Ethics, Law and Privacy

Disentangling Law from Ethics in Privacy Discourse

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Abstract— **Numerous science, technology and engineering developments are perceived as raising privacy concerns. As such, privacy repeatedly finds itself addressed through the mixed lens of an 'ethical-legal' (if not 'ethical-legal-social') perspective. The aim of this contribution is to dispute the validity of this indistinctive approach, to stress its shortcomings, and to investigate the paths that help to disentwine ethics and law in accordance with their respective singularities and the distance between them. The paper's basic premise is that it is not possible to address the articulation between law and ethics from a neutral, un-aligned, un-attached perspective, and that, regardless of the perspective adopted to examine them, and irrespective of their many intersections, ethics and law are to remain uncoupled. The contribution illustrates how contemporary discourse on privacy can be affected by the merging of the ethical and the legal with examples taken from support of security research in the European Union (EU). Examining the limits of this viewpoint, it puts forward that legal and ethical perspectives of privacy will always remain separated by a gap, and that it is by embracing such gap, instead of attempting to erase it, that the study of privacy should be apprehended. Continuously seeking and questioning the boundaries between law and ethics is, it is suggested, perhaps the most ethical approach to enter the subject.**

Keywords—privacy; personal data; ethics; law; European Union.

I. INTRODUCTION

Ethics and law are not the same. The distinction between them can be envisioned and explained from multiple perspectives: from the viewpoint of law, from the viewpoint of ethics, or even from an external viewpoint. Each of these perspectives, in their turn, open up several possible points of view. Law's perspective, for instance, can be understood in at least in two ways: as normativity (or applicable legislation), or as the production of secure or stable legal bonds [1]. This contribution is concerned with what happens when ethics and law are not distinguished but, on the contrary, merged, amalgamated, fused, and when the notion of privacy is caught up in such coalescence.

First, the paper introduces some examples of amalgamation of the ethical and the legal in the discussion of privacy, examining how privacy can get trapped in perspectives of unclear nature. Second, the contribution examines the question of the distinction between ethics and law. Finally, it discusses the paths to satisfactorily disentwine the ethical and legal in the study of privacy.

II. ENTANGLEMENTS AROUND PRIVACY

The ethical and legal dimensions of privacy are sometimes clearly defined. One of the most illustrative embodiments of the distinction between ethics and law in relation to privacy is probably the figure of the ethical hacker, which is in fact somehow a contemporary version of Robin Hood. Hackers are, by definition, people using computers to gain unauthorised access to data, and thus responsible for unlawful activities that can be legally described as encroachments on others' privacy. This, however, is not perceived as an obstacle to the idea that their actions might nonetheless be regarded as ethical, or morally correct, at least from the hackers' perspective. Crucially, in many cases hackers will argue that, by unlawfully interfering with the privacy rights of some, they are actually aiming to put on the table the need for effective privacy protection for many, and to bring to the light potentially dangerous vulnerabilities. They invoke the same kind of relation between means and end as the hero who steals to honestly redistribute wealth.

The notion of the ethical hacker thus encapsulates the possibility to deal with divergent conceptions of privacy, and to accept that what is from a legal perspective privacy-compliant is not necessarily something that, from an ethical perspective, can be described as ethically sound.

In the last seventy years a considerable number of debates about the recognition of different sorts of sexuality have very clearly shown the importance of distinguishing between legal and ethical approaches. In democratic constitutional States, it is

accepted that it is not the State's task to take a position (be it through legislation, or even through case law) on how people – at least as regards consenting adults – should and must behave sexually. That is why laws or judicial rulings prohibiting homosexuality or (sado)masochism infringe upon the core of a person's privacy. They are legally unacceptable, precisely because they attempt to legally impose a certain sexual ethics. For law to protect liberty and autonomy, it must create their conditions of possibility, particularly by holding the imposition of specific morals and ethics at a distance, in the spirit of John Stuart Mill.

