Privacy As Virtue: Moving Beyond the Individual in the Age of Big Data.
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The core question of this book is whether a rights-based approach to privacy regulation still suffices to address the challenges triggered by new data processing techniques such as Big Data and mass surveillance. A rights-based approach generally grants subjective rights to individuals to protect their personal interests. However, large-scale data processing techniques often transcend the individual and her interests; they may affect broader and more general values. To provide an example, it is very difficult to specify whether and if so, to what extent the large-scale data gathering activities of the NSA have negatively affected the personal interests of an ordinary U.S. or E.U. citizen, which holds true even for broader values such as human dignity, individual autonomy and personal freedom. Similarly, although specific individuals may be filmed by the thousands of CCTV camera's surveilling some European cities, the problem is not so much that these camera's film specific individuals; the problem is that everyone or almost everyone living in these cities is filmed almost constantly and everywhere. Consequently, rather than affecting specific personal interests, such data processing initiatives seem to revolve around general and societal interests.

On a practical level, the problem is that people are often simply unaware that their personal data are gathered by either fellow citizens (e.g., through the use of smart phones), by companies (e.g., through tracking cookies) or by governments (e.g., through covert surveillance). Obviously, people who are unaware of their data being gathered will not invoke their right to privacy in court. But even if people were aware of these data collections, given the fact that data gathering and processing is currently so widespread and omnipresent and will become even more so in the future, it will quite likely be impossible for them to keep track of every data processing initiative involving (or potentially involving) their data, to assess whether the data controller abides by the legal standards applicable, and if not, to file a legal complaint. Consequently, it is increasingly the question whether individuals are able to effectively exercise their rights.

It is important to stress, however, that a rights-based approach to privacy regulation will need to be preserved to address issues in which individual interests are at stake. For example, when the government enters the private home of an individual or when a data controller collects sensitive personal data about a specific subject, it makes sense to grant that individual a subjective right to protect her personal interests. The effects of such matters are limited to one person or a small group of persons, they generally know that they have been affected by the privacy infringement and such infringements are usually temporal and incidental. In these circumstances, individuals are generally capable of invoking their rights in order to protect their personal interests. The question is, however, whether a broader conception of privacy regulation can be introduced, which aims not only at protecting the subjective rights of private individuals, but also the interests at stake that cannot be (directly) linked to a specific individual. This book has developed such an approach by turning to virtue ethics.

Virtue ethics is seen as a third approach in ethics, next to consequentialism and deontology. Virtue ethics argues that an action is good if a virtuous person would perform that action, while consequentialism holds that an action is good if it promotes the maximum amount of happiness for the maximum number of people, and deontology argues that an action is good if it accords to the categorical imperative. Human rights and even the legal framework as such are commonly held to be based on a deontological framework, even though the current human rights framework is often critiqued for being overly consequentialist. This book proposes to base privacy protection not only on the question of respect for the (human) rights of citizens, but also on the broader question of whether the actions of an agent are the actions a virtuous agent would perform.

Leaving the rights-based focus intact, the virtue ethical approach to privacy regulation can be used to tackle the broader implications of Big Data and mass surveillance initiatives. A virtuous agent not only respects the rights and interests of others; a virtuous agent has a broader duty to act in the most careful, just and temperate way possible. The type of agent that is central to this book is the state, although the conclusions reached are potentially also applicable to other agents, such as large data companies like Apple, Facebook and Google. This book has developed two sets of virtues that states must take into account when gathering, analyzing and using data, even if no individual interests or subjective rights are at stake: on the one hand a set of ‘minimum requirements’ and on the other hand a set of ‘maximum requirements’ or aspirations. The minimum requirements are procedural conditions, related to

the rule of law, which must always be respected, the maximum goals or aspirations, which can never be reached in full.

