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Pablo Cárcamo & Klaus Lehmam

Perceptions of Privacy Among Agents in the Chilean Criminal Justice System

DERECHOS DIGITALES
América Latina

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Translation: Constanza Espina

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© ONG Derechos Digitales
Diagonal Paraguay 458 Piso 2, Santiago de Chile
CP 833005I.
+56 2 2702 7I08
http://derechosdigitales.org
info@derechosdigitales.org

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ONG Derechos Digitales

Summary

Objetive: To explore the concepts of privacy employed by the main actors in the criminal justice system. We examine varying perceptions of the concept of privacy and the practical implications of these perceptions, classifying our findings according to the analytical categories presented in the theoretical framework.

Methodological approach: II semi-structured guided interviews were conducted with key actors in the Chilean criminal justice system (distric attorneys, defense attorneys, trial lawyers and academics).

Results: As the theoretical literature suggests, different actors in the criminal justice system maintain different conceptions of privacy. These differences can be shown to depend on the different role each actor occupies within the system. Further examining the consequences of these divergences would help to establish shared practices and definitions related to privacy on a system-wide level.

Research limitations: Certain important actors, such as the Chilean Investigation Police Department, could not be contacted for this study. The discourse saturation in some of the classification categories of actors was insufficient, due to the limited number of interviews completed.

Introduction

The importance of privacy on a global level is growing as digital comunication systems become stronger and increasingly universal. At the same time, we are becoming aware of governmental efforts to control the flow of information through new communication channels.

This does not mean that we are looking at an entirely novel phenomenon, nor that issues of privacy are exclusively encountered in the domain of digital media. Private space is a concept that dates back all the way to the creation of enclosed spaces.

As Bennett says (2011;1):

> "Surveillance is a condition of modernity, integral to the development of disciplinary power and new forms of governance (Haggerty and Ericson 2006, 4). It has been essential to the development of the nation state, to global capitalism and to the decentred forms of disciplinary power and 'governmentalities' inherent within modern societies."

There exist global initiatives dedicated to the condemnation of cases in which the right to privacy is threatened, as well as projects of academic inquiry seeking shared definitions that will allow practical agreement in national laws related to privacy-related social phenomena.

For instance, the Special Rapporteur for the promotion and protection to freedom of expression and opinion of the United Nations writes:

> "Modern surveillance technologies and arrangements that enable States to intrude into an individual's private life threaten to blur the divide between the private and the public spheres. They facilitate invasive and arbitrary monitoring of individuals, who may not be able to even know they have been subjected to such surveillance, let alone challenge it. Technological advancements mean that the State´s effectiveness in conducting surveillance is no longer limited by scale or duration (Quoted in Molinaro et.al, 2013;23). [1]

In the case of Chile, debates about privacy are seldom found in the public discussion and academic literature. Other than discussion of major global controversies (like the Edward Snowden leaks at the beginning of 2013) reflection about privacy is largely absent in Chile. This is especially the case among creators of public policies and political decision-makers, whose activities most influence

1 Taken from original: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/133/03/PDF/G1313303.pdf?OpenElement

this level of privacy. This situation compels us to reflect here on what motivates actors in this system.
Accordingly, the present investigation aims to examine perceptions of the concept of privacy among main actors in the Chilean criminal justice sysem and the practical implications of these perceptions in their performance of their respective duties.

This document will reflect on the perceptions of the Chilean criminal justice system's main actors using the following structure: First, the theoretical framework underlying the investigation will be presented. Second, the methodology used to obtain relevant information will be explained. Third, main results will be shown. And last, pertinent conclusions will be drawn.

I. Theoretical Framework

I.I. The concept of privacy

Defining the concept of privacy is not easy, considering that the idea of privacy has changed throughout history and that it is applied differently according to national and cultural differences (such as the distinction between East and West).

Discussing the significance and limits of privacy brings to life different theoretical approaches, legal frameworks to regulate their applications, and practical applications in people's daily lives. We do not intend to offer a new definition of privacy, nor to take a side in current debates. Rather, the current investigation intends to uncover the perceptions of privacy that actors in the criminal justice system actually have. It is therefore important to present a wide classification of possible types of privacy before analyzing the discourses of specific actors.

