

Editorial

Our face is essential to human contact, personal expression and trust relations. The eyes are said to be the window to the soul, facial expressions reveal emotions and thoughts and for many people, their hairdo is a reflection of their identity. You look a person in the eyes when communicating, you use it to gesture agreement or surprise, you kiss friends and family on the cheek and a kiss on the lips is perhaps the most intimate expression of love. When something important, private or sensitive needs to be discussed, you'll have a face-to-face conversation, and of course, it is love at first sight.

No wonder the face has played a crucial role in literature on identity, social relationships and public life. Perhaps the most important passage in modern western philosophy is Hegel's hypothetical description of the first encounter between two persons ever. When one person sees the other, she realises both that the other is the same – like her, a person – and different – another creature. Although at first, they want to annihilate each other, maintaining the status of the only person on earth, later, they come to realise that they need the other. To be a person, Hegel suggests, requires another person to acknowledge and see you as a person, while you recognise that person as such. Consequently, the so called *Anerkennungs*-theory is based on a reciprocal relationship – individuals are mutually dependent on each other to be human.¹ This line of thinking is the basis of many philosophical theories, inter alia those set out by Derrida, Deleuze and Guattari, but it was Emmanuel Levinas that devoted most attention to the question of recognition and personhood. Perhaps unsurprisingly, his philosophy has been summarised as the 'philosophy of the face', with his central proposition that when we see another person's face, we first see her as subject, stripped from all social and cultural constructions we apply later, such as race, gender and age. The face shows an individual's bare and uncovered personality behind her outer appearance; it also shows her at her most vulnerable – defenceless. 'The bareness of the countenance of the other that faces me, reveals the vulnerability of the other'.²

With the face and mutual recognition playing such a crucial role to normal human interaction, it was inevitable that the potential for online anonymity would open an array of activities, positive and negative: whistle-blowing on states or big companies but also planning and committing crime, having open discussions on sensitive personal issues but also hate speech. This duality of online anonymity (the potential for 'faceless'-communication) is reflected in the approach of regulators and courts. The European Court of Human Rights, for example, has underlined 'the interest of Internet users in not disclosing their identity. Anonymity has long been a means of avoiding reprisals

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1 G W F Hegel, *Phänomenologie des geistes* (Suhrkamp Verlag 1986) (in German).

2 A Peperzak, 'Introductie' in E Levinas, *Het Menselijk Gelaat* (Ambo 2003), 17 (in Dutch).

or unwanted attention. As such, it is capable of promoting the free flow of ideas and information in an important manner, including, notably, on the Internet. At the same time, the Court does not lose sight of the ease, scope and speed of the dissemination of information on the Internet, and the persistence of the information once disclosed, which may considerably aggravate the effects of unlawful speech on the Internet compared to traditional media.³ That is why it also stresses that if online platforms allow for anonymous reactions by users, such will be taken into account when establishing its liability in case one or more of these amount to a violation of human rights. A number of governments around the world have simply prohibited anonymous communication on the Internet and/or have made it effectively impossible, by 'nationalising' the Internet.

In more recent time, discussions on the pros and cons of online anonymity have been transposed to the physical realm, and applied in particular to discussions over a potential prohibition of the niqab and other veils. Obviously, a number of arguments for doing so have surfaced that are outright discriminatory, spiralled by the fear that Islam and Muslims would overtake Europe, and others are wafer-thin, such as that the niqab would be used for criminal purposes (eg robbing a bank wearing a niqab), still, other, perhaps more valid reasons have also been put forward. One of these relates directly to western culture and philosophy, stressing the importance of face-to-face communication for human relations and for establishing and maintaining an open, democratic society. For example, when a French ban was put to the European Court of Human Rights for judicial scrutiny, the government argued, among other things, that the ban was necessary to maintain an open and vital public sphere. The Court accepted that argument and held:

The Court takes into account the respondent State's point that the face plays an important role in social interaction. It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier. That being said, in view of the flexibility of the notion of 'living together' and the resulting risk of abuse, the Court must engage in a careful examination of the necessity of the impugned limitation.⁴

Consequently, the face is considered vital to both being a person, interpersonal relations and a vital and open democracy, but in recent times, new dilemmas and questions have emerged.

3 *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) §147.

4 *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) §122.

First, obviously, in the current pandemic, the face is seen as the main source of contamination, attracting the disease by breathing in microparticles of Covid-19 through the air or rubbing your eyes with your potentially contaminated hands, and spreading the virus mainly by coughing and sneezing. Many countries have introduced measures relating to social distancing, face-to-face conversations are replaced by online communication and requirements have been introduced for wearing face masks in public areas, public buildings and public transport.

Second, persons' countenance can and increasingly are abused by parties in terms of creating fake identities. Already, it is possible to create a video in which a person appears to say things she has never said in almost exactly her tone of voice and although still visible when watching closely, video can be manipulated to mimic a person's facial expression faithfully. There are fears not only for identity theft and fraud, but also that countries will deliberately spread misinformation to destabilise either the national opposition or another country's economy or political system. Military leaders have especially warned about manipulated videos (for example of political or military leaders) in times of war.