Virtue ethics produces these two sets of requirements by using the idea of *telos* (purpose or goal). Things, objects and beings have a natural goal towards which they strive, so virtue ethics holds. A tree strives to flourish to the maximum extent and needs roots, branches and leaves to do so. This also applies to man-made instruments. A hammer or a chair, for example, is a non-neutral object – a hammer is designed for hitting other objects such as nails; a chair is designed to sit on. The intrinsic purpose of these tools follows from their design, their embedded aspiration. The best hammer is the hammer that is optimally capable of hitting other objects such as nails and the best chair is the one in which it is best to sit. Two things must be kept in mind. First, that the optimal hammer or chair will never exist – it is a utopian idea. Second, that what is conceived as the best hammer or chair may differ from person to person and from time to time. One person may want to sit comfortably in a chair, another person may want a chair which is good for working in, etc.

Still, it is important that there is a correlation between means and ends. If one chooses a certain goal, for example 'sitting', there are a number of means suited to this goal (chairs, beer crates, cushions, etc.), but most objects, such as plants, umbrellas and lamps, are intrinsically unfit for this purpose. Likewise, a cotton swab is unsuited for hitting other objects. The other way around, instruments are only suitable for certain goals and not for others; a hammer, for example, may be used for hitting other objects and, perhaps, for opening a bottle of beer, but it is unsuitable for the goal of playing rugby or baking bread. This leads to the point that from the aspirations, not only may the maximum goals be derived, but also a set of minimum conditions. A hammer that is made out of cotton instead of wood and steel is a bad hammer, or not a hammer at all; a chair that has no legs, no back and no seat is a deficient chair, or no chair at all.

The same type of logic is often used in professional ethics. A doctor should not only strive to be a decent doctor; she has a professional duty to be the best doctor. A parent should not only strive to be a decent parent; she has a social duty to strive to be the best parent - and so forth. Again, two types of duties or requirements may follow from this. First, a doctor that does not cure any patient and even expedites their sudden death is generally seen as a bad doctor not worthy of her profession; a parent that hits or sexually molests her children, leaves them underfed or does not care for their hygiene is generally seen as such a bad parent that she should be relieved from her parental authority. Second, the doctor has a duty to strive to be the best doctor and the parent has a duty to strive to be the best parent. These are

aspirations, the exact definition and scope of which may be a matter of debate. Still, we have a general idea of what a good doctor is and what good parents are. A good doctor, for example, is not only someone who cures the diseases suffered by her patients, but also provides optimal information to her patients, is empathetic towards them and their family, etc.

It is important to stress that although minimum requirements ('do not assault or molest your children', 'do not expedite the death of your patients', etc.) make up the larger part of the law, aspirations are not absent from the legal realm. For example, most legal regimes around the world embed both a duty of care for doctors and for parents, specifying 'act as a good doctor would act' or 'do as a good parent would do'. These are open norms, which are interpreted according to the prevailing societal norms. It is mostly left to courts of law or disciplinary councils to decide whether in concrete cases, parents, doctors and others acting under a duty of care have done enough to be the best possible parent, doctor or otherwise. Moreover, most professional standards and codes of conduct are based on aspirations and goals, rather than on minimum requirements. To provide a final example, some human rights courts have stressed that states are not only under the negative obligation not to abuse their power by violating human rights, but also under a positive obligation to promote human freedom and autonomy, create a healthy living environment and to promote minority identities and life styles. They have a duty to use their power to strive for 'the good' and to use their power in the best way.

