

Editorial

‘Every human society must justify its inequalities: unless reasons for them are found, the whole political and social edifice stands in danger of collapse. Every epoch therefore develops a range of contradictory discourses and ideologies for the purpose of legitimizing the inequality that already exists or that people believe should exist. From these discourses emerge certain economic, social, and political rules, which people then use to make sense of the ambient social structure. Out of the clash of contradictory discourses—a clash that is at once economic, social, and political—comes a dominant narrative or narratives, which bolster the existing inequality regime. In today’s societies, these justificatory narratives comprise themes of property, entrepreneurship, and meritocracy: modern inequality is said to be just because it is the result of a freely chosen process in which everyone enjoys equal access to the market and to property and automatically benefits from the wealth accumulated by the wealthiest individuals, who are also the most enterprising, deserving, and useful. Hence modern inequality is said to be diametrically opposed to the kind of inequality found in premodern societies, which was based on rigid, arbitrary, and often despotic differences of status.’¹

These are the opening lines of the monumental new work, *Capital and Ideology*, of Thomas Piketty. In his book, Piketty describes and analyses inequalities through the ages. Although the author remains mostly descriptive, there are clear lessons to be drawn. One of his central themes is how inequalities have been justified through discourse, ideology and prevalent narratives. The dominant, capitalist, narrative, he shows, is full of metaphors, ideals and illustrations that help keep intact and justify existing differences between groups in society. The idea of trickle-down economics, for example, speaks to the idea that if the rich are affluent, they will spend money, hire personnel and donate to charity, so that everyone will be better off. The story of the American dream helps to keep people at the lower echelons of society supportive of the economic system; when people do not make it from paperboy to millionaire, the narrative of the American dream puts the blame on people themselves – apparently, they have not worked hard enough, have not been innovative enough, etc. The belief that man is a *homo economicus*, to provide a final example, that is, a rational and calculating being navigating through the various markets of demand and supply, means that everything is brought down to the choices of the person herself; her poverty-stricken life is the consequence of her own conscious decisions.

What is interesting about the book of Piketty is that he seems to treat the narrative not only as an instrument for explaining and justifying inequality, but also as the cause of it. The narrative not only shapes the minds of people, it shapes society and the way in which institutions are designed and function. ‘Inequality is neither economic nor technological; it is ideological and political. This is no doubt the most striking conclusion

to emerge from the historical approach I take in this book. In other words, the market and competition, profits and wages, capital and debt, skilled and unskilled workers, natives and aliens, tax havens and competitiveness—none of these things exist as such. All are social and historical constructs, which depend entirely on the legal, fiscal, educational, and political systems that people choose to adopt and the conceptual definitions they choose to work with. These choices are shaped by each society's conception of social justice and economic fairness and by the relative political and ideological power of contending groups and discourses.² Consequently, a narrative is not chosen to explain or justify existing inequalities, the narrative produces the societal inequalities.

In his line of argumentation, Piketty builds on (but also diverges from) Marxist theory, in particular on the notion of 'false consciousness' (a term that Marx did not use himself). This term is deployed when answering the questions that Marx puts forward, such as: Why doesn't the mass revolt? Why do the poor accept the deplorable situation they are in? Why do they see a society that produces such stark inequalities as legitimate? False consciousness is a theory that explains why a person or group would wilfully participate in their own oppression or in situations in which their best interests are harmed. Why do people smoke, although it has been well-known that cigarettes have a disastrous impact on their health? Obviously, in part, this is due to the products put in cigarettes that make them highly addictive, but also, the theory of false consciousness would suggest, because a narrative was created in which smoking was associated with freedom, with being cool, with being independent.

As Friedrich Engels, Marx's companion, coined it: 'Ideology is a process accomplished by the so-called thinker consciously, it is true, but with a false consciousness. The real motive forces impelling him remain unknown to him; otherwise it simply would not be an ideological process.'³ Through the narrative, people engage in actions that they believe are in their own best interest, while in fact they are not. Many institutions in society are based on narratives that produce such inequalities. One of Marx's most famous claims, concerning religion, should be seen in this light: 'Religion is the sigh of the oppressed creature, the heart of a heartless world, and the soul of soulless conditions. It is the opium of the people.'⁴ Religion, especially at that time, had been used as one of the primary forces to keep inequality intact – between men and women, between followers and heathens and between the poor and the rich, such as through the promise of life after death, reducing a miserable life on earth to a temporary passing moment on the path towards eternity: heaven.

Such theories have by no means been restricted to economic analysis; they have also been applied in the realm of privacy. For example, although Foucault is perhaps best known for his *Surveillance and Punishment*, in which he argued that Bentham's panop-

2 ibid.

3 F Engels, "Letter to F. Mehring". Karl Marx and Friedrich Engels: Selected Works in Two Volumes, Volume II. (Foreign Languages Publishing House 1949).

