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Privacy, Freedom, and Dignity

Closing Remarks at the 26th International Conference on Privacy and Personal Data Protection

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We may believe that we are only discussing data protection; in fact we are dealing with the destiny of our social organisations, their present and – above all – their future. We started the Conference by debating domestic and international security; then we moved on to functioning of markets and business organisation, the media system and globalisation issues, the relationship between technology and politics and how citizens come to terms with their past. The whole gamut of the issues raised by the hard times we are living in is spread before our eyes. One can appreciate the strong connection between freedom, dignity and privacy, which requires us to consider the latter by going beyond its time-honoured definition as the right to be left alone.

In the absence of strong safeguards for the information concerning them, people are increasingly in danger of being discriminated against because of their opinions, religious beliefs, and health. Privacy is therefore to be regarded as a key component of the equality society. In the absence of strong safeguards for the data concerning political opinions or membership of parties, trade unions, and associations, citizens run the risk of being excluded from democratic processes. Thus, privacy is becoming a prerequisite for being included in the participation society. In the absence of strong safeguards for the “electronic body”, the set of information gathered in our respect, personal freedom as such is in danger. Therefore, there is little doubt that privacy is a necessary tool to defend the society of freedom and counteract the drive towards establishment of a society based on surveillance, classification, and social selection.

Also in fighting terrorism, one should never forget what happened under totalitarian regimes – where blatant violations of fundamental rights were made possible exactly by the massive collection of information, which allowed continued, pervasive, and oppressive surveillance of everyday life. From this standpoint, privacy can be defined as an

indispensable component of the society of dignity – and “dignity” is mentioned in the first sentence of the German Constitution exactly in opposition to Nazi logic, as well as being referred to at the outset of the Charter of Fundamental Rights of the EU.

Still, the title of the Conference refers, above all, to a very demanding task – associating privacy and dignity. This requires all specific issues to be addressed against the background of the primacy recognised to individuals and individual-related values, individual freedom and autonomy.

This is no strained association. Ever since the mid-19th century, a writer such as Robert Kerr described Victorian English society by referring to the “right to be left alone” – forty years in advance of the well-known essay by Warren and Brandeis. He analysed the meaning of privacy and found that its essence consisted in “mutual respect and intimacy”. One hundred and fifty years after his book, “respect” retains all its symbolic value as a word – so much so that it was chosen as the title of the latest essay published by a well-known sociologist, Richard Sennett.

These two words, intimacy and respect, allow addressing the dignity issue by remaining alert to all its complexity and multifariousness. Intimacy has the flavour of something inviolable and inalienable; respect has to do with everyone’s relationships with everyone else. Dignity is the line connecting these two sides – the individual and the social one – and contributes to defining everyone’s social position and standing.

Such an approach is far from alien to data protection issues. In the very well-known Census Act Case of Germany, it was stressed exactly that “the focus of the constitutional order (...) is the value and dignity of the person, who operates in self-determination as a member of a free society”. One might argue that this conclusion could be drawn because the German Grundgesetz expressly refers to dignity in its first Article; however, this consideration is actually obsolete, as Article 1 of the Charter of Fundamental Rights of the EU – which is currently Part II in the Constitutional Treaty – states that “Human dignity is inviolable. It must be respected and protected”.

This Article is more than a carbon-copy of the German model. It actually mirrors the complex evolution experienced by domestic law in many countries, where increasing importance has been attached to dignity. This is in line with the clear-cut guidance contained in the Preamble as well as in Article 1 of the 1948 Universal Declaration of

Human Rights, which expressly refers to dignity as an essential component of the human being and a condition for freedom and equality. As regards more recent constitutional experiences, only consider France or Poland, Italy or Finland, Switzerland or Brazil, Israel or South Africa. New provisions such as Article 16 in the French Civil Code or Article 2 in the Italian data protection Code expressly mention dignity, and the same applies to international instruments such as the Council of Europe's Convention on human rights and bio-medicine, which begins by re-affirming the principle of human dignity, and UNESCO's Universal Declaration on Human Genoma. One can therefore come to the conclusion that dignity is a universal, fundamental, and inescapable term of reference even though it should always be seen against the specific cultural background.

Starting exactly from the latter consideration, one might argue, however, that there are two different ways to address privacy issues in the Western cultural tradition – as maintained by several (mainly US) scholars. There is the European approach, basically grounded on the dignity concept, and there is the other one, which is mainly typical of the USA and rests on the freedom concept. Still, legislative and cultural developments have shown over the past few years that this dichotomy is no longer applicable to data protection.

Indeed, the right to data protection has been included exactly in the Part concerning freedom within the Charter of Fundamental Rights of the EU. Again, this mirrors a major development that took place in the past years, whereby what was formerly regarded as the “right to be left alone” turned into a pre-requisite for exercising other fundamental rights and freedoms. The strong protection of sensitive data has therefore become a fundamental component of equality in order to prevent the collection of these data from turning into a tool used to discriminate against some individuals. And, the protection of medical or genetic data is actually a condition to put the right to health into practice – just like safeguarding personal opinions has become a prerequisite to exercise freedom of expression, communication, association, and worship. Moreover, occupational status, access to credit and insurance are increasingly dependent upon the degree of personal data protection. In the European model, there is an increasingly close association between privacy and freedom.