This book suggests that the idea of professional ethics may also be applied to the state and the legal order as such. It is argued that these are non-neutral institutions. Why live in a legal order rather than a tyranny? Because legal orders tend to have stable and accessible rules that enable humans to take them into account when making certain choices. Tyrannies, in general, are more prone to ask the impossible of people and to punish them retroactively, because punishment is dependent on the will of the tyrant only. The nature of a legal order is thus that it is aimed at preserving human autonomy and individual freedom to the greatest extent possible. This is the essence, the intrinsic quality, of a legal order. Thus, its aspiration or *telos,* its natural direction is aimed at promoting human autonomy and freedom to the maximum extent. In addition, as Fuller specified, there are minimum requirements; if the state or legal order flagrantly ignores or disrespects human autonomy, for example by structurally adopting retroactive laws, by not making them public, by relying on unstable and *ad hoc* decisions, it can no longer be called a state or a legal order proper. Rather, it would constitute a form of tyranny. In addition to these minimum requirements, the state and its legal order are, or should be, striving towards promoting human autonomy and freedom to the optimal extent.

The introduction of minimum and maximum requirements to privacy regulation could address the problems faced by the current paradigm. The main problem is that there is currently a tension between, on the one hand, a technical reality (Big Data and other large data processing operations) which affects general and societal interests, and on the other hand a legal realm that is focused on the individual, her rights and her interests. A virtue ethical approach to (privacy) regulation is, by contrast, not uniquely focused on individual interests. For example, the virtue ethical approach to privacy regulation does not depend on the question of whether personal data are processed or whether the private life of an individual is at stake. This is because virtue ethics looks at the virtuousness of the agent's behavior as such, without individual interests and rights of others necessarily being at stake. As has been stressed, it goes further than merely respecting the rights or interests of others. Thus, a virtue ethical approach to privacy regulation can specify rules for the gathering, analysis and use of 'data' as such. This solves two tensions under the current regulatory framework that become increasingly evident. First, the fact that data processes are increasingly based on nonpersonal data, such as metadata, statistical data and aggregated data. The processing of such data is difficult to assess under the current regulatory framework, because these data often do not directly or indirectly identify a person. Second, as stressed, the effects of such processes often transcend the individual and her interests. This is problematic because courts often only accept cases by applicants who can demonstrate that they have been or will be affected by the acts or laws complained of. Regulating the processing of data as such might provide a solution for both of these two problems. The gathering, analysis and use of 'data' by states might be regulated as such, irrespective of whether they are linked to specific individuals, and legal complaints could be assessed without it being necessary that the claimants can demonstrate that they have been harmed significantly by the practices complained of.

A virtue ethical approach applies minimum requirements to data processing techniques. Data processing should accord to some, though not all, of the principles currently linked to the processing of 'personal data', such as purpose limitation, data security and data quality. It proposes, second, that the laws and data processing programs they facilitate must always abide by the minimum requirements of legality, legitimacy, transparency and accountability. It proposes, third, as a minimum requirement, that a number of additional duties should be applied in the phase between gathering and using data, when data are combined, harvested through the use of algorithms, analyzed and aggregated in group or statistical profiles. These include the duty that data controllers must ensure that the datasets are not biased, that the data that are combined actually entail the same types of data, that the

algorithms used are not biased and that metadata are kept on the data analysis process. These are merely three examples of minimum requirements that a virtue ethical approach to privacy regulation might produce. Others may be derived from such an approach as well. A virtue ethical approach to privacy regulation also proposes maximum goals. The exact content of these aspirations cannot be written in stone. Still, some examples of policies promoting human autonomy and freedom have been provided in the realm of privacy and data protection, namely promoting diversity, autonomy and combatting social stigmas. Moreover, it has been stressed that there are natural limits to these and other aspirations, meaning that an equilibrium has to be found by the state.

Finally, it is important to stress that both these minimum and maximum requirements have already been sporadically suggested, both in the literature and in the jurisprudence of the European Court of Human Rights. For example, starting with the *Klass* judgement and culminating in the *Zakharov*, the Court has gradually accepted that focusing solely on individual rights and individual interests does not do justice to the complexity of cases addressing large scale data processing techniques. It has stressed that in exceptional cases, it is willing to accept *in abstracto* claims and assess the legitimacy and legality of laws and policies as such, without requiring that the laws and policies have had a direct impact on the rights and interests of specific individuals. On the other hand, the ECtHR also uses the concept of positive obligations. Essentially, these are obligations for states to use their power in the optimal way for the promotion of human happiness and the well-being of the country. Similarly, some scholars have suggested that courts and lawmakers should focus on general and societal interests in addition to individual privacy interests.

