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Judging public perceptions of privacy: Should law actually care about what people think?



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Gloria González Fuster and Serge Gutwirth
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PRISMS D5.3: The legal significance of individual choices for privacy and personal data protection

- Key question: What is the relevance for law of individual choices?
- Law understood as => What judges do.
- Individual choices:
 - the choice of a single individual;
 - the sum of many of individual choices => 'public concerns'.



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General principles of human/fundamental rights protection

- Human/fundamental rights protect everybody, not only the majority:
 - Article 7 EU Charter: '**Everyone** has the right to respect for his or her private and family life, home and communications'.
 - Article 8(1) EU Charter: '**Everyone** has the right to the protection of personal data concerning him or her'.
- Human/fundamental rights enjoy special legal status to protect them against fluctuations of public perception.



Can those rights be relinquished by individuals?

- It is not possible to generally renounce to those rights.
- It is possible to refrain from exercising them (and actually one cannot be forced to use them) in a concrete case.
- Even in those cases when somebody commits not to make use of those rights, they can always change their mind (subject to compensation if applicable).





Individual choices and public perceptions in the adjudication of privacy

- In relation to the right to respect for private life, doctrinal debate on how should be defined what is 'private life':
 - formal criteria? is private what each person deems private;
 - material criteria? private is what law thinks deserves to be protected as private (=> ECtHR: '*a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor*' *P.G. and J.H. v UK*, 25 September 2001)
- Can public perceptions legitimise interferences with the right to respect for private life?
 - ECtHR: Certainly not all public perceptions (see for instance *Smith and Grady v UK*, 27 September 1999)



Individual choices and public perceptions in the adjudication of personal data protection

- EU legislator views data subjects as:
 - Uninformed to the point of not knowing they are 'paying' for free services, but
 - still able to provide 'informed consent'.
- At the CJEU, general resistance to view individuals as subjects defined by statistics:
 - cf. case law on the 'average consumer': the average consumer is '*reasonably well informed and reasonably observant and circumspect*' despite any evidence proving the contrary.





Individual choices and personal data protection: The unclear role of consent

- Still limited CJEU case law on the right to personal data protection, and some its elements are contradictory:
 - *Deutsche Telekom*, 5 May 2011:
 - Directive 2002/58/EC does not establish a 'selective right' of subscribers to decide in favour of certain providers of public directories of subscribers of communication services.
 - When subscribers consent to their data being published in a directory with a specific purpose, they assume the 'detrimental' impact of such decision and will 'generally not have standing to object to the publication of the same data in another, similar directory'.
 - *Volker und Markus Schecke and Eifert*, 9 November 2010 hints consent could legitimise by itself interferences with the right to personal data protection.



Concluding remarks: The right to be forgotten at the crossroads between individual choice and public interest

- Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, 13 May 2014
- **Individuals** have the right to object to some information and links appearing in results of searches made using their name, when *they consider such information inadequate, irrelevant or no longer relevant*, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine.
- *Particular reasons*, such as the role played by the data subject in public life, might however justify the the interference with their fundamental rights is by the preponderant **interest of the general public** in having, on account of inclusion in the list of results, access to the information in question.





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Questions?
Comments?

Gloria.Gonzalez.Fuster@vub.ac.be

Serge.Gutwirth@vub.ac.be



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Thank you.

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