Why data law cannot be reduced to data protection law ?

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The subject of my intervention is somewhat controversial, given it won't be focussed on data protection but on everything in data law that is unrelated to privacy: the freedom of data processing. Why raising such a controversial issue? Because I noticed during the last years of my research that when it comes to data law, people are only interested into data protection, human rights etc.

As a result, data law is often reduced as data protection law or, even worse, as “privacy law”. Such a point of view is not wrong because data law do protect – or at least genuinely tries to protect – privacy, human rights etc. But by doing so, one is likely to refer only to a small part of data law and, what is worse, not to the essential part of it.

Before going further, let me be clear about something: my point si not to minimize the interest of data protection. My point is to cast some light upon the dark side of data law: the freedom of data processing. More precisely, my point is that although data protection is important, it has not led legislators to adopt instruments promoting personal data secrecy.

As a matter of fact, it is quite the opposite. Indeed, everyone can notice in his or her everyday life that data aw instruments do not prevent from personal data processing. And there is, in my opinion, the real purpose of data law instruments: promoting personal data processing by giving them legal security. In other words, paving them the legal way.

More precisely, data law instruments aim at setting legal frame for data processing system and – thus – to computer science, so that its full development can be compatible with human rights. In other words, data law instrumnts try to humanize cmputer science uses, not to annihilate them.

At this point, one question has to be raised: data law is about regulating personal data processing, not computer science itself. So why can I consider that data law regulates computer science uses?

Because personal data processing cannot be separated from nonpersonal data processing. Indeed, as long as a computer can be linked to a keyboard with letters, it can process verbal and not just

mathematical information. Personal data processing can only be separated from data processing in the case of the use of a calculator, where no letters can be involved.

Thus, data law instruments apparently regulate only personal data processing but, in reality, they regulate the use of any computer device. **As a consequence, data law instruments should be considered as the legal foundations for what we call Information society**.

By Information society, I mean the last industrial revolutio known by the world since the end of World War II. In this global society, freedom to process personal data is vital.
Indeed, this expression refers to every social change produced by the development of computer science since WWII.
All theses progress made two things possible:

- first, the mechanization of rational processing of information. Beforehand, it could only be performed by human brain. Since that moment, more and more informations can be processed.
- Second, the separation between information itself and its physical support, that entails information to flow freely, regardless of boundaries.

These two evolutions brought by progress in computer science boil down to Information society, that is a society in which information can be considered as valuable as oil, and free information processing is more and more vital yo an increasing amount of mundane uses. Ans, as a matter of fact, personal data processing is no exception to that general evolution. There is the core subject of my intervention: defining **why it is so important that personal data be freely processed, thus explaining why data protection cannot mean data secrecy**, or only as a limited exception.

So, the point of my intervention is to highlight the main object of data law, that is not data protection but freedom of personal data processing.

Yet, defining the substance of that peculiar freedom does not come immediately to sense. As a matter of fact, it requires to imagine what we would lose if the object of data law were purely data protection, thus forbidding any computer use that could possibly harm privacy. In that extreme scenario, data protection would be closely equivalent to data confidentiality. As a result, in that hypothetical scenario, free processing of personal data would be banned, which would logically

entail two concrete outcomes:

- first, an excessive rigidity in the management of any institution, thus leading to a structural lack of efficiency in basic management;
- second, a crippled development for anything related to freedom of information: freedom of speech, internet, trade of services liberalization.

Actually, what we would lose if informatics development were crippled comes to two invisible freedoms:

- the **freedom of administration**, which means the freedom for any institution to manage itself in the best way serving its interests by processing data. I will explain myself further in part one (I);
- the **freedom of information**, that is to say global free flow of information. It will be the object of my second part (II).

I/ First part: personal data processing, a necessity for the freedom of administration

In this part two questions have to be asked: why is information processing so important for any institution? What consequence for data law?

A/ The importance of free data processing for any institution

First, unlike freedom of information, there is no definition in international law for that freedom. It's more a sociological fact than pure law, although some part of it may be law in some countries. For example, we have in France a legal principle that is quite widely shared, whatever the name: we call it the principle of freedom for local government. It enables local authorities to manage freely a significant part of their business. In french public law, we also the notion of discretionnary power, that refers to the ability that some administration services have to manage themselves, with a minimal control of judges.

But whether this principle be a law or not, it refers to a reality put in lights by law theory and general sociology.

In french law theory, some authors like Maurice Hauriou, from the beginning of twentieth century, define any institution by two of its fundamental parts:

- first, the idea which is at the origin of the institution ; or in other words the project embodied by the institution;
- second, the means by which this idea can effectively be put in motion. In other words, human and material ressources of the institution.

But what these classic authors missed was a third element that is now considered vital in Information society : **the existence in any institution of an information system that enables to coordinate the ressources in order to achieve the institutionnal project**.

So, from this viewpoint, it is necessary that information flows freely in any institution, in order to enable its management, even at the most basic level. To achieve its goals, it is equally necessary that any institution be allowed to collect and process informations from the outside. For example, let's imagine a company that would not collect informations on the market on which it operates. This company would be doomed to fail by lack of adjustment.