On a practical level, a virtue ethical approach to privacy regulation might facilitate this move and bring the alternatives suggested to a higher and more consistent level. On a theoretical level, the problem is that the suggestions that have been made so far remain mostly without ethical/theoretical foundation – they are mainly practical solutions to concrete problems. Virtue ethics could provide a solid basis. More importantly, it seems that the alternatives in the case law and literature seem to diverge from and even conflict with the dominant approach to human rights in general and privacy regulation in particular. It is mostly unclear how the alternative approaches relate to the fundamental premises of the current human rights framework, namely that human rights are designed to protect humans by granting them subjective rights to protect their individual interests. For example, when the ECtHR assesses the legitimacy and legality of laws as such, without any harm having been done, it is acting as a constitutional court rather than a human rights court. Similarly, some

commentators have critiqued the notion of positive obligations for states, because in effect it allows judges to decide which aspirations and goals states should ascribe to, while this should be left to the democratic legislator. Consequently, more thought is needed on how an alternative approach to (privacy) regulation could be reconciled with the current privacy paradigm.

The first chapter of this book identified two approaches to the regulation of privacy and data protection. The original approach was only marginally based on the protection of the individual and her interests and focused primarily on laying down obligations for states and data controllers. Gradually, the focus of privacy and data protection has shifted towards granting subjective rights to natural persons and protecting their personal interests. It has to be stressed that although many legal provisions and cases were discussed in this chapter, they were presented in an idealized way. The original paradigm did not disregard individual rights and interests absolutely, nor does the current paradigm focus exclusively on personal interests and subjective rights. Still, showing this gradual transformation from an approach which focused primarily on societal interests and general duties, to an approach in which the individual is central, serves two purposes. First, it shows that it is not true that by definition, privacy regulation must focus on private interests and subjective rights. Second, contrasting the current with the original approach to privacy and data protection regulation offers the reader a better understanding of some of the core characteristics of the current legal paradigm.

The second chapter discussed the development of privacy and data protection rules over time. It primarily discussed the instruments developed on a European level, though the American Fair Information Practices, the OECD's guidelines for the protection of personal data and some national European laws and case law were also referred to occasionally. For privacy regulation, the main objects of study were the Council of Europe's European Convention on Human Rights and the jurisprudence of the European Court of Human Rights. For data protection regulation, the main focuses were the European Union's Data Protection Directive and the upcoming General Data Protection Regulation. It has to be stressed that the Directive is to a large extent inspired by the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and that the ECtHR often refers to the EU's Charter of Fundamental Rights when delivering its decision. The instruments of both organizations are increasingly intertwined and interrelated and can

(and perhaps need to) be studied in connection to each other. Furthermore, it is important to stress that although privacy and data protection are discussed separately, it is by no means the intention of this book to enter into the discussion whether privacy and data protection are two strictly separated rights or in fact two sides of the same coin.