A. Privacy and Related Issues

The EU is currently supporting research through a programme named Horizon 2020, which establishes the guidelines for EU's research funding for the years 2014 to 2020. Privacy appears repeatedly in the pages of Horizon 2020's Work Programme for 2014 and 2015, albeit in a peculiarly puzzling manner. Is privacy to be regarded as a legal issue? Or is privacy an ethical issue? Is it maybe both? If so, does the programme envisage any difference between approaching privacy as a legal or as an ethical issue? Answers are difficult to find in the text of the programme.

Let's consider a few examples. One of the calls for proposals described in the Horizon 2020 Work Programme, devoted to studying the use of Big Data for forensic investigation, states that proposals for research projects will have to deal with the management of personal data 'and related ethical and legal issues', after which it is pointed out that 'therefore' attention will have 'to be given to privacy and data protection, and to the adherence to European regulations' through an analysis of 'these rights and regulations' [2, p. 48, see also p. 54]. This would seem to imply the alluded ethical and legal issues related to the management of personal data might be subsumed under the mere consideration of the rights to privacy and data protection and EU regulations.

Conversely, describing another call for proposals, the same Work Programme establishes that applicants must 'develop solutions in compliance with European societal values, including privacy issues and fundamental rights' [2, p. 65]. Here, it would seem that 'privacy issues', which could allegedly be something different from 'fundamental rights', are in any case together with the latter to be understood as elements of a wider category of 'societal values', which are to be regarded as the main reference.

Some of Horizon 2002's calls for proposals describe the impact expected from research projects in terms of increasing privacy and data protection [2, p. 53]. It is very unclear what such an increase might mean from a legal perspective. Legally speaking, fundamental rights can be ensured or violated, expanded or restricted, but not increased or decreased. So what can it exactly mean to intend to 'increase privacy and data protection'? Does it allude to the fact that the desired impact of the research projects is that the rights to privacy and to personal data protection should be breached comparatively less often? Or does the phrase perhaps not refer to the rights to privacy and data protection at all, but rather to a different understanding of these notions?

A further ambiguous appearance of privacy can be found in a research topic placed under the 'ethical societal dimension' of the Work Programme devoted to the subject of Secure Societies. In a topic description on the use of social media for public security purposes, the European Commission declares that special attention should be paid to the 'ethical and privacy aspects' of the issue [2, p. 64]. The coordinating conjunction is here the critical element: are 'privacy aspects' something that can be added to 'ethical' aspects? Is thus privacy not an ethical aspect, but something different? If that is the case, why devise the consideration of these 'ethical and privacy aspects' under the banner of the exploration of an 'ethical/societal dimension'? Describing another call, related to the European Reference Network for Critical Infrastructure Protection, the European Commission indicates that '(r)elevant legislation' must be taken into account, 'including potential ethical, societal and privacy issues' [2, p. 101]. Are then privacy issues something to be found in legislation besides potential ethical and societal issues, which are thus also elements of legislation?

B. Genealogy of a Mix-Up

The amalgamation of ethical and legal issues has been constant in the development of EU security research. In 2007, a special group, the European Security Research and Innovation Forum (ESRIF), was entrusted with assisting security research by providing guidelines for its development 'with due consideration of ethical issues, impacts on citizens' rights, and social perceptions of technological and broader knowledge developments in this field' [3, p. 247]. This blending of 'ethical issues', 'citizens' rights' and 'social perceptions' was echoed in the final ESRIF report, which identified as a systemic need of society to ensure the protection of 'civil rights' such as privacy, and suggested these rights should be approached by studying the 'social, legal and ethical issues of surveillance' [3, p. 52].

The European Commission reverberated this line of thinking when describing its own vision of EU security research: it stressed the significance of the 'societal dimension of security', a dimension allegedly consisting of a 'legal and ethical dimension' together with a 'societal dimension' as such. As a legacy of these developments, in the EU privacy has been often portrayed as an 'ethical aspect' of the 'societal dimension' of security [4, p. 33].

Under the Security Programme of EU's Framework Programme for research for the period 2007-2013, there was as a matter of fact a whole area of research (Area 10.6.5) titled 'Ethics and justice', which was devoted jointly to the 'various ethical and legal concerns' raised by security technologies and policies, maintaining the illusion of approaches and disciplines being almost perfectly interchangeable.