4 K Marx, Introduction to A Contribution to the Critique of Hegel's Philosophy of Right. Collected Works, vol 3 (New York, 1976).

tion had become a blueprint for Western societies, perhaps more interesting is his trilogy (a fourth volume has appeared posthumously) on *The History of Sexuality*. The first part, entitled *The Will to Knowledge*, explains how our Western society has become so concerned with transparency, so much focussed on disclosing information and gathering data. In short, he traces this tendency back to two dominant forces. First, Catholic religion which is/was preoccupied with confessions. Citizens were expected to confess their sins, their darkest desires and their most vicious behaviour, at least once a week to their priest. Second, the scientific search for truth, for which the world, including its inhabitants, had to be uncovered, measured and mapped. Perhaps a third driving force are the worldly powers, which, in order to exert control, map and measure terrain, organisations and people alike.⁵

Again, Foucault's interest is with the fact that we ourselves have begun to believe in these institutions and the narrative behind the force towards openness and transparency, which turned most citizens into voluntarily disclosers and supporters of a regime that punishes people that are not. 'One confesses in public and in private, to one's parents, one's educators, one's doctor, to those one loves; one admits to oneself, in pleasure and in pain, things it would be impossible to tell to anyone else, the things people write books about. One confesses- or is forced to confess. When it is not spontaneous or dictated by some internal imperative, the confessions wrung from a person by violence or threat; it is driven from its hiding place in the soul, or extracted from the body. Since the Middle Ages, torture has accompanied it like a shadow, and supported it when it could go no further: the dark twins. The most defenceless tenderness and the bloodiest of powers have a similar need of confession. Western man has become a confessing animal.'⁶

Consequently, dominant narratives in the Western world have made people wanting to confess private information, while in fact, such disclosures are more often than not harmful to their own interests. Obviously, confessions create and keep intact power inequalities between citizens that disclose and the institutions that are at the receiving end. Seeing things from this perspective, perhaps it becomes easier to explain the so-called privacy paradox: the fact that most people claim that they value their privacy to a high extent but in practice, disclose their private information in online platforms, apps and social network sites. Obviously, these services and apps are designed in a way that they are attractive to us. Psychologists have helped build their design and interface, so that they appeal to our intuitive, unconscious mental processes. Just like cigarettes, they are intended to be highly addictive. But perhaps another important explanation is that for centuries, we have been trained to believe that disclosing intimate details is good, that we have internalised the will to confessions.

In addition, the narrative and ideology created by internet companies is an important factor. To give just one example, Sherry Turkle has explained in her book *Alone To-*

5 See also: J C Scott, *Seeing Like a State* (Yale University Press 1999).

6 M Foucault, *The Will to Knowledge* (Penguin 1978).

gether, how internet fora have taken over the traditional job of institutions like the church. 'Older people – say over thirty-five – talk about online confession as a substitute for things they want and don't have (like a trusted pastor or friend). Younger people are more likely to take online confession on its own terms.'⁷ More in general, she explains, internet companies are effective when it comes to creating new narratives, new dreams and new desires. An obvious one is that of connectivity. In order to be part of the word, so the narrative goes, in order to know what your friends are doing, where the coolest parties are and what the latest fashion is, you have to be online and connected. Turkle explains that although we are indeed continuously connected and sending and receiving information constantly, we have never felt so disconnected (or alienated, to use a Marxist term).

Again, her analysis explains why people not only do things that do not benefit them, but also falsely believe that they do. In fact, the lonelier we become, the more we yearn for connectivity, the more we resort to technology, the lonelier we become. 'Overwhelmed by the place that technology makes possible, we think about how new, more efficient technologies might help dig us out. But new devices encourage ever-greater volume and velocity. In this escalation of demands, one of the things that comes to feel safe is using technology to connect to people at a distance, or more precisely, to a lot of people from a distance. But even a lot of people from a distance can turn out to be not enough people at all. We brag about how many we have "friended" on Facebook, yet Americans say they have fewer friends than before. When asked in whom they can confide and to whom they turn in an emergency, more and more say that their only resource is their family.'⁸ It would be interesting to see how the Piketty of the future will look back at our current society and the inequality in terms of power and money it produces.

Turning to this issue of EDPL, I am very proud that we have again two leading scholars that have penned an opinion. James Rule is one of the most interesting privacy scholars in the US and combines insights from sociology, law and technology in his work. Janneke Gerards is one of the leading European scholars in human rights law. Both engage on a theme that has been discussed in EDPL in the past, namely the notion of balancing.⁹ While Gerards agrees that there are a number of problems intrinsic to this approach, she believes alternatives hardly provide more satisfactory results. In contrast, while Rule has no easy solution to offer, he believes that an alternative to balancing should be developed.