The second chapter was divided in an introduction (Section 1), a description of the development of privacy regulation (Section 2) and data protection regulation (Section 3) over time and a conclusion (Section 4). Section 2 started by showing in general how privacy has transformed from a classic negative right into a personality right, and then made four specific points. Though the right to complain was originally not or only marginally granted to individuals, it is now solely or almost exclusively granted to natural persons (Section 2.1); though the ECHR as a whole and the right to privacy in particular were originally primarily concerned with the protection of societal and general interests, Article 8 ECHR is now predominantly concerned with the protection of the private and individual interests (Section 2.2); although originally, laws and policies by the states were judged primarily on their intrinsic qualities, such as their effectiveness, legitimacy and legality, the preferred methodology of the ECtHR to determine the outcome of cases is currently the balancing of interests (Section 2.3); although originally, the protection of privacy was only partially done through juridical means, currently, legal regulation is the dominant approach (Section 2.4). Section 3 started off by showing that the term 'personal data' has broadened over time, which means that like the right to privacy, the material scope of the data protection instruments has widened significantly. Subsequently, four arguments were made. Over time, the duties of data controllers have become more and more elaborate and less and less like general duties of care (Section 3.1); there has been an increased focus on the interests and rights of individuals, *inter alia*, to control their data and to submit complaints about a violation of the data protection rules (Section 3.2); like with the right to privacy, though to a lesser extent, there has been an increased focus on balancing the rights and interests of the different parties involved (Section 3.3); the instruments have changed from code-of-conduct-like documents to almost market-regulation-like, full-fledged juridical regimes with high fines and penalties in case of a violation (Section 3.4).

While Chapter II showed how privacy and data protection regulation became increasingly individualized and legalized, Chapter III analyzed the problems of the current privacy paradigm when applied to Big Data and mass surveillance. These problems were explained and analyzed on the four points featuring in chapter II, namely the focus on individual rights, on individual interests, on the balancing of interests to determine the

outcome of a case and on legal forms of regulation. Also, a number of the material provisions in the European Data Protection instruments were discussed. The goal of this chapter was not to provide an exhaustive list of the questions raised by modern data processing initiatives, but to show that Big Data and mass surveillance challenge some of the fundaments of the current regulatory framework as such and of the privacy and data protection paradigm in particular. The core argument made here is that Big Data and mass surveillance often transcend the rights of individuals and instead affect general and societal interests. Obviously, this tension has been signaled by others already, both in jurisprudence and in the literature. That is why alternatives to the focus on subjective rights and personal interests developed by others, were discussed in detail in this chapter.

With respect to jurisprudential alternatives, the case law of the European Court of Human Rights with respect to the application of Article 8 ECHR, especially in (mass) surveillance cases, served as an example. Although in *Klass and others v. Germany* from 1978, the ECtHR already made an exception to its rejection of *in abstracto* claims, and has been willing to do so in a handful of cases since then, it was only in the *Zakharov* case from 2015 that it explicitly acknowledged that, in exceptional cases revolving around mass surveillance activities by the state, it is willing to abandon its victim requirement and assess laws and policies on their intrinsic qualities, such as on effectiveness, legitimacy and legality, without any individual interests or personal rights needing to be affected. This jurisprudential precedence serves as a building block for developing an alternative to the rights-based approach to privacy regulation.

Such building blocks have also been found in the literature, where many authors have tried to develop alternatives to an exclusive focus on individual rights and interests. It has to be stressed that although the legal regulation of and case law on privacy discussed in this book are almost exclusively European, the literature is predominantly American. This is unproblematic because these theories are not used to reflect on or interpret the European laws or cases as such, but to find alternatives to the focus on individual rights and interests in privacy regulation, which is as dominant in the U.S.A. as it is in Europe, perhaps even more so. Again, the goal of this discussion was not to provide a full and exhaustive list of theories and proposals, but to give a brief overview of some of the most appealing suggestions made so far. It was suggested that one branch of these theories, namely the agent-based theories, might be used to further develop a virtue ethical approach to privacy regulation.