So, freedom to process information freely must be considered as a basic condition for the existence and success of any institution. Information process enables coordination between the project and the ressurces and adjustment to its environment. That function of information process is what Henri Fayol pointed out in its book “general and industrial management” in 1918 as the “administrative function”. In that book, ancestor of present management litterature, Henri Fayol used to compare this function in any compagny as a “nervous system”.

B/ What consequence for data law?

That being said, i let you imagine the situation in which data law would as a principle ban any free and non monitored use of personal information.

Any institution need to process information to survive, and especially personal information. How any institution could survive without asking a resumé from its potential new employees, thus processing personal data ? How any company could survive without taking track of its customers ? Just think about that : the simple fact to put personal data on a word file on its computer is considered by french judges as personal data processing.

And all this process must be free by principle for the simple reason that, otherwise, it just would not work. Just imagine a data law instrument that would compel any personal data processing, whatsoever, to some formalities and/or monitoring. Such a law would just kill any possibility for any institution to be effective.

That is the first reason why data law cannot be resumed to data protection law and is actually devoted to promote the freedom of processing personal data. That reason is why we have in european law so much legal instruments relating to personnal data processing. Each time a new policy is decided, it calls for a specific data law instrument, like when Europol or Eurojust have been created.

On this point, one can go further: without coordination, which requires constant information exchanges, European union could not work. Why? Because the european administrative model is based on cooperation of national administrations. There is only a tiny part of european affairs that are directly dealt by properly european administration, such as competition law and regulation.

That reason is also why an increasing number of international treaties is faced to data law compliance issues. Indeed, there is global trend for national States to cooperate in any fields – cooperation against terrorism, against tax evasion-. In any cases, that cooperation requires a certain degree of freedom to process personal data, in order to enables all of theses various institutions to achieve their mission.

We just finished to point out the first reason why data law cannot could not, from the origin, be reduced to data protection law. Now we will see the second reason, in part two.

II/ Second part: personal data processing, a necessity for freedom of information

Freedom of information enables anyone to make information travel across the border, regardless of the content of the information. Unlike freedom of administration, freedom of information is an established principle in international law, for example in the preamble of the 1981 convention n° 108 for the protection of individuals with regard to automatic processing of personal data, last sentence: “Recognising that it is necessary to reconcile the fundamental values of the respect for privacy and the free flow of information between peoples”.

At this point, one question naturally arises: why putting on balance privacy with that principle?

Because that principle gives concrete expression to two priceless freedoms in Information society: the freedom to provide services and freedom of expression.

A/ Freedom of information, a concrete expression of freedom to provide services

Computer science progress has had two consequences:

- first, the improvement of institution management, what we saw in part one;
- second, the development of an economic sector: the service sector.

Why this? For two reasons.

First, because **freedom to process personal data is inherent to service providing**. Without that element, service delivery cannot work. Why?

Because generally, services offer are made for human persons and service providing answer to human needs. So in the process of service providing, it is very unlikely to avoid personal data collection and use.

For example, if you want to take an appointment with your hairdresser, the simple fact for he or she to register your name and phone number, that is considered in EU law as personal data processing.

Another example: you have at your home a leak that you can't fix. When you call the plumber, you have to give away at the very least your name and address, that will be put on a file in plumber office. That, is also personal data processing.

Basically, if data law instruments had prohibited any personal data processing in order to protect privacy, the service sector would necessarily be crippled.

The second reason is that free data processing is necessary to service sector because that freedom enabled to sustain and foster international services providing, through online shopping development. Why?

Because for its basic functioning, internet requires that information flows freely. Cookies, for example, are processing personal data but, in the same time, they do improve website surfing. Indeed, the problem is that you cannot discriminate between personal data and other data without killing all interest of the internet. For example, that is why in EU data law, there is so muech exceptions to the principle that, and I quote article 25 of 95/46 directive: “the member states shall provide that the transfer to a third country of personal data which are undergoing

processing or are intended for processing after transfer may take place only if (…) the third country in question ensures an adequate level of protection".

If that was really the principle, thus provinding europeans a perfect level of privacy protection, internet just would not exist because most of present and common unlawful personal data transfer would be effectively banned. That explains why such devices like Safe harbor principles or Binding corporate rules, in spite of their obvious flaws, are necessary.

B/ Freedom of information, a concrete expression of freedom of speech

The link between free data processing and freedom of expression is less direct than for freedom to provide services. But still, it exists for two reasons.

First, freedom of speech implies - at least in international law – that no discrimination should be made regarding to the content of information. For example, if any use of such a freedom were submitted to prior monitoring from a data protection authority, I am not sure we could still talk about real freedom of speech.

Second, at least in european case law and legislation, one can observe a sort of merger between freedom of speech on one side, internet existence and freedom to provide services on the other side. One could find an example of such a merger in ECHR recent case law, the 2012 decision "Ahmet Yildirim Vs Turkey". Indeed, in that decision, the court decided that nowadays, freedom of speech implies the right to access to online communication services, because these last make that freedom concrete.

Conclusion

As a general conclusion, for all the reasons I have explained, freedom to process personal data is vital to information society. This entails a consequence, that is data law cannot be reduced to data protection law, and that data protection law cannot be reduced to data secrecy law.

In short, and in my opinion, a constant decrease of protection of our privacy should be considered as the necessary condition to enjoy the benefits of living in an Information society, amongst which we find, at the first places, the efficient management of any institution, global development of service sector and the mere existence of internet, smartphones etc.