Resultantly, Christian Fuchs (2011) effort at systematization proves hugely useful for our investigation. In his analysis Fuchs describes different types of categorizations and definitions of privacy. Among those that stand out, first is Daniel Solove's system (2010), which cosiders six different definitions of privacy: 1) the right to be left alone; 2) Limited access to the self; 3) Secrecy; 4) Control over personal information; 5) Personhood; and 6) Intimacy. Alternatively, Gormley (1992) describes four types of conceptualizations: 1) Privacy as an expression of personality; 2) Privacy as autonomy; 3) Privacy as the citizens' ability to regulate information about themselves; and 4) multi-dimensional notions of privacy. Working to systematize the literature on the subject, Schoeman distinguishes three ways to understand privacy: 1) As a right and complaint; 2) As the level of control of an individual over his/her personal information; and 3) As the state or condition of limited access to an individual.

According to Fuchs, most of these distinctions do not develop strong theoretical criteria for distinguishing and categorizing possible interpretations of the phenomenon of privacy. Instead, they offer arbitrary typologies (Fuchs, 2011:222) based primarily on hypotheses without theoretical grounding. In order to give a solid basis for the concept of privacy, Fuchs turns to the distinction suggested by Giddens between theories based on subjectivism and objectivism.[2] In the former, the private space is determined by the actions of agents, that is,

2 This distintion is based on a fairly old debate within social theory about the duality of structure and agency. Margaret Archer (1995) Realist Social Theory: the Morfogenetic Approach. Omar Aguilar (2008). La teoría del habitus y la crítica realista al conflacionismo central. For a broader exposition of this topic look at: Margaret Archer (1995) Realist Social Theory: the Morfogenetic Approach. Omar Aguilar (2008). La teoría del habitus y la crítica realista al conflacionismo central.

through the control they exert over information. Privacy in these theories is variable, dynamic and flexible, and its limits depend on individual behaviours, which means that there is no a priori determination. On the other hand, objective theories conceive privacy as a space shaped without the influence of subjects; as a moral structure that is intended to protect all human beings and that takes precedence over actions and policies impacting personal[3] behaviour. Privacy in this sense is conceptualized as a "circle around every individual human being." (Mill, 1965, quoted by Fuchs 2011: 938).

In sum, subjective theories explain privacy from subjects and their actions, whereas objective theories explain privacy from social structures whose control escapes individual's actions. That said, there is also a third approach that, recognizing the dual nature of privacy, tries to integrate the objective and subjective views. This approach understand privacy as a dual process determined by social structures as well as individual's actions. These theories are the limited/restricted access theories, merging the autoregulation of individuals with the normative structures that "objectively" [4] define privacy.

With the distinction between subjectivism and objectivism in mind, we can now establish a theorical foundation and system of classification for concepts of privacy, which certainly represents a step in the right direction. However, according to Fuchs, this is still not enough. We must still carry out a critical analysis of privacy, that is, a historical investigation connecting privacy with the material conditions of existence in which it has always been inscribed. In actuality, this is equivalent to analyzing the connections between the concept of privacy and 21st century capitalism.

1.1.1. A critical view of privacy

Utilizing the classic Marxist concept of fetishism, Fuchs says that almost all theories of privacy, abstracted from social reality, always presuppose some positive element, in that they bring freedom and dignity to individual persons. In this way, the aforementioned theories, through ahistorical analysis, situate privacy as a value to protect, independent of the material reality in which it is inscribed (Fuchs, 2011).

3 The classical definition of Warren and Brandei, for example , is classified under the category of objectivist theories.

4 See for example: Moor, J.H. (2000), "Toward a theory of privacy in the information age", en Robert, M.B., Ramsower, R. y Rosenbaum, S. E. (Eds), Cyberethics, Prometheus, Amherst, NY, pp. 200-12.

On the opposite side, some authors argue that privacy can become harmful.[5] For example, considering that privacy can encourage individualism, it can be used to commit illegal actions or to justify domestic violence. We thus see that a non-fetishist analysis of privacy – that is, non-ideological (ideology, for Marx, stemming from false consciousness), forces us to examine privacy in its actual context. In other words, to really understand the function of privacy in society we must uncover its connection with capitalism.

Under the lens of critical analysis, it is possible to observe that the concept of privacy has a liberal origin, which means that it is inextricably connected-to and functional-within the capitalist mode of production. Several observations follow. First, we can say that the classical notion of liberal privacy is closely related to the idea of private property, the fundamental pillar of capitalist society. This conception of the private world promotes individualism (as opposed to individuation) in accordance with the assumedly selfish "nature" inherent to human beings. What results is a fragmentation of society that may serve to harm the common good.