Third and finally, facial recognition can be used to identify a person (an application that is also promoted in light of the pandemic, as it allows identification without human contact), such as to allow her access to a person's home, to a concert or to critical infrastructure, such as a nuclear facility. Facial recognition can also be used for 'cool' gadgets, such as an app that allows you to upload a photo, for example of a movie star, and to find a date that looks like that celebrity. And, perhaps most intrusive, facial recognition can be used to recognize and potentially manipulate emotions. In smart cities, for example emotion detection as a specific form of facial recognition can 'play a role in security and control, such as when certain emotions such as fear and anger are automatically recognized and used to act quickly and prevent escalation.'⁵ In addition, in the retail sector, companies want to scan their customers' faces for emotions (and heartbeat through pupil dilation, revealing excitement) in order to personalise products and offers. In response, citizens have started to wear masks or put items on their head so as to 'distract' or 'mislead' the artificial intelligence programs behind these applications.

With technological developments evolving rapidly, the regulation of facial recognition is currently on the agenda of many EU countries and the EU itself. Regulators have called for more rules, companies have lobbied for investments and civil society organisations have urged for a (partial) ban. We are honoured that two leading experts have put down their opinion on this matter for EDPL, namely Michael O'Flaherty, the director of the European Union Agency for Fundamental Rights (FRA), and Lotte Houwing, the senior policy advisor of the civil society organisation Bits of Freedom.

5 E Keymolen et al, 'Op het eerste gezicht' (Tilburg Institute for Law, Technology, and Society, 12 March 2020) <<https://bit.ly/2B6AaGQ>> accessed 15 June 2020 (in Dutch).

The articles section is again packed with intellectually stimulating academic output. Dara Hallinan and Nicholas Martin suggest that the core of a DPIA is not so much the assessment of the risks in relation to the provisions of the GDPR, but an assessment of the risks to the complete catalogue of rights and freedoms, outlined in foundational European fundamental rights instruments. Eric Lachaud discusses the notion of certification under the GDPR and argues that a strong uptake of ISO based certification could either strengthen or threaten Article 42/43 GDPR certification. Diana Dimitrova argues that whereas the right to know the reasoning and criteria underlying a decision could be derived from the right of access, this is less explicit in the case-law of the CJEU as compared to the ECtHR; she stresses the need for clarifying the relationship between and boundaries of data protection rights and other areas of law. Carl Vander Maelen analyses the GDPR's approach to Codes of Conducts compared to the Data Protection Directive 1995. Finally, Leon Trakman, Bruno Zeller and Robert Walters argue that the transnational trade in personal data is hindered by the fragmented and ad hoc approach to data protection taken by governments around the globe and suggest that lessons might be learned from approaches available in intellectual property law, copyright law and contractual law.

The reports section, led by Mark Cole, as always is filled with timely and topical developments. Obviously, the emergency measures in light of the current pandemic are central to a number of reports. Magdalena Brewczyńska covers the Polish government's plans with respect to the 'Selfie App' and location data, Sergio Guida discusses the EDPS' position on this topic and Christina Etteldorf gives an overview of the national DPAs' responses. We have two reports in our GDPR Implementation Series, namely by Juraj Sajfert on Coratia and by Jakub Míšek, František Kasl and Pavel Loutocký on the Czech Republic. Then, there is a country report on Estonia. For a while, all discussions on governmental strategies towards privacy and data protection seemed to end with the conclusion that countries should follow the 'Estonian approach'. Paloma Krõõt Tupay assess the Digital Nation project, its merits and its pitfalls. Finally, Njomëza Zejnullahu gives an unadorned description of the failures of the regulation of personal data in Kosovo.

The case note section, led by Maja Brkan and Tijmen Wisman, contains three very insightful reflections on judicial developments. Pieter Aertgeerts deals with the CJEU's assessment of video surveillance in apartment buildings, Ioannis Revolidis delves into the Opinion of AG Pirtuzzella on the matter of crime investigation, privacy and data protection and Stefano Fantin critically reflects on AG Saugmandsgaard Øe's Opinion on standard contractual clauses. The book review section, led by Gloria González Fuster, contains a book review of Yve Pouillet's *La vie privée à l'heure de la société du numérique*.

Finally, an organisational update. Nelly Stratieva, the executive editor will leave our team. Although invisible to most readers, everyone who has ever contributed to EDPL or has been part of the editorial board knows that Nelly was the spider in the web. Her intelligence, warmth and humour were essential to the success of the journal and she

was the backbone, brains and visionary. Although we are sad that she will move on to a higher position in the publishing house, at the same time, we are very happy to welcome Jakob McKernan as the new executive editor for EDPL; Jakob has a long history as executive editor for several other journals by Lexxion, our publisher, and will have no problem of filling the shoes of Nelly.

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

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

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

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