On the other hand, looking at the developments in the USA one can see that the very definition of privacy has come to include items that can be traced back to the conceptual framework of dignity. Indeed, privacy is said to consist in “the protection of life-choices from public control and social disgrace” or “a claim about social boundaries that protect us from being simplified and objectified and judged out of context”.

This cursory reference to complex cultural situations shows that the dichotomy I mentioned before is no longer acceptable. Above all, it is not acceptable that the European privacy model is considered to be alien to freedom components. In fact, the European model has evolved by coupling the protection of intimacy and confidentiality with the fight against any discrimination and the search for effective equality. In this manner, the social and political function of privacy has changed dramatically; indeed nowadays privacy goes well beyond the individual’s private sphere and has become a component of citizenship in the new millennium.

Now, getting back to the issue of dignity, one might argue that exactly the perspective and experience applying to the new privacy concept can allow doing away with the ambiguity pointed out whenever this concept is taken into consideration. Actually, “dignity” is used both to convey the need for absolutely respecting an individual’s autonomy and rights and to support the claim to controlling individuals and their behaviour for the sake of values that someone plans to impose on other individuals.

In dealing with privacy, emphasis has been put increasingly on the need for eliminating or reducing external interference with an individual’s private sphere. Therefore, it is not a matter of imposing alien values, but rather to make possible the full development of the personality and the autonomous participation into the social and political life. The aim is to prevent one’s life choices from being conditioned by public and/or private influence so that everyone can be free to act autonomously. This is why not even public security requirements can ever downsize privacy in a way that is incompatible with the features of a democratic society, and business logic cannot legitimate the commodification of personal information.

Seen in this perspective, the dual construction – perhaps the ambiguity – of the dignity concept can actually be overcome. Dignity as related to privacy is a concept summarising principles such as recognition of an individual’s personality and non-commodification of

the individual, equality, respect for other people, solidarity, non-interference with another's life choices, possibility to act freely in society and in the political arena. There are no values to be imposed on others. Actually, the foundations are laid to ensure autonomy and mutual respect. Moreover, Article 1 of the Charter of Fundamental Rights provides that dignity is to be not only "respected", but also "protected" – after the pattern followed in the German Grundgesetz. This means that public authorities are required not only to refrain from tampering or interfering with an individual's private sphere, but also to take steps actively in order to bring about the conditions allowing individuals to live with dignity. The right of privacy represents exactly one of these essential conditions.

Seen in the social perspective, this construction of the privacy-dignity relationship can be considered as a fundamental tool to fight the powerful drive aimed at transforming our social organisations into surveillance / classification / discriminatory selection societies. However, this fight would appear to become increasingly difficult as shown by many examples quoted in the course of this Conference.

Let us consider the equality issue. We are facing the stepwise extension of social control on the grounds, basically, of the need to fight terrorism. We are experiencing deep-ranging social changes. Surveillance is becoming the rule instead of being the exception, its focus being shifted from "dangerous" individuals to people at large. No crowd is "solitary" and anonymous any longer: crowd is "naked". Image digitisation and facial recognition allow extracting the individual from the crowd, identifying and tracing his movements. Data mining, i.e. the unrelenting search for information on individual behaviour, is continuously generating individual, family, territorial and group "profiles". Surveillance knows no boundaries.

Stretching the interpretation of these changes to the extreme, some US scholars have maintained that the shift from control targeted to individuals and social groups regarded as dangerous towards objective, universal forms of control would produce "democratisation" effects as it would rule out any selection, i.e. any discretion, in respect of the persons under investigation. In other words, all would be equal because all would be controlled and on file. In this sense, equality before the State could only be ensured by relinquishing all safeguards.

However, this concentration field-style equality violates dignity, denies freedom, and thwarts democracy. Sure, one might argue that this is a paradoxical view and should not be taken too much in earnest. In fact, it is the extremised version of a widely held, down-to-earth view according to which you cannot strike a balance between different values and rights in the customary way whenever it is the very survival of a State that is at stake. Does it mean that we all will become if not potential enemies, certainly potential suspects – which gives the green light to all manners of mass control? Are we to make do with a modified version of freedom itself?

Another historically fundamental freedom right, i.e. the freedom of movement, is currently jeopardised by video surveillance and location techniques. Again, all hopes of defence rest on the privacy-dignity interaction, which has become especially important after some reports published in July concerning, in particular, application of RFID devices to individuals.

It appears that microchips were implanted into the arms of Mexico's Fiscal General and 160 Fiscal's employees to control their access to an important documentation centre and possibly track them in case of kidnapping – at a cost of 150 \$ per implant. The Fiscal only commented that “it hurt a bit”.

On July 19th, the UK Prime Minister announced a programme whereby the five thousand most dangerous UK criminals would be “tagged and tracked” via satellite. Many have pointed out the technical difficulties related to this project; however, it is the symbolic value of the message that should be taken into account very earnestly.