Second, "the liberal concept of privacy is related to a conception of the individual as the proprietor of his own person or capacities, owing nothing to society for them" (MacPherson, 1962, quoted by Fuchs, 2011:3). In this way, wealth and poverty alike are both treated as situations attributed almost entirely to individuals. This legitimizes inequality in the distribution of wealth, therefore lending ideological legitimation to capitalism.

Third, and connected with the previous point, we can say the following: The connection between the notion of the private sphere and the notion of private property in modern society is a foundation of the antagonism between capital and work. In other words, the concept of privacy that came about with the advent of capitalist society places men within a space in which others - including state actors- have no right to interfere. It is in this space where private property is located. And since private property is a fundamental pillar of capitalist society, whose central characteristic is the antagonism between capital and work, it is possible to say that the right to privacy itself establishes a juridical support for capitlism´s central antagonism.

Fourth, ever since Engels (2000), it has become increasingly clear that there is an inherent connection between privacy, private property and the patriarchal family. Arendt (2005) maintains that before the arrival of modern society, economic activity resided in the home, in the private sphere. Only with time did the private sphere lose its productive functions. Along the same lines, Habermas maintains

5 For example the work of A. Etzioni, "The limits of Privacy", Basic Books, Nueva York. More examples can be found in Fuchs, 2011.

that in modern society, the economy is separated from the "life-world" to which it was initially bound, giving rise to an independent economic subsystem ruled by money. The course followed by modernity, according to Habermas, was the colonization of the life-world by the economic subsystem, which imposes its logic of instrumental rationality, thereby reducing the public space and turning the families into pure private consumers (Habermas, 1898).

This critical analysis suggests that privacy is functional to a determinate social configuration and that, like most goods, it is distributed unequally. Presently this phenomenon becomes extremely transparent with the growth of the Internet, where privacy is often a good meant to be enjoyed only by the owners of capital, leaving users largely unprotected. Facebook is the example par excellence. This social network aims to create the impresion that each person can control his/her privacy, as each user can configure their profile so as to limit access to their personal information. However, this privacy protection does not impose a real barrier on the supplier company, nor on companies buying user information. Immediately upon uploading any information, the user loses control over the data, turning ownership of the info over to Facebook. This is expressed in the joining contract and terms of service that each user signs upon creating an account.

The purpose of this small digression is to give more significance to common definitions of privacy and, at the same time, to place each interviewee's discourse within a common theoretical framework, from the most liberal notion of privacy to the most critical.

1.1.2. Public space versus private space

So far we have only treated the concept of private space, excluding the other important element of the equation: public space, whose delimitation is equally important. A first aproximation of public space might consist in defining it as a complement, that is, as everything that exists besides the private space. In this sense, we would define the public sphere from things that are not included into the private sphere. But this kind of definition is recursive, which is a problem because it does not provide us with the actual characteristics of the public space. Therefore we must conceptualize the public sphere independently, not just as a complement to the private sphere.

As we did for private spaces, we must start from the recognition that the public space has an historical nature, which implies that its delimitation and characteristics depend on the material reality in which it has been inscribed. This forces us to conceive the public sphere not as an eternal substance, but as a historical construct changing through time.

Guided by this recognition, most of the literature tends to agree that since the Ancient Greek political world there has always existed a dividing line between the public sphere and the private sphere, even though this line has not always remained in the same place. Accordingly, it is worth mentioning Arendt´s (2005) famous separation between the *polis* and the *oikos* of antiquity. For greeks, explains Arendt, the *polis* was the place where citizens, in other words, free people, discussed the transformation of the state and the election of representatives. That is, politics were conducted in the *polis*. The *oikos* referred to the work of survival, or *Oikonomia*, which was conducted in the privacy of the home.

Political activity was considered an inherently human action, and it differentiated humans from other animals. This is where we get the famous Aristotelian concept *Zoon Politikon*. According to this view, a person who does not take part in political discussion is at most considered a potential man, never a complete man. Political discussion was the most highly valued act, and its exercise could not be denied to any citizen. The public space was, therefore, a transparent space of dignity and pride, and it had to be observable by all inhabitants of the city. This is why discussions of the polis were conducted in the agora. That way, they could be seen by all.