More recently, the European Commission has been stressing that privacy is a legal obligation, and more concretely a fundamental human right, the respect of which is one of the basic objectives of EU funded security research [2, p. 6]. The totality of Horizon 2020 Work Programme for Secure Societies is placed under the principle of respect of 'privacy and civil liberties' [2, p. 7]. The Work Programme's introduction notes that all projects 'must meet the requirements of fundamental

rights, including the protection of personal data, and comply with EU law in that regard' [2, p. 7]. This new emphasis on compliance with legal requirements related to privacy and personal data protection, however, concerns less the substance of projects than the way in which they are to be carried out. In this sense, it appears to counter the traditional framing of privacy as one of the 'ethical issues' that researchers submitting project proposals needed to consider in a self-assessment exercise prior to submission.

In the currently in place Horizon 2020 programme, the table on ethical issues to be pondered by applicants when submitting proposals does no longer refer to privacy as an ethical issue to be reflected upon, but there is however in such table a reference to the 'protection of personal data', inviting applicants to dwell on an ethical perspective on the possible use or collection of personal data during the completion of the project. Taking into account that, as recognised and stressed by the European Commission, all projects need to comply with legal data protection obligations, the question of what could be the specificity of additionally thinking about data protection as an ethical issue remains open, and is not deprived of ambiguity. Already before Horizon 2020 some specially appointed experts had reflected on the possible meaning of considering privacy as an element of the 'ethical issues' of proposals in the self-assessment phase carried out by applicants, only to end up by cryptically noting that '(o)n the whole, the way data protection and privacy issues are taken into account and formally treated fundamentally depends on the legal environment' [5, p. 5].

C. Impact of the Blurring

The implications of the tendency to mix up ethical and legal considerations of privacy are many. Some of them could be described as strategically disadvantageous, insofar as the amalgamation of ethics and law ties them both to a category of issues that is not only ill-defined, but also consistently granted a secondary role in research agendas. In the area of security research, this recurrent blending translates into a de facto downgrading of both ethical and legal issues to a non-security, and thus inessential, peripheral category of aspects. In this marginal set of issues, ethics and law might as well coexist with any other similarly shadowy matters, ranging from often fuzzy 'social' aspects to any 'related' issues that 'related' researchers might deemed fit to consider. Their eventual relevance is in any case in a way pre-empted by their placement at the margins of the research agenda, where the sharpness of disciplinary contours does not particularly matter (apparently). Additionally, the risk of ending up with only a consideration of ethical issues instead of legal issues, or the opposite, is high.[1]

The merging of the legal and the ethical is a phenomenon that goes well beyond security research. In reality, it appears to affect all research areas concerned with emerging technologies. In many areas, the notion of ELSI-fication, with actually invites to coalesce the ethical, the legal and the social, has enjoyed particular popularity.

ELSI-fication can be described as a certain way of supplementing research on any scientific or technical developments with an attached assessment of their ethical, legal and social implications. Its deployment across different research agendas was inspired by the setting up of research on Ethical, Legal and Social Implications (ELSI) to accompany the Human Genome Project, already at the end of the 1980s. In Europe it surfaces more often under the name of ELSA, standing for Ethical, Legal and Social Aspects [7].

ELSI-fication generates its own impact. Over-simplification and trivialisation of the issues at stake, inappropriate framing of the research questions, and lack of any effective influence on the research agenda have been highlighted as some of its most negative implications [8].[2]

ELSI-fication has had peculiar ramifications in EU support of research, at least partially due to the powers granted to the unit responsible for implementing and promoting ELSA across EU research in the mid-1990s. Such unit conceptualised ELSA as a transcidisplinary approach to support research on issues as disparate as legal protection of biotechnology inventions, fundamental and applied values in biomedicine, personal data protection, or consumer attitudes. The unit was responsible for supervising the ethical review of all scientific proposals, which helps to understand the pervasiveness of the ethical-legal mix up in so-called 'ethical reviews' of EU-funded projects.[3]

The merging of the ethical and the legal can also permeate powerfully into the literature. Scholars investigating privacy from an ethics perspective have to deal with the rights terminology currently abounding in the field [9].

