but can nevertheless be applied to the privacy debate.

2.1.6. Social function

Schoeman¹ argues that different information is being used in different relationships. Data protection is needed to allow people to have multiple identities. Liberals will support this, because it gives people the freedom to experiment, whereas communitarians may acclaim the participation in multiple communities that is facilitated. Inrona (1997) elaborates on the need for various degrees of social and intimate relationships and social roles. He argues that most social relationships can only function as long as they are simple, which means that only a limited information domain is involved. Inrona mentions the example of the complex relationship of man and wife, where an overflow of mutual knowledge about each other's behaviour exists, and concludes that most relationships in society can only function by means of simplicity in the information exchange. A barrier between different social spheres may lead to this requirement, as it prevents the blurring of simple relationships into complex ones without people voluntarily choosing for it.

The protection of room for experimentation and multiple identities is not very relevant for the state-citizen relationship, as the social function will not be harmed by a single information leak. The concept is more about a social norm of what is desirable and what is not. In this sense, developments in the private sphere, particularly in the information society, are of greater importance. Of course, this only holds true as long as government is not publicising information about the personal life of its citizens, an assumption that holds true in most western societies. For this reason, we will not elaborate further on this ground for protection.

2.2. Motives for disclosure

Most privacy infringements are enacted deliberately and for a reason. With regard to the state-citizen relationship, a trade-off between privacy and the common good exists. Inrona and Pouloudi (1999) have labelled this the 'privacy-transparency claim'. In order to counter free-riding behaviour in the case of (desired) collective action, information is a necessity. A dominant motive in the current political climate is the need for security, touching upon the classic freedom versus security debate. In these cases, it is quite clear where communitarians stand. However, it is too simple to argue that liberals are always opposing privacy infringements. A liberal society, as well, needs the enforcement of certain rules. In the most minimalist and libertarian case, the state needs to protect its citizens against violence and should enforce the rule of law. Information about behaviour is a necessity to carry out that task. In more Rawlsian views, the collective must be able to enforce agreements on matters like redistribution and fair chances. Democrats will put forward the need to execute democratic decisions and enforce compliance. On the other hand, communitarians are not by definition in favour of more transparency. A good example is, again, the freedom-security clash, where one could argue that security is a means to create freedom. A Big Brother state is not what most communitarians stand for, they take a balanced position as well. Too little privacy can also backlash against communities, as people may feel pressure that withholds them from (fully) participating in a community.

An application of Rawls difference and maximin principles would be problematic in the case of privacy as opposed to security. Neither privacy nor security can be (re)distributed. Security levels, as a result of the state's policy, are equal for every citizen. In a certain sense, this is similar for privacy protection levels. The actual exchange of information about one's personal life may vary, but this cannot be determined upfront behind a veil of ignorance. As privacy and security could be seen as communicating vessels, when ultimately simplified, one cannot improve one's privacy without reducing another one's privacy. Accordingly, the evaluations have a more utilitarian nature.

These complexities illustrate that defining the abstract positions of liberals and communitarians is easier than deliberating on concrete policy measures. The stances could not be expressed as black and white, but are on a spectrum, where the devil is in the detail.

2.3. Overlap between the protection grounds

We can conclude that liberals and communitarians do agree on the prevention of information harm, that they would ensure at least basic levels of political participation, but that they are also more or less concerned with the common good for which information may need to be disclosed. An important question is whether the disagreements on moral autonomy and community's internal orderings are also

¹ Referred to in Nissenbaum (2004), not directly consulted.

practically relevant, in that they ask for a different level of protection of the same or different information, as is needed for the shared purposes. We think it is not so much about different information, but that the more value one puts on the protection of the individual or the common interests, the more the balance will shift towards either direction. If both ideological camps can agree that no privacy infringement will be made without a good reason to do so, privacy protection can be seen as a spectrum with complete disclosure on the one side, and complete protection on the other.

3. Demands for institutional protection

Now that we have identified the reasons for data protection, we can discuss the demands for institutional protection they pose. With each reason, we will outline the status quo and consider whether and which changes could be desirable. We delimit the range of possible measures to those that change decision-making at the national and international level, by both the judicial and the legislative powers. This is a relatively high level of intervention as opposed to for instance concrete working procedures for the police, but when discussing abstract reasons for privacy protection, it is clearer to discuss the ‘solutions’ at a comparably high level. The measures we discuss are strong majority voting (a change of the decision procedure in the legislative arena), the exercise of constitutional rights (judicial and/or legislative arena) and the introduction or reformulation of constitutional conditions (legislative arena). To this, we add a general principle to be used by decision-makers and with the potential of becoming a jurisprudential norm: proportionality.