The necessary condition for the performance of political activity is the satisfaction of material needs. In other words, for someone to dedicate himself to the discussion of politics, it was necessary for issues of shelter and food to be excluded. Otherwise public discussion would become occupied with issues other than politics. This is where the concept of *oikos*, or the home, derives significance. It is in the home where issues of survival must be resolved so that men can free themselves from the necessity of supplying themselves with means of subsistence, thus allowing them to freely engage in politics.

Women, slaves and children, all of whom were considered pre-political beings, in other words, incomplete humans, had to carry out the work of survival. This kind of activity was conducted behind closed doors in the privacy of home because it does not offer the most dignity. Domestic work was not considered different from the activities performed by the rest of the animals. These activities were considered a necessary stage for subsequent arrival at properly human action.

Bernal (2012) later tells us that Christianity importantly changed the valuation of public spaces, giving much more importance to the activities of daily life than to the discussion of public issues. If good actions and sacrifice earn us entrance into heaven, domestic work is given greater importance.

Although it is true that Christianity inverted the respective values of public and private spaces, it did not eliminate their division. It is possible to say that in the

present day, certainly with respect to several elements of neoliberalism, we maintain the concept of the private sphere in which, together with one´s family, one acheives personal development. This is not to say that modern thinking totally devalues political activity. Rather, political activity is no longer a requirement, as it was in the Greek world, for the achievement of personal realization.

It is important to note that with the development of the capitalism a large amount of survival activities that previously belonged to the home sphere were moved to the market. Thus, the home´s function of satisfying needs started to weaken after thousands of years of relative stability. The domestic work of making clothes and preparing food was relocated into the market, where it was performed in exchange for money. The home was thus deprived, albeit incompletely, of its function of satisfying needs, retaining only the task of protecting property and harboring intimate activity.

Another change introduced by liberalism is the granting of cotizenship status to an increasingly large number of people. The philosophers of the Enlightenment believed that Reason is the most equally distributed good in society and that every person who enjoys reason deserves access to the public space. This accounts for the perpetually open nature of that space.

This outline of the separation between the public and private spheres doesn't aim to be comprehensive, but merely to show that our currently operative notion of public space is inherited from a large tradition of western thinking. We have tried to show that the public sphere was born in the Greek world as the space to which no citizen can be denied access. This is where is derives its open and transparent character, which it retains, in theory, today.

Opposite to the public space, the private space is characterized by its closed nature. In the Greek world this space was considered much less valuable than the public space, and that which happened inside it was not considerated worthy of public exhibition. First with Christianity and recently with liberalism, this conception of the private space has changed. We do not see this space as a place for pitiful activities, but rather the opposite. We see it as the space of personal realization. Currently, the private space is a place of freedom where no one can interfere. Privacy, then, invokes a sphere in which everyone can do whatever they want, as long as those actions do not damage public goods. If private actions do damage public goods, the state has the right and duty to interfere and act so as to preserve that which has been agreed upon as a common good.

Even though the valuation of the private sphere has changed substantially throughout history, its closed nature has been present since ancient times. To put it simply, we can say that the fundamental difference at present between

public and private spaces is their respective levels of openness. While the former is essentially open and transparent, the latter is closed, or at least susceptible to the establishment of limits on the part of the principal agents of the space. It should be noted that this dichotomy corresponds more to ideal agents than concrete situations – that is, it accounts for agents who do not always correspond with reality but who nonetheless help us to understand reality.

1.2. Biopower

The other theoretical element we will use for our investigation is the concepts of "biopower" and "biopolitics", as formulated by Michel Focault (1998) and later developed by Antony Negri, Michel Hardt (2000) and Paolo Virno (2004). Our interest in biopower pertains to its connection with surveillance.

We will understand the concept of biopower using the following definition:

> "We can interpret biopower as a form of social and political organization that does not necessarily cancel individual rights and freedom formally, where these are present" (Bellini, 2011:8).

The author adds:

> "Biopower can also be understood as a sort of cybernetic control and surveillance, which extend to both the natural world and to man intended as a political and social subject" (Bellini, 2011:9).

The concepts of surveillance and privacy are in conflict, and each must be considered when discussing the other. Surveillance, understood as the practice in which states follow or monitor the behaviour of citizens in order to prevent harmful behaviours, involves very blurry limits that generally conflict with privacy rights. In fact, surveillance is one of the most frequent justifications employed by goverments to overlook citizens rights to privacy. (as in the case of the "Patriot Act" in The United States).