Yet, a specific impact that deserves special attention is triggered not by the amalgamation of law and ethics as such, but rather by reactions against it. As a result of a perceived problematic confusion between law and ethics, some chose to attempt to disentangle them by emphasising the mandatory nature of laws. This is illustrated, for example, by the insistence of the European Commission on the fact that privacy and personal data protection are EU fundamental rights, and that, being applicable legal rights, they need to be respected by all researchers in the completion of all research projects. The same line of reasoning becomes manifest, for instance, when an analysis of ethical considerations of online communities, described as encompassing privacy, is followed by a call to put in place 'legal issues' expected to effectively guarantee that people are treated in the suitable manner [12, p. 302].

This viewpoint underlines the importance of normativity in the appraisal of law's singularity. Ultimately, the approach is based on the assumption that the main difference between law and ethics is that the latter is something that must be explored and considered (and possibly taken into account, depending on one's moral standards), whereas the former is something that must imperatively be applied. This path, however, fails to

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[1] Noting how legal assessments can occur in lieu of ethical assessments: [6].

[2] Identifying two lines of ELSI-fication critique: [10]. See also, for a discussion on ELSA and genomics and related criticism: [11].

[3] More information on this subject: http://cordis.europa.eu/elsa-fp4/home.html.

grasp what is really at stake in regarding law and ethics as distinct.

III. DETACHING LAW AND ETHICS

Approaching law as a set of binding norms can only reveal a partial picture of law. Indeed, law is certainly, in a way, about legally binding existing legislation, applicable case law, and applicable legal principles. But law is more than that, and it is also somehow something different [1].

A. The Distinctiveness of Law and Ethics

Law can be envisioned as a singular arrangement of operations, producing singular types of bonds. It can be portrayed as a practice, borrowing from Isabelle Stengers; as a regime of enunciation, following the terminology proposed by Bruno Latour [13 and 14]; or as a mode of existence, in line with both Stengers and Latour.[4] It has also been described as a social system, by Niklas Luhmann [15 and 16].

All these notions share the premise that law is submitted to a unique set of constraints, which ensure that legal operations are (happily, to borrow from Latour's terminology) connected to each other. They stress that there is something unique about law, and that such uniqueness is what, through law, maintains together things for the purposes of law.

None of these approaches contend that law, as a practice, as a regime, as a mode of existence, or even as a social system, actually coexists with other practices, regimes, modes, or social systems. They do however highlight that law can only grab things legally.

From this viewpoint, studying privacy from a legal perspective is not about identifying lists of binding norms, sets of principles, or series of sources that determine what must be done. It is not about focusing on the norms that must be imperatively respected. It is rather about assessing how law grasps privacy issues, giving special attention to the hermeneutic specificity of this seizing, as well as to the distance that separates this seizing from other ways of grasping issues, such as ethics. In other words, practising law is always about anticipating how and what a judge might decide when confronted with the issue at stake, knowing at the same time that it is impossible to predict what will be decided.

In the literature, it is common to encounter the idea that law pursues ethical values.[5] Ethics appears sometimes as a superior, stable reference to which laws can refer to as they evolve in their endless pursuit of technological advance.[6] Philosophical discussions on the possible moral justification of a right to privacy similarly abound,[7] especially in American literature.[8]

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[4] See: http://www.modesofexistence.org/.

[5] For instance, presenting justice as the most important virtue: [17].

[6] As an illustration, see: [18, p. 13]. Exceptionally, the influence of law in shaping ethical discussions is also noted: [19].

[7] Observing lack of consensus on such justification: [20].

[8] Linking this phenomenon to the absence of a reference to the right to privacy in the Constitution of the United States: [21].

What the described theoretical approaches teach us is that actually law cannot be concerned with anything else than law.[9] Of course, we might take a step outside, and adopt an external viewpoint from which we venture to understand how law as a practice interacts with other practices. Nonetheless, from a legal perspective, such interaction can only be apprehended as something that still happens in law.

