

Security, Surveillance and Civil Liberty in Cyber Space

DigEnlight Debate, Nov 2016 – Report

The human rights issues raised when activities of individuals in Cyberspace are monitored either by the State or others have been addressed by legislators and regulators for more than 30 years now.

Any such monitoring or related activities, constitute *ipso facto* an interference with at least the privacy rights and the right to data protection of such individuals, and possibly with their rights to freedom of expression, freedom of association and freedom of religion. Moreover, if such measures are taken as part of criminal investigations (or may lead to such investigations), they raise fair trial – and fair investigation – issues.

However, as technological advance allows exponentially increasing data storage capacity, even more powerful data analytics tools and the ubiquitous devices constituting the growing internet of things, much of the existing relation is rendered inadequate to deal dynamically with emerging threats to civil liberties.

It is in response to this that a number of initiatives worldwide, including the “trust and security” plank of the European Commission’s strategy for a Digital Single Market are gathering speed.

One of the most serious threats to the rule of law as such is the growing attempts to define cybersecurity as inherently being an integral part of national security. Two particular threats emerging from this are:

Individuals suspected of a wide range of crimes – including crimlevant Websites not in any way involving violence – are increasingly treated as “terrorists” and/or as “threatening the fundamental order of the State”.

The law enforcement agencies in states otherwise strongly committed to the rule of law are increasingly adopting the methods, practices and ethos of security agencies – who have very often been shown to cross the boundaries set by the rule of law.

The development of an EU approach to these issues is critical to the success of the Digital Single Market strategy and the trust of European citizens in the EU institutions.

This debate will focus on such issues and will try to explore (a framework of) rules for Europe to maintain its values and human rights, whilst ensuring the security of individuals and the state and is aimed to produce concrete recommendations in the form of a white book.

Challenges

A range of participants came together to identify and discuss the challenges associated with researching the themes of liberty and security. In doing so they discussed a wide variety of issues and questioned some widely accepted assumptions about how the relationship between liberty and security is imagined.

Over the course of the breakout session a number of questions were raised regarding how we can define and best understand both liberty and security, and also liberty in relation to security.

As an important starting point it was noted that there are two lines along which we can understand liberty. The first being liberty as a negative normative value, where you are free **from** certain constraints and restrictions. The second is liberty as a positive normative value, where you are free **to** act in certain ways. Building on this dual understanding of liberty, there was extensive discussion on the need to recognise that we cannot understand the relationship between liberty and security as one of balance or trade-offs, but rather they are mutually constitutive and each requires the other to operate.

Further discussion on how to better understand what we mean by the term security explored the tensions between individual and collective or societal security. There was general agreement that you cannot think about the relationship between liberty and security without thinking about the role of the individual. Recognition was also given to the growing discourse of the collective good, and the increasing value placed on putting the collective good above and before that of the individual. Consideration was also given to the ways in which this discourse is increasingly framing the discussion on the relationship between liberty and security and closing down possible alternative avenues for thinking and exploring this relationship. Two further points were offered on the relationship between liberty and security. Firstly, the question was raised; can we say that liberty stops where it endangers society? Such an approach would require a contextual definition of liberty. Secondly, discussion branched out to consider defining liberty and security, and their relationship to one another, in terms of their relationship with the future. Specifically, security is seen as an attempt to construct a relationship with a certain imagined future, whereas, liberty is seen as an attempt to construct a relationship with an uncertain imagined future.

While the theme of the session was liberty and security a number of associated issues were also discussed. These included the role of privacy, without the right to which, it was described, you cannot really be free. Similar to liberty and security, privacy is also viewed as a term whose definition is context dependent, as individuals and groups engage with and determine a sense of privacy in a fluid way, adjusting from what and from whom they want things to be private. In addition, the issue of informed consent was discussed and the question of whether it is possible to achieve meaningful informed consent in a time that is characterised by 'tick the box terms and conditions' lifestyles was raised.

Building on these discussions of privacy, the topic of surveillance was raised. Anchored around the Snowden revelations, participants debated whether or not we are witnessing a chilling effect on the ways in which people engage with data gathering devices. For some participants there has been such an effect, but others did not agree. It was suggested that research should be done to gather empirical data on changes in behaviour regarding levels of awareness of surveillance post Snowden.

This in turn, opened the discussion to consideration of the different parties that are involved in constructing and shaping how the wider public understands surveillance technologies and techniques. Three key actors were identified, the individual, society and digital oligarchs. It was argued that we need to better understand what incentivises these parties in relation to privacy, liberty and security, and how can we best align their incentives..

Finally, many of the themes that were raised on the Wednesday of the conference emerged within the space of the session, with particular emphasis placed on the need to build relationships of trust, and how to operationalise an ethos of accountability.

Possible ways forward

Special attention was given to the role DEF can play in furthering our understandings of the relationship between liberty and security. In so doing a number of points were raised.

Foremost among these was the need to critically identify and explore the forces that construct the relationship between liberty and security as one of opposition. This would require an unpacking of the way in which individual and collective security has been constructed.

These aims raised a number of questions, such as what can we do to change the oppositional relationship, what kind of environment is required to challenge this discourse, in addition to how can we best understand liberty in an era of unending, low impact threats.

In response to these questions a number of suggestions for the role DEF can play were put forward. These included the capacity for DEF to act as a space to develop the stories that don't get told. In this sense, DEF could act as a curator of debate on how Civil Society Organisations can hold governments to accountability. Two existing web-based initiatives were offered, '[They work for you](#)' and '[38 degrees](#)' as models for exploring possible future steps.

Additional actions DEF could take include an exploration of concepts and linguistics bundles that frame the narratives that develop around liberty and security. Such a course of action could include the development of a toolkit including a taxonomy of terms and conceptual clarity. It was also suggested that DEF should establish a position on data collection.

Building on the importance of collaboration stressed on the Wednesday, it was noted that DEF should develop alliances with similar actors operating in the digital field, collaborating with those

who share similar research agendas.

The suggestion to establish a basic quality of digital life standard index and publish an annual barometer report was also offered. Along with this was the idea of developing critical transparency and risk management reports that explore the ways in which transparency is instrumentalised and put to use.

Further Reading

- [The rule of law on the Internet and in the wider digital world, Council of Europe](#)
- [Privacy Bridges \(IPCAnsterdam\)](#)

Relevant Website of Civil RightsGroups:

- European Digital Rights - [EDRi](#)
- American Civil Liberties Union - [ACLU](#)
- Electronic Frontier Foundation - [EFF](#)
- Center for Democracy and Technology - [CDT](#)
- [Privacy International](#)