It is not the aim of this investigation to extensively review all perspectives in theoretical discussions of biopower, but rather to use the concept of biopower in order to deepend our understanding of perceptions and opinions among real agents about the idea of state surveillance.

We also do not want to vulgarize the concept of biopower, since we believe that its contribution to the discussion of privacy rights is very relevant. We understand the act of surveillance as one more state resource aiming to control life, and we therefore agree with Virno in the following:

> "The concept of biopolitics has recently become fashionable: it is often, and enthusiastically, invoked in every kind of context. We should avoid

> this automatic and unreflective use of the term. Let us ask ourselves, then, how and why life breaks through the center of the public scene, how and why the State regulates and governs it" (Coleman & Grove, 2011;1).

It is important to note that this investigation is not the first to connect biopower with surveillance, since surveillance appears as a central element in understanding systems of power over life. In this way, Kristensen says:

> "Thus power over life, on the one hand, consists in individualization and subjectivation through discipline and surveillance, and on the other, in regulation and manipulation of the overall qualities of population" (Kristensen, 2011;21).

In this way we can understand that the ideas of control and state surveillance have a close relationship with the concept of biopower. As a result, it is interesting to examine relations of power and resistance in relation to the state within the perceptions of agents from the criminal justice system. This will allow us to study the kinds of discourses associated with processes of control in the lives of the citizens.

2. Perceptions of Privacy among actors in the criminal justice system

2.1. Methodology

The instrument used in the investigation was the semi-structured interview. This technique allowed us to generate a conversation based on previously defined topics, while also permitting the emergence of topics not previously considered. In adition to the semi-structured interview, each interiewee was given ten closed questions at the end of the interview- each with a "yes"or "no" answers and the opportunity to justify the reasoning behind the answer.

In total, eleven interviews were conducted with prosecutors, attorneys, public defenders and criminal law academics.

We contacted the interview subjects through their connection with prestigious higher education centers (in the case of academics) and through a "snowball effect process" from personal contacts of the NGO Derechos Digitales (in the case of public defenders and attorneys).

The constitutive elements of criminal proceedings motivated our selection of the interview subjects´profiles. In these proceedings, the privacy of the accused is necessarily affected. The reasons and established limits perceived by the agents in the system offer us valuable insight into the phenomenon of privacy in Chile. These subjects are the people who interact most with concepts and phenonena of privacy – concepts which are not a popular subject in the daily lives of citizens.

To analyze the interviews we used the techniques of content analysis, with the help of Atlas TI sofware.

2.2. Results

As we mentioned at the beginning of the document, the main objective of this investigation is to examine the perceptions of privacy among actors in the Chilean criminal justice system and how these perceptions interact with the way they exercise their different functions. The analysis of each interview will be focused on two main categories: i) definitions of privacy and their justifications, and ii) biopower as a justification for the transgresion of privacy.

2.2.1. General conceptions about privacy

A first element common to all discourses is that privacy appears as a highly appreciated juridical right and, in some cases, equally as important as freedom.

This is not to say there are not different perspectives, since we can indeed observe important differences between the interviewees. It does emphasize, moreover, the fact that privacy is considered a fundamental condition for the development of the personality:

> "So, my point is that the protection of privacy is so important that no one can infringe it, except in unusual situations, for example, if a judge gives a judicial authorization for that special case." (Academic)
>
> "The privacy I distinguish, I relate it directly with intimacy, with proper acts, with liberty." (Public Defender)
>
> "Privacy in a broad sense, is one of the most inherent rights of human beings, and it claims a relationship with our most intimate sphere. And it appears in different ways, such as, for example, the protection of each person's thoughts .... It can be translated into concrete acts aiming to protect those thoughs and prevent other persons from accessing them against one's wishes." (Academic)
>
> "But more than privacy I think the base concept is freedom, which is to say, the rights I have to decide about certain things, and among others I place particular importance on choosing which part of my life I make private and which part I make public." (Trial Lawyer)

Just as there is no consensus regarding the importance carried by privacy, its definitions also vary widely. Thus, it is possible to find discourses inclined towards subjectivism and others towards objectivism, even though in no case we find a completely singular position, which pushes us towards the practical union between objectivism and subjectivism mentioned in the theoretical section.