Chapter III started with an introduction (Section 1) and then discussed the problems of the current regulatory framework in general and the privacy and data protection rules in

particular when applied to Big Data and mass surveillance processes (Section 2). To illustrate this argument, the tensions were shown on three aspects, namely the material data protection principles (Section 2.1), the focus on individual rights and interests (Section 2.2) and the focus on legal regulation (Section 2.3). Subsequently, the cases in which the ECtHR has struggled with the focus on subjective rights and individual interests were discussed (Section 3). It appeared that, in exceptional cases, the court has in fact been willing to relax the victim requirement when there is a reasonable likelihood that a person is harmed by a specific law or policy (Section 3.1), when it is likely that harm will result from specific laws or policies (Section 3.2) and in exceptional circumstances, it is even willing to assess cases *in abstracto* (Section 3.3). Finally, the *Zakharov* case was briefly discussed and it was argued that in *in abstracto* cases, the ECtHR acts as a quasi-constitutional court (Section 3.4). Subsequently, Section 4 discussed some of the most prominent theories proposed in scholarly literature that try to develop alternatives to the approach based on individual rights and interests, namely theories that focus on the constitutive value of privacy (Section 4.1), group and collective interests (Section 4.2), potential harm (Section 4.3) and agent-based theories (Section 4.4). Finally, the analysis suggests that the focus on *in abstracto* claims and the agent based theories developed in the literature could be used as building block for developing an alternative approach to privacy regulation (Section 5).

Chapter IV developed the fundaments of a virtue ethical approach to privacy regulation. It did so by explaining the core characteristics of virtue ethics, such as human flourishing, virtue and practical wisdom. The work of Lon L. Fuller was discussed. He believes states and legal orders are in fact teleological (purposive) institutions, aimed at promoting justice and human autonomy and freedom. These goals provide the 'inner morality' of states, from which both minimum and maximum requirements may be derived. It was also briefly pointed out that such an approach might provide alternatives to the four aspects of the current privacy paradigm as discussed. First, virtue ethics does not believe that duties necessarily correlate with the rights of others; the state may have certain duties that transcend the mere respect for the (human) rights of its citizens. Second, the duties of states may transcend the protection or promotion of mere individual interests; virtue ethics focuses on more general and societal interests, on the society as such and the environment people live in. Third, virtue ethics does not merely focus on external moral concepts or on a clash of different interests; it focuses on the 'inner morality' of law and the character of the state. Fourth and finally, virtue ethics lays down minimum requirements for states and suggests positive obligations through the use of data.

Chapter 3 started with an introduction (Section 1) and discussed the notion of virtue ethics (Section 2). First, Subsection 2.1 provided the general contours of virtue ethics. Second, Subsection 2.2 discussed in further detail what a virtue ethical approach to the legal regime in general might entail; it did so by analyzing the work of Lon L. Fuller. Third and finally, Subsection 2.3 briefly pointed out how such an approach might help to overcome the difficulties involved with applying the current privacy paradigm to Big Data and mass surveillance practices. Section 3 analyzed some of the most prominent arguments against adopting a virtue ethical approach to (privacy) regulation. The counter-arguments that have been discussed are: virtue duties do not correlate with rights of subjects, while law supposes a correlation between rights and duties (Subsection 3.1); the legal regime separates is from ought and thus an 'inner morality' of law must be rejected (Subsection 3.2); law must provide action guidance, while virtue ethics is unable to do so (Subsection 3.3).

Chapter V picked up where chapter IV left off. It started with an introduction (Section 1) and subsequently developed the minimum and the maximum requirements for virtuous states with respect to data processing. First, regarding the minimum requirements (Section 2), three examples were provided. It was argued that regulation should apply to 'data' independent of whether they are personal, private or sensitive or not (Section 2.1). Second, it was suggested that there are a number of intrinsic qualities of laws and policies that could be assessed irrespective of whether personal interests have been harmed (Section 2.2) Third, several minimum conditions for analyzing data were developed (Section 2.2). Then, the maximum requirements were developed with respect to data processing (Section 3). It was argued that an equilibrium must be found between the different means and ends of the state (Section 3.1); that states, when using data processing techniques, should strive towards promoting the flourishing of its citizens (Section 3.2); and that there are good reasons for adopting more open, ethics-inspired doctrines in privacy regulation (Section 3.3). The chapter concluded with a brief analysis of the possibility of embedding minimum and maximum requirements in the current legal paradigm (Section 4).