3.1. Majority voting

Standard majority voting is a procedure in which a decision should get the support of at least half of the votes in order to be accepted. It is one of the most common voting procedures because of its simplicity and ‘face acceptance’ of its justice. The decision procedure itself can cause problems in the translation of individual preferences in a collective preference ordering, as Arrow’s Impossibility Theorem has demonstrated (Velthoven and van den Doel, 1998). However, decisions can also be problematic when the representatives do not fully reflect the opinions of the people they represent. We mention three imperfections, particularly relevant for our privacy discussion. Firstly, decision-makers in general and politicians in particular are tempted to favour the short-term benefits and mitigate the negative long-term consequences of proposals (Velthoven and van den Doel, 1998). This is clearly visible in today’s politics on counter-terrorism measures. Privacy protectors have a hard time in getting their worries accepted, as it is much harder to make privacy threats concrete than to refer to specific terrorist actions in the recent past. Secondly, politics cannot exist without emotions and the associated irrationality. Fear is not a good policy advisor, but it certainly is one. Finally, not all political parties have an ideological or even consistent basis, so they cannot always be placed on the liberal-communitarian spectrum. Populist parties can have an extreme bias towards the ‘popular’ opinion, which can be a result of disinformation and emotions. No academic or otherwise argument-based discussion may influence their opinions. Populist parties have an ever stronger tendency towards the short term and emotions, as they benefit from presenting a simplistic view on politics in which today’s problems could be solved immediately by firm measures. However, the problem of imperfect representation seems to be merely academic when it comes to preventing information harm or ensuring political participation. The current legislative conditions, sufficient for these purposes, are the result of standard majority voting. The procedure can deal with a certain degree of imperfections, as long as the parties that (in a specific case) act more or less rationally have a considerable majority.

3.1.1. Information harm

The simplest measure to prevent harm is to take away the opportunity to do so, by not disclosing sensitive information. It is impossible to give a general rule on which information should be collected for the common good and which should not, as these are always specific decisions with specific trade-offs between interests. However, a general principle that already is embodied in privacy law is that only that information should be collected that is necessary and that it should be stored for a limited time. Those regulations need to be sanctioned to be effective. On the repressive side of the judicial coin, we find the punishment of people and organisations who have misused the information. This could be derived from general criminal and private law (slander and the wrongful act) and administrative law, where the former is more relevant for the private sector, whereas the latter deals

with unique government competences. Protection for the public realm is more difficult, as the government, despite the fact that it is not a homogeneous whole, is not always able to comply with its own rules in the absence of external checks. Obvious cases of information misuse can be punished, sometimes by suing the individuals responsible for it. However, a check on internal procedures and databases is not always in place. Creating a watchdog can be helpful. In some countries the data protection authority has also the power to conduct audits on government organisations including the police. It is likely that standard majority voting will result in these 'reasonable' outcomes, as they already exist at the moment.

3.1.2. Political participation

Almost no contemporary political party will deny that citizens should have the right to decide on their opinions in freedom. Standard majority voting has delivered a strong protection of the citizen, not only in national, but also in international law and institutions like the Organisation for Security and Co-operation in Europe.

3.2. Strong majority voting and constitutional checks

A relatively straightforward adaptation in procedures that makes it more difficult to make changes to the status quo is to demand a strong majority. With a stronger majority, one needs more than half of the votes, i.e. two-thirds of them, to get a proposal passed. As it will be harder to get such a broad support, this can help improving the quality of decision-making and ensure long-term stability, because it is more likely that a simple majority will not exist anymore in the near future, whereas with a stronger majority, it is likely that a simple majority will continue to exist. A simpler argument is to say that radical changes are simply blocked by a minority, which may be in the interest of either political camp. Strong majority voting is frequently applied when it comes to changes of the constitution.

A more sophisticated measure would be the requirement of a strong majority not for all legislative acts of a single category, but only after the advice of an independent body of experts. If any proposal gets a 'veto' of this body, the majority needed to pass it in parliament should be greater than when the body is in favour. Many objections can be raised for this decision procedure. It distracts power away from the democratic bodies to new organs, which may be hard to control. To prevent the advisory body from misusing its power by blocking too many reasons, an appeals procedure or other safeguard must be built in, which makes it possible to get around the tighter conditions. And finally, without changing the voting procedures advisory bodies and other experts are already capable of presenting their opinion and lobbying for influence.

A different measure is the introduction of constitutional guarantees. As it is harder to change the constitution, it will be harder to remove the guarantee. In the status quo, contemporary societies deal differently with constitutional protections. In some countries, a democratic (standard majority voting) outcome can overrule the constitution, although in general the parliament having the ability to use this power consists of two chambers. This is the case in for example United Kingdom and The Netherlands, who uphold the principle of parliamentary supremacy. Other countries, like Germany, France and the United States have erected a constitutional court or supreme court with constitutional powers that can deactivate laws that are in conflict with the constitution. It is important to note that international treaties can be a part of the constitution, as they frequently have similar legal status, especially in monist legal systems.