A public defender, for example, established the two following opinions about privacy. The first expresses a subjectivist definition, since it says that the people choosing the limits of the protected sphere are the same people through their actions and decisions. The second opinion is based on a more objectivist conception, given that the private space appears delimited a priori, independent from people. Granted, it is important to note that in the interview there was only one mention of the latter, which speaks to a preference for the idea that people have the ability to control the limits of privacy:

> "The thing is that I define my protected sphere. If I leave my window open I can´t think that no one will look at me. Like I tell you, everyone builds his protected sphere. If I want to walk through the street inside a cage so as not to be seen, I could. But do people do it? No. And the people you see who cover themselves entirely for their beliefs, all the way to their feet. You have to see this as a way to manage the protected sphere." (Public Defender)

> "If you notice, there is a protected sphere when I am inside my house, it being my castle, with all its rules and fortifications. And the other protected sphere- which I believe is the most exposed of all- is that which we are in when we are in the street, in the public thoroughfare, where other people can interfere with us." (Public Defender)

It is worth mentioning that it is posible to identify contrary discourses, which is to say, with many appeals to an objectivist conception of privacy and with less of a subjectivist character. For example, it is said that:

> "I think that this is effectively a judgement, because usually the behaviours that are considered part of private life take place in closed spaces." (Prosecutor)

It might seem that this distinction is of purely academic interest, but this is not the case. The derivative practices from each stance- subjectivist and objectivist- are not of meager importance. Someone inclined towards a subjectivist perspective should not be in favour of a legislation promoting people having more control over their personal information, allowing them to decide which things to make public and which things not to make public. On the other side, a person inclined towards an objectivist theory will agree that no matter what, people will always depend on a protected sphere. In this sense, the protection will be given by the juridical superstructure, displacing the role of the people in forming the private sphere.

With this in consideration, it is worth mentioning that those most inclined towards a subjectivist conception of privacy are the public defenders. In the case of academics and prosecutors we see a complementarity between both visions.

Public Defenders

Analyzing in detail the point of view of each member of this group, we notice some shared and distinct characteristics from other interviewees, allowing us to say that working as a defender is associated with a determined conception and valuation of privacy beyond the conventional discourses of other interviewees. In other words, being a "public defender" causes one´s to become a certain way.

First off, each of these discourses features a high appreciation for the right to privacy. They frequently say that privacy rights can only be affected under very special circumstances and with highly punishable crimes. This view stand in contrast to reality, according to the interviewees, who believe that the right of privacy is illegitimately affected every day, with the Chilean Police being primarily responsible.

It is worth mentioning the claims about privacy in a critical context. Although they are rather limited, they are nonetheless important given that they expose a discomfort - maybe a hidden one- among the different interviewees. For example, a defender talking about the sale of personal information says the following:

> "Sure, and as I say, they sell database packages from one company to another company to the detriment of a client." (Public Defender)

Two other defenders, in reference to their disagreement with the sale of personal data, say:

> "To me it´s bogus, because punishing the ones selling my info is really cumbersome in this system. For example, I don´t know, say I join the club "The Happy Glass." There is my info, my email, everything, and I don´t give it to anyone else. And yet, after it people are phoning me offering me a credit account." (Public Defender)

> "And Facebook is into everything, because they have access to everything, let's say. For them there is no privacy. This is so much the case that once one kid wrote on Facebook chat that he wanted to kill the President of the United States, and the next day the CIA appears there. It is real, absolutely real. The CIA appeared."(Public Defender)

> "I mean, Facebook is rich because of selling personal info. Not for anything else. They sell information. It´s not because of advertisement. They know everything about you, your age, what you do. And there are people dedicated to that, and then they sell your info. After that you get offers, weird things" (Public Defender)

It is worth mentioning that this kind of opinion appears more frequently in the discourses of defenders than in the other interviewees discourses. One possible hypothesis to explain the heightened critical inclination of this group is that, being aligned with those who are suffering illegitimate challenges to their privacy rights, they have developed a higher sensitivity to this subject. It is important to note that in no case do we see privacy expressed in what Fuchs (2011) considers a socialist sense, even though many are critical of privacy´s unequal distribution. You cannot find an elaboration of a definition of privacy different from the one with a liberal origin, even though many are uncomfortable with the current state of things.