The Articles section contains the five best papers that were submitted to EDPL's 4th annual Young Scholar Award.¹⁰ As always, from the dozens of papers sent in, I have se-

7 S Turkle, *Alone Together* (Basic books 2011) 231.

8 *ibid* 280.

9 See among others: R Gellert, 'We Have Always Managed Risks in Data Protection Law' (2016) 4 EDPL. B van der Sloot, 'Editorial' (2017) 1 EDPL. R Gellert, 'On Risk, Balancing, and Data Protection: A Response to van der Sloot' (2017) 2 EDPL. B van der Sloot, 'Ten questions about balancing' (2017) 2 EDPL.

10 The call for papers for this year's 5th EDPL Young Scholar Award is already available online at <https://www.lexxion.eu/wp-content/uploads/2020/03/Cfp_Young_Scholars_EDPL_2020.pdf>.

lected the 10 best papers. Subsequently, the jury consisting of Franziska Boehm, Maja Brkan and Hielke Hijmans, did a blind peer review of the papers, abstaining where there was a conflict of interest or they knew who the author was. From those reviews, a selection of the five best papers, which are presented in this issue, was made. The authors of the top three papers were invited to present their paper at a special session hosted at the yearly Computers, Privacy and Data Protection conference in Brussels. These were Thilo Gottschalk, Johan Peeters and Thiago Moraes; the latter is the winner of the Young Scholar Award 2019. Congratulations to Thiago Moraes!

In his article, Thilo Gottschalk explains that law enforcement increasingly relies on complex machine learning approaches to support investigations. Interestingly, because of a lack of knowledge and expertise, they often depend on opaque private-public collaborations. On what points the current legal regime fails and how the practice can be improved is explained by Gottschalk in detail. Thiago Moraes discusses the legal safeguards that could be in place in the European jurisdictions when law enforcement authorities conducting investigations of criminal offenses implement circumvention measures to bypass encryption technologies designed to protect the right to privacy of users of electronic communication services and equipment. Johan Peeters engages with the rise of mobile wallets and the legal vacuum in which mobile wallet issuers have operated. The obligations to apply enhanced security measures and strong consumer authentication should result in increased security of mobile payments, but might conflict with the GDPR. Sara Roda discusses the review of the Passenger Name Record Directive and questions the validity of certain provisions of the Directive in light of Opinion 1/15 of the Court of Justice of the European Union of 26 July 2017 concerning the EU-Canada PNR Agreement. Finally, Laura Somaini engages in a topic that is dear to me, namely the regulation of non-personal data. She critically assesses the issues arising from Regulation (EU) 2018/1807 on the framework on the free flow of non-personal data, focusing on the definition of non-personal data and the data porting principle.

As always, special mention should be made of the Reports section led by Mark Cole, which is one of the reasons that EDPL stands out from other journals in this field. Dan Jerker B. Svantesson engages with the EDPB's Opinion on the Competence of a Supervisory Authority in Case of Establishment Changes and Christina Etteldorf explains the EDPB's Guidelines on Data Processing Through Video Devices. In the GDPR Implementation Series, we have three new contributions, namely on Greece, written by Lilian Mitrou, on Latvia, written by Māris Ruķers and on Slovenia, written by Helena Vrabec. Finally, we have one country report by Arvid Peix on a decision by the Austrian constitutional court on Number Plate Recognition and malicious software and one report in the Practitioner's Corner by Laurens Vandercruyssen, Caroline Buts and Michaël Doods.

This edition's Case Notes section, led by Maja Brkan and Tijmen Wisman, has three great case notes to offer. Two of those concern cases by the European Union's Court of Justice. One, penned by Agnieszka Jabłonowska and Adrianna Michałowicz, concerns the matter of consent and pre-ticked checkboxes, the other, written by Yuliya Mi-

adzvetskaya and Geert Van Calster, analyses the two recent ‘right to be forgotten’ cases, which also deal with the territorial application of the GDPR. In the third case note, Diana Dimitrova reflects on a case by the Council of Europe’s European Court of Human Rights, namely on the matter of video surveillance at work.

Finally, in the Book Reviews section, led by Gloria González Fuster, two books are reviewed. First, Paddy Leerssen critically engages with the book by David Erdos: *European Data Protection Regulation, Journalism, and Traditional Publishers*. Second, Barbara Giovanelli reflects on an edited volume that has produced ‘good data’ proposals, a book which itself is a best practice in terms of inclusivity and diversity.

For those interested in submitting an article, report, case note or book review, please e-mail our executive editor Nelly Stratieva (<stratieva@lexxion.eu>) and keep in mind the following deadlines:

- Issue 2/2020: 15 April 2020;
- Issue 3/2020: 1 July 2020;
- Issue 4/2020: 1 October 2020 (Young Scholar Award);
- Issue 1/2021: 15 January 2021.

I hope you enjoy reading this edition of the European Data Protection Law Review!

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