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"Privacy and Digital Technology (Judges and Witnesses)"

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Introduction

Technological developments do not entail a decline or waning of politics as was anticipated by philosophy in the past, but rather a new tool and means at its disposal. This is predominantly beneficial, but may also influence our privacy (and dignity)[1]. The modern era of vast technological development, especially digital, confronts legal systems (national and international) with rapid and tremendous changes. What used to be a topic for science fiction movies has, at least to a certain extent, become reality. What may be considered an essential tool for authorities in their fight against crime and in ensuring public order and public safety may also easily interfere with fundamental human rights such as privacy and human dignity.

Numerous challenges confront legal systems: *(i)* technological development is faster than the development of regulatory frameworks; *(ii)* rules differ from State to State; *(iii)* not all effects can be easily anticipated and (international) jurisprudence is also evolving (but not fast enough); *(iv)* it is mostly the highest European judiciary (the ECHR and the CJEU) that is setting the (minimum and EU) standards; *(v)* legal reasoning is complex, far from easy, and no one solution or test fits all cases; *(vi)* a step-by-step approach should be applied (for instance, an end-to-end safeguards rule[2]); *(vii)* the issues are different in relations between authorities and individuals and among individuals, but they often overlap. Put simply, the effects of digital technology are overwhelming.

I will focus on several points. Firstly, I will address the difference between the vertical and horizontal issues brought about by digital developments. Secondly, I will discuss the broader picture of the power of digital technology with regard to the executive and legislative branches of power. Thirdly, I will discuss the judiciary's role and the importance of the ECHR in this regard.

The effects of digital developments on vertical and horizontal relations

One can easily divide up the open questions along two main lines: *vertical* and *horizontal*. The vertical line offers empowered institutions advanced technology to ensure safety, prevent crime, etc., in relation to individuals. On the other hand, along the horizontal line, the development of the Internet,

[1] Two values that interact with and support each other.

[2] If a process of assessment is subject to "end-to-end safeguards", this means that, at the domestic level, at each stage of the process an assessment has to be made of the necessity and proportionality of the measures being taken.

especially social media, has allowed for almost unlimited, high-speed and effortless (also anonymous) access by individuals not only to other individuals but also to the general public.

Along both lines, huge dilemmas are present. They stem, as I see it, from the question whether privacy is under such heavy attack from the rapid and substantial digital developments that we have to protect it more robustly by also adopting deterrent measures and more far-reaching safeguards. It seems that this is true, especially in vertical (that is, *de iure imperii*) cases.

Hence the same technology might, on the one hand, prevent crime and on the other hand, for instance, detect and trace a journalistic source, decipher our bank codes, eavesdrop on our conversations without our knowledge, etc. And it is not only a matter of safeguarding privacy. Whenever the powers of the executive and legislative branches are used to control individuals or for mass surveillance, the principle of legality is also in the foreground. The scope and limitations of such measures must be widely discussed in democratic procedures. First, they have to be the subject of discussion in parliaments. And after that, the scrutiny of judicial control follows.

The picture regarding horizontal relationships is different. As mentioned, the Internet and social media allow individuals fast and instant access to the general public. Filters, cookies, algorithms, etc., make it possible not only to select what we would like to read, see and hear (thereby diminishing pluralism in a way that we do not really notice, that is, quietly but efficiently), but also allow for personal attacks, insults and offence. Even where these are deemed necessary for democracy, we must ask where the threshold lies. Is there a line beyond which lies so-called over- (or excessive) democracy? Do we need a new notion of privacy to safeguard victims? Can specific platforms indeed be treated differently? Twitter, for instance, is defined by some as a social network with a particular subculture of expression and communication. This could lead to differential treatment of social media and, as a corollary, also of the assessment of instances of defamation. What is in the foreground of these developments is not only privacy but also the dignity of individuals, which can be attacked much more easily. As a premise, I believe that technological development cannot justify a decrease in the level of protection of personal dignity. We can also expect the same in a digital age, in both vertical and horizontal relations.

The role of the judiciary and the ECHR as a beacon

What is the role of the law, the judiciary and (national) judges, and our responsibility in a modern State that utilises sophisticated technology[3]? Superior courts also articulate values such as dignity and privacy by restraining political power. Firstly, one has to look at the whole picture. Those who have access to technology and information are powerful. An expansion of power is also a kind of teleological tendency. Interference can be aimed at limiting individual rights as well as collective rights. Broadening powers can also serve legitimate aims, but this mere possibility is not enough. The legitimate objective is only the first in a series of conditions. It is easily fulfilled. The central and more complex conditions follow in the next stages. Miss just one of the safeguards and national regulations will overstep the line. This may not even occur intentionally. The faster and more overwhelming the development, the more numerous, complex and detailed are the rules. In the words of the ECHR, in principle, the broader the objectives the greater the potential for abuse. Hence, in areas where the authorities have a lot to gain, self-restraint on the authorities' part might not be sufficient. Temptation can be a dangerous thing. Democracy on the one hand, which is a slow and complex system (sometimes not easy to

[3] The issue, however, does not only concern judges: even witnesses may easily intrude on someone's privacy, for instance by recording them doing something in order to produce a piece of evidence. However, it is not so easy for individuals to know whether such an invasion of privacy will result in the exclusion of the evidence or even in their being held liable.

understand), and rapid, bold and overwhelming technological development on the other hand, may easily clash.