The fact that this group most frequently mentiones privacy in this sense does not mean that these opinions are absent among other interviewees. For example, one prosecutor says:

> "There is a large amount of databases going around with yours and my information, so they know a lot, and especially the privates." (Prosecutor)

Academics

The first element emphasized in the discourses of the academics is the conceptual clarity in the their treatment of privacy right, especially in comparison with the other interviewees. This is to be expected considering their work as professors. We can say that they bring a greater awareness about the existing connections between the concept of privacy and current social structures. Since we live in a capitalist society the private sphere assumes a distinct form, specific from that of a socialist society. Following Fuchs, we encountered a greater historical review of privacy within this group.

A second shared element within the academic group was an awareness that, like all other rights enshrined in law, the right of privacy is not absolute. As a result, its protection and frontiers will change depending on circumstance. Therefore, we constantly find the idea that, in a conflict of rights, the right to privacy may be legitimately infringed. The following quote is very helpful:

> "The criminal process is designed to affect rights. This is the first premise we have to assume. The criminal process is a tool used to affect rights, and it looks for the affectation of rights." (Academic)

Although all four teachers recognize the importance of privacy rights, the emphasis on its protection is not uniform. Thus, in some cases we can observe a noticeable appreciation for this right and a large perceived neccesity to protect it, while in others, more permissive opinions appear. The following two testimonies show very differents visions about this point. An important divergence can be observed especially in relation to the state:

> "No, it is absurd, because…. You have certain obligations towards whoever offers you the virtual space, which is not entirely virtual since there is a physical side as well in which things will be stored. You have certain duties towards them, and they have certain duties toward you. On other hand, the state is in a powerful position to access everything freely… My conception is that if I open it, as I tell you, if I give my info to a bank, I give it to a bank. I don't give it to the state." (Academic)

> "(…) so one might ask, well, if people are ready to show their pictures, conversations, etc. to a commercially motivated third party and sign those agreements because they want to use the system, it seems that they don´t have high expectations about taking care of their security. What´s most relevant here is free trade, and the state can´t intercede. Well, it´s very disputable to think that the state can't intercede in the Internet because the Internet is a street, and a non-private street at that. The myth of this being a private street is just that, a myth. Because as you can see in China, it depends on the state, if the state

> gives you permission to use that street." (A∫cademic)

Faced with a hypothetical scenario in which the state appears to be in control of all the personal data on the Internet, on one side we can imagine a totally opposed position, while on the other side we can imagine that this posibility does not seem to represent a major problem. It is worth mentioning that along with the aforementioned opinion about the excessive role of the state, one of the interviewees repeatedly stated his inclination towards bringing more juridical tools to people in order to help them protect their personal data and thus extend the sphere of privacy even in public spaces. This second opinion appears alongside others arguing that, faced with a conflict of rights in the context of a criminal investigation, the process of prosecution must take precedence over the right to privacy.

There is also a third position between these two extremes, in which we can observe a moderate valuation of privacy:

> "I don´t have an all-or-nothing opinion. In other words I'm not a liberal person, so I don't have a special appreciation for the exclusion of third parties. I think there is a shared public space that is more relevant than the private spaces. I think if there are private spaces they should be immaterial for public decisions. I don´t think we should have cameras inside houses nor should the state be able to look into your email, but I do think there are public spaces where it could be reasonable for the state to have control." (Academic).

Thus, within the group of interviewed professors there are wide-ranging opinions regarding the importance of privacy rights.

Prosecutors

It is worth stressing two elements regarding prosecutors, where there exist lines of discourse not present in the rest of the actors.

First, there is a large emphasis on the idea that the right of privacy is available and can be waived by subjects. When that happens, the law does not have an obligation to protect people. This is especially relevant in the case of social networks because people can hardly argue that an infringement of their right of privacy has occurred, after they have opened access to their personal data. In these discourses a comparison is often made between the right to privacy and the right of life, the latter being inalienable and not waiveable. The law does not permit suicide, nor third-party assisted suicide, situations which occur in privacy:

> " So, the subject of privacy is when I don't wanna give up on it, but

> if I waive. I see it that way. The state does not have to take care of something that you are willing to waive. We are not talking about life. Life is not waiveable." (Prosecutor)

Secondly, these discourses also emphasize the flexibility of the limits of privacy depending on the situation. One possible explanation for this is that they are a part of the state´s prosecutory mechanism and have therefore developed a more lax vision of this right in order to allow themselves to function with more lattitude. It is important to remember that the role of the district attorney is to investigate and pursue crimes, a task that proves hardly feasible without affecting certain constitutional guarantees, even within the scope of action set out by law. In this sense, working with a strict definition of privacy is totally anathema to the prosecutor's work.