Not only the protection of the constitutional provisions is important, the content of the constitution may be even more essential. The high-impact European Convention on Human Rights (Council of Europe, 2003) as well as a derivative, the Charter on Human Rights adopted by the European Union (European Community, 2000), mention the right to privacy protection in article 8, albeit in different wordings. They both introduce a legality principle, which states that infringement on the right to the protection of personal data respectively the personal living must be based on the law. The problem with these formulations is that it only protects a 'rest' that has not been dealt with in specific laws. The ECHR states that:

“There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of

national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” (Council of Europe, 2003, article 8)

Note the word “necessary”. This leaves room for additional jurisprudential norms. However, the protection is very broad and no balancing of interests is guaranteed. Changes to the status quo would impose a limitation of exceptions, or maybe even an inclusion of all the exceptions in the constitution or treaty. This comes at the expense of flexibility but ensures a better protection. Instead of detailing the list of exceptions, one can also introduce new procedural safeguards like a compulsory sunset clause, which makes sure that laws will automatically expire after a certain period of time.

Summarising, liberals and communitarians may want to (1) get their policy translated to constitutional rights or other provisions, (2) tighten the formulation of existing conditions, including the removal of the right to make exceptions to fundamental rights or to internalise these exceptions in the constitution, (3) establish a constitutional court and/or (4) demand strong majority voting for the exceptions to fundamental principles.

3.2.2. Complex equality and the protection of communities

We showed before that drawing the line is a matter of notions on the common good and the position in the universalism-relativism debate. Many contemporary, western societies, have not taken a final stance in that struggle, but adopted a mixture instead.

Whether decision procedures should be adjusted in either direction is something very much dependent on ideology. Liberals and communitarians both want to get their ideas realised and change the equilibrium. Their wishes in terms of changes to the decision-making procedures could be the introduction of strong majority voting and the establishment of constitutional checks.

3.2.3. Moral autonomy

Liberals will put a greater emphasis on the value of moral autonomy. The notion of the passionate majority (Velthoven and van den Doel, 1998) that can bargain and exchange issues with other political streams does not hold, as it concerns a principal clash for either side. Communitarians are passionate, too, not willing to trade their principles for other issues. Essentially, the same problems occur as with the protection of communities’ orderings. The possibilities for liberals are similar, too: constitutional protection or adjustments to standard majority voting.

3.2.4. Conventional privacy

Conventional privacy is an exclusive communitarian demand, which touches upon the universalism-relativism debate. We have already discussed this under complex equality.

3.3. Trade-off between privacy and the common good

Even when goals are shared, it may be necessary to find a balance between principles instead of simply applying one of them. We have shown that one cannot construct a strict framework for deciding how liberals or communitarians should deal with the trade-off between privacy and the common good. It is only clear that both, in some cases, may depart from opposing positions.

A popular guideline to evaluate privacy-infringing security measures is to assess their proportionality, effectiveness and subsidiarity. Iachello defines proportionality as:

“Any application, system or process should balance application goals with the privacy and security concerns of all involved stakeholders.” (Iachello, 2006)

In our view, this embodies the principles of effectiveness and subsidiarity as well. If a measure is not effective, i.e. it does not serve any goal, but does harm privacy, there is an imbalance. If a less infringing and equally effective measure exists, this one should be preferred as it favours some stakeholders without hurting anyone. This decision rule can be used both by liberals and communitarians, as we have seen that both agree on the prevention of unnecessary information harm.

The proportionality principle may be used in decisions from the legislative power, although here it is not possible to formally bind parties to it. The principle may as well be used in the judicial system, for instance by introducing it explicitly in the constitution. The “necessary” keyword mentioned in the previous paragraph may already point in the direction of a fair balancing of interests. An advantage of

a judicial safeguard is that it is a warrant against non-rational political forces. It can also ensure consistency, as jurisprudence generally is less sensitive for elections and fast changes in the public opinion.

4. Conclusion

We distinguished six demands for the protection of personal data, which we interchangeably called data protection or privacy protection. Both liberals and communitarians agree on the need to prevent information harm and ensure basic political participation, where the latter should not be confused with complete moral autonomy. Standard majority voting, the status quo position, seems to be appropriate to safeguard these demands.

More disagreement exists on the value of the protection of the internal ordering of communities. Communitarians have a much stronger interest here than liberals, although there are different shades of gray here. Liberals have their own demand when it comes to safeguarding moral autonomy. The communities' orderings and moral autonomy may get a better protection by requiring strong majority voting in parliament. An alternative is the introduction or reformulation of constitutional rights and tighten the judicial safeguards. For all demands, we discussed the proportionality principle as a key to decision-making.

It cannot be surprising that there is no consensus on radical changes to the status quo, but that this is dependent on ideologies. Many differences are not absolute and abstract but will only become clear in specific situations. The actual political stances towards the institutional protection of privacy are dependent on the composition of the (inter)national political arena, which consists of liberals, communitarians and many groups not bound to either of these blocks.

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