Indeed, there is a dramatic change in the legal and social status of individuals underlying this approach. Having served a sentence in full will not be enough to regain freedom. If an individual is classed as “highly crime-prone”, he or she will be deprived for life of his or her freedom of movement and all the attending forms of personal autonomy, because he or she will be obliged to carry an electronic device to allow being located at any time. And this “tagging” of dangerous individuals could also be implemented by inserting underskin microchips. The very nature of our body would thereby end up being modified, because the body would become a “post-human” body that has undergone technological manipulation.

Can this be considered compatible with the human dignity principle? Should one accept the audacious wording who termed this latest version of the “surveillance society” as “society of respect”?

While one should be concerned with one’s future, one should not lose sight of the present, where video surveillance is all-pervasive and image digitisation allows tracking our movements. Video surveillance not only affects freedom of movement, but also makes the past “visible”.

The effects produced by location control and merciless storing of individuals’ behaviour are equally clear-cut if one considers electronic communications. Here, the extended data retention periods are doing away with the right to oblivion and actually enhance the opportunities for unrelentingly producing all kinds of profiles, which carries deep-ranging consequences in terms of social selection and discrimination.

What dignity may be left to an individual who has become a prisoner of his past, which is held wholly by others and of which he has been dispossessed without being able to object?

Furthermore, the new driving force of biometrics is giving rise to new combinations between the physical and the electronic body. Our physical body is becoming a password. Our electronic body, meaning the set of data concerning us, is the subject of increasingly aggressive and pervasive data mining on grounds of security or else for market purposes. Social surveillance avails itself of increasingly sophisticated electronic leashes. The human body is being equated to a moving object that can be controlled remotely via satellite, or by means of electronic devices.

We are confronted with changes that have to do with the anthropological essence of individuals. There is a stepwise shift in progress – after being “observed” via video surveillance and biometrics, individuals are being “modified” via various electronic devices, underskin chips and “smart” tags to such an extent that they are increasingly turned into “networked persons”. We are always connected and can be configured differently so that from time to time we can transmit and receive signals allowing movements, habits and contacts to be traced and defined. This is bound to modify meaning and contents of individuals’ autonomy, therefore to affect their dignity.

This unrelenting erosion of personal prerogatives – getting as far as transforming the body – co-exists not only with the growing attention paid to dignity – as mentioned at the beginning of my contribution –, but also with the veritable constitutionalisation of the individual, as shown most clearly by the Charter of Fundamental Rights of the EU of which the new, autonomous fundamental right to data protection is a basic component.

“We shall not lay hand upon thee”. This was the promise made in the Magna Charta – to respect the body in its entirety: *Habeas Corpus*. This promise has survived technological developments. Each processing operation concerning individual data is to be regarded as related to the body as a whole, to an individual that has to be respected in its physical and mental integrity. This is a new all-round concept of individual, and its translation into the real world entails the right to full respect for a body that is nowadays both “physical” and “electronic”. In this new world, data protection fulfils the task of ensuring the “*habeas data*” required by the changed circumstances – and thereby becomes an ineliminable component of civilisation, as has been in the history for the *habeas corpus*.

Thus, a stringent analysis of the threats affecting privacy and dignity should not result into resignation or pessimism, nor should it lead to a luddite call for destroying technological devices that are actually excellent means to enhance knowledge and political/social participation as well as being sources of welfare and channels of personal and social security. Still, one should never forget that availability of a technology as such does not imply that all uses of such technology are permissible; in fact, all uses have to be assessed in the light of values other than those conveyed by technology itself. Privacy is no hindrance; it is actually the way through which scientific and technological innovations can lawfully become a part of our society and lives.

I am not afraid of using highly evocative words. I am convinced that a thorough analysis of data protection, of the relationship between privacy and dignity, is fundamental to get a really firm grasp of man’s condition in this millennium and identify the pattern according to which democracy is being modelled.

We must be aware of all this at a time when things are and will be quite difficult. This is just why the role of independent authorities, which has been constitutionalised via the Treaty adopting a Constitution for Europe, is becoming more demanding and requires them to assume increased responsibilities before public opinion.

Data protection authorities operate along the thin line separating the appropriate balancing of privacy against other values from the imposition of limitations that may distort the features of a democracy. We should speak out. We should act together, because no single authority can adequately cope with complex issues that arise in a worldwide context. And, we should do this by making the most of the available tools – first and foremost, the Working Party set up under Article 29 of Directive 95/46/EC.

We should be cautious and capable to respond to the attacks coming from terrorism; above all, we should be brave and never forget our past, which reminds us of insufferable forms of authoritarianism. We are actually in danger of being exposed, once again, to authoritarian measures. Democracy is a valuable good, but it is fragile and should not be taken for granted once and for all.

Perhaps it will not always be possible to stop this authoritarian drift. This is exactly why independent authorities have the duty to explain what is really happening to the public opinion.

It is not merely a moral duty. In fact, it is the only way for us to fulfil our institutional tasks as parts of the balancing powers that are necessary to the soundness of democratic life.