From a legal perspective, the ethical hacker is not ethical, or unethical, or even a hacker, but the legal subject to which are attributed some unlawful actions. Law might operate using legal notions that remind us of ethical considerations (such as, for instance, the notion of fairness in 'fair' personal data processing, a key element in EU data protection law), but these are, still, legal notions. In the opposite sense, from an ethical perspective it will never be possible to assess the legality of the actions of the ethical hacker, because that would require entering the realm of law by adopting its own constraints.

B. The Coexistence of Law and Ethics

Embracing the distinctiveness of law and ethics as different practices, regimes, modes of existence, or even social systems, opens up the question of how to conceive of their coexistence. Here, the different theoretical approaches mentioned appear more or less interested in helping to get a wider (and different) picture. Social systems theory shows the strongest resistance to this exercise of taking steps outside of specific practices. Being peculiarly attached to the premise of the autonomy of systems, it envisions relationships always from the systems' perspective (concretely, through the notion of heteronomy [22, p. 909]). Stengers' ecology of practices, as well as hers and Latour's modes of existence, by contrast, are viewpoints more directly concerned with how to make sense of the world among a plurality of singular practices and modes. Their contributions suggest that there is a way to get a certain hold of the ethical hacker that takes into account both the singularity of law and the singularity of ethics, resulting however in an understanding that will not be neither the legal nor the ethical understanding.

Thus, there are different modes of existence of privacy, and the notion will have different meanings depending on such mode. Sometimes such differences are particularly manifest, and almost palpably linked to the keynote or character of the mode. In this sense, some descriptions of privacy in law may depict it as a means at the disposal a claimant; in ethics, it is possible to underline it constitutes a value necessary for emancipation, or for introspection; in politics, still another mode of existence, privacy can be depicted as a residual area of freedom, self-determination and autonomy, where individuals are protected against steering of conduct by the State and by others. But even when conceptions from different modes of existence appear to meet each other, or even overlap, they remain separate.

Disentangling practices and modes of existence obliges to recognise the permanent existence of a gap, a discontinuity between them. Different modes of existence are never fully

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[9] To this extent, they echo the general concern of legal positivism of refuting natural law's conception of the structural linkage between law and morality.

coincidental. Even when they seem to intersect, they are always separated by a 'hiatus', or the 'successive abysses' [23, p. 101] that remind us that they can only be addressed as a plurality of singularities.

In the end, the challenge is to study privacy as a notion that is certainly in a way at the crossroads of ethics and law, but at the same time accepting that such crossroad is a chimera. Privacy can only be reached by one of the existing paths, or by creating a new road, but that in any case to move from one path to another one will be forced to jump. When one moves from the study of privacy as a legal issue to its study as an ethical issue, a gap is crossed, and in this crossing the parameters of the study are altered. Crossing the gaps is however to a certain extent also a way of folding, or of opening up to the possibility of new knowledge, as long as the reality of the gap and the folding are recognised [24].

C. Ethics of Detachment

Having accepted that it is imperative to respect the existence of boundaries between law and ethics, the question remains of where to find such boundaries. In this regard, we propose that the question must always remain open, and that to refuse to close it, or to put it aside, might be in itself an ethical act.

Latour's abysses between modes of existence recall in this sense the impossible and necessary limits of ethics as described by Jacques Derrida [25]. Conceiving of ethics not as a set of rules but rather as a permanent quest for its confines [26], Derrida unlocks the possibility to think of the disentanglement of ethics and law as an ethical exercise.

IV. CONCLUDING REMARKS

In this contribution we have examined how privacy can get trapped in viewpoints that amalgamate the ethical and the legal, as well as the negative implications of this mixing up, but also of attempting to disentangle them on the basis of a reductive understanding of law.

We claim that the study of privacy would benefit strongly from a clear recognition of the discontinuities between law and ethics. This acknowledgement appears as the best strategy to accurately encompass both its legal and ethical dimensions. It is not, as such, an easy solution. It requires from those studying privacy the effort of looking into the gaps that separate these different practices, and highlights that any attempt at inter or transdisciplinarity might involve some spams of vertigo. It also obliges those responsible for the design of research agendas to be open to embrace those gaps, instead of seeking to erase them.

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