Therefore, the key issue concerns not only privacy or dignity: it concerns the search for the right balance. Sensitive balancing between a legitimate aim and privacy safeguards is not an easy task[4]. Also, one test does not usually fit all (cases). Therefore, upgrades (that is, constant developments) of the case-law are necessary. The ECHR expressed this nicely in *Big Brother Watch*[5]. And the ECHR is doing an important job. It offers us (minimum) guidance that needs to be put on the scales[6].

The ECHR is a vital beacon in these circumstances, where national legal systems are (slowly) catching up with technological developments (and the above-mentioned *Big Brother Watch* judgment proves that). In the face of diversity and under-regulation, etc., the ECHR offers national judges detailed, specific, urgent, wide-ranging, courageous and balanced guidance. Cases like *Roman Zakharov*[7], *Weber and Saravia*[8], *Gaughran*[9], *Centrum för rättvisa*[10], the above-mentioned *Big Brother Watch*, and many others, shaped rules that need to "radiate" back to national legal systems. The case-law of the CJEU is also to be taken into account. For legislatures and governments, this entails *ex ante* applicability in drafting (changing) legal frameworks, and for national judiciaries, *ex post* relevance for the cases at hand.

The ECHR judgments emphasise (*inter alia*) the following: *(i)* transparency and the necessity of a measure in a democratic society are among the most important starting-points for the assessments; *(ii)* measures adopted with legitimate objectives serving public safety, public order and the prevention of crime are to be further scrutinised by the use of tests and criteria; in this regard, the objectives have to be addressed diligently (they need to be taken seriously, and this is the approach taken by the Court); and *(iii)* criteria for the assessment of measures, such as the possibility of less intrusive measures, end-to-end safeguards at every stage of the process, a sufficient degree of precision of measures, strong and appropriate selectors, appropriate limitations as to what materials can be collected, intercepted and shared, the level of protection and safeguards in the receiving State, independent control and *ex post facto* review, etc., must be carefully applied in each case. And there are numerous such cases every day.

Conclusion

In the sphere of law, whenever we have a vulnerable individual on the one side, and an empowered State with very effective tools at its disposal on the other side, the judiciary must play its role carefully. Hence, I believe that history has proven that a combination of the following elements is dangerous: *(i)* a vulnerable group (or subject); *(ii)* prejudice against such a vulnerable group; *(iii)* the State being supported by politicians and *(iv)* the State having effective tools (that is, technology) at its disposal.

[4] For this reason, the judiciary must also remain completely independent. Clipping the wings of the judiciary (which is not the topic of this speech) would result in weakened protection of individuals and reduced collective protective safeguards.

[5] In *Weber and Saravia* and *Liberty and Others*, the ECHR applied the minimum safeguards developed in its case- law on targeted interception. However, seen in the light of the intervening technological developments, the scope of the surveillance activity considered in those cases would be much narrower: targeted interception and bulk interception are different in several important respects. See *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13 and 2 others, 25 May 2021.

[6] On the one side of the scales is the legitimate aim pursued. On the other side is an assessment of whether the safeguards applied sufficiently protect our privacy (and dignity), or whether less intrusive measures should have been applied, etc.

[7] *Roman Zakharov v. Russia* [GC], no. 47143/06, ECHR 2015.

[8] *Weber and Saravia v. Germany* (dec.), no. 54934/00, ECHR 2006-XI.

[9] *Gaughran v. the United Kingdom*, no. 45245/15, 13 February 2020.

[10] *Centrum för rättvisa v. Sweden* [GC], no. 35252/08, 25 May 2021.

Therefore, at the end of the day, the judiciary must be the one to set the limits if the other branches of power fail to do so.

The national courts in EU member States also need to apply EU rules and the case-law of the CJEU in a highly synchronised manner, without causing legal uncertainty. This is because both the ECHR and EU law regulate the same topics mentioned above. Nevertheless, I observe some specific differences: EU law can be much more detailed. The regulative framework of EU law is also, but not exclusively, composed of directives containing detailed (and complex) rules on e-commerce, data protection, e-privacy, and many other subjects. The case-law of the ECHR is based predominantly on a broad interpretation of Article 8 of the European Convention. Hence, a particular case "*in concreto"* can also be adjudicated from a broader perspective. Both approaches are welcomed.

The above reference to how to strike the proper balance between dignity and privacy on the one hand, and safety on the other hand, is essential in this regard. There are two sides to the same coin. Let us imagine that we address these questions exclusively through the lens of safeguards, without focusing on security (which also ensures personal freedoms): in such cases, distortions may result.

I would like to add that a comparative approach is very necessary. Judges have to learn from each other. Digital developments are borderless. This is not true of legal systems, but with comparative approaches and guidance from the ECHR (as well as the CJEU) our decisions will follow the same path. As remarked by Judge Ziemele at the opening of a previous judicial year, since Europe is a space of common minimum values, it is important that the courts within the common European legal space take similar approaches on values.

In addition, one more thought from my own experiences. Whenever the legal sphere is faced with (highly) advanced issues of a nature different from the law (like technology), we may not fully understand them. However, to be able to adjudicate we have to, sometimes even in detail. Therefore, such situations demand from us also a broader technological knowledge. With such combined knowledge of the law and an understanding of technology, a judge can adjudicate confidently.

There is more, however. The internal sense of each judge as to the effects (of such power to control) is also important. This is my own experience from adjudicating such cases. It involves two elements, namely a sense of human dignity and ethics. It involves values. Something that technology, even when carefully wielded by State authorities, must not push aside. The effects of technological (ab)use are liable to be irreversible. That is why a mindful and bold approach by the whole judiciary in the European legal space, including the two highest European courts, is necessary.