The absense of these discourses among the rest of the actors could be due to sample limitations, or due to particularities of these specific actors, in their treatment of a theme that deserves further examinations.

2.2.2. Perception about the relation between society and privacy

There is a clear pronouncement of the small importance placed on privacy by ordinary people, especially according to the academics:

> "I have the feeling he doesn´t take them because he doesn´t give a crap about his own privacy, and my impression, this being only my reflection, is that in the last few years we have gone from a reserved society to an exhibitionist one. (Academic)

> "What I think is that people think they have privacy benefits that they don´t actually have. People think they can't be under surveillance in the streets, but they can be. People think their internet traffic can´t be controlled if they have a web page, but this can be done."(Academic)

But this discourse is not expressed by the academics alone, finding voice among other actors as well:

> "I think privacy is a new right, there are many people who are unclear about what warrants a right to privacy, and, on the other hand, a faction can be found that has internalized it and demands and asks in a positive way for a crime of privacy." (Prosecutor)

2.2.3. Privacy and public spaces

In relation to this point we encounter much disagreement. But despite the diversity of opinions, a certain agreement can be distinguished: The space in which actions are performed importantly affects the expectations of privacy that people should maintain, as well as the protection they should be given by law. But no agreement exists regarding the level of these expectations and legal protections.

The use of ideal types is very convenient in simplifying our interpretation. First off, we can imagine a position maintaining that people should lose all expectations of privacy when entering the public space. Second, we find those who believe that people should hold high expectations for maintaining the protection of others, even in public spaces. For example, some interviewees believe that the surveillance camaras placed in the streets are a serious affront to privacy and therefore support their elimination. On the opposite side, there is the opinion that expecting not to be recorded in public is unreasonable, since everything we encounter in that space it available for public knowledge, which means that the audiovisual register is equally acceptable. Thus, while for some people a fundamental characteristic of the public sphere is the right to anonymity, to move freely without having our actions recorded, others see publicity as synonymous with total transparency, so anonymity is not one of their central principles.

It is important to mention that even though the subjects take one of the two previously mentioned positions, a certain level of ambiguity is always present, which leads us to say that in certain situations opposite opinions about the relationship between privacy and public space co-exist. This is a sign that we are in the midst of an open discussion that has not been solved. In fact, disagreement persists even within the group of academics, which leads us to believe that the academic debate is interminable.

When you introduce the variable "technology and Internet", opinions become even more diverse and confusing. Generally, there is much agreement about the fact that technologies affect the right to privacy. The disagreement pertains to the scope of their influences. While some people say that the introduction of new technologies has changed our very idea of privacy, others say that the media have changed without hugely modifying the concept or the legislative agenda:

> "But we are in a risky situation. We are even more vulnerable, because of the technological growth. Today we have emails, computers, but tomorrow more things will come and every time a technological device appears the people's privacy is affected.. Technology will always allow more infringements of intimacy. When we have more technology we have more opportunities for the infringement of privacy. Therefore we

have to create laws to avoid those situations, and if they happen we must penalize them." (Academic)

"In this way, new technologies give us new ways of making impact, but they do not change the conceptual agenda, only giving us new situa-tions, new modalities." (Academic)

We can observe diverging opinions related to the Internet and public spaces. It is possible to distinguish three stances: I) The idea that the Internet, as a public squa-re, is a space in which people should not maintain greater expectations of privacy than what they would in a public park. However, problems appear here, since as explained before, contradictions emerge when trying to explain the public sphere as a physical space, so conceiving the Internet in these terms becomes even more complex; 2) The idea that the Internet is a private space, and that using database storage, sending emails, and having chat conversations are all part of the private sphere, so users have the well-founded expectation that the given information will be withheld from third parties; and 3) The Internet, depending on how it is being used, works sometimes as a private space and other times as public space.

The following quotes demonstrate these three stances on the Internet:

"I think it has to be considered as a new public space because it is so open."(Public Defender)

"Being in a square is something I decide. I decide if I'm on Facebook or not. I don't know if people get it. I think there is an exposure. I came to this square. I can't avoid people looking at me. I mean, sure, in social networks there are some filters. But that's a mixture. I have the feeling that´s more public than private. I mean, privacy exists on the margin. Because in fact, it´s how I participate in a social network." (Prosecutor)

"I have the feeling that the idea that you can´t expect anonymity on the Internet is wrong. I think you could want anonymity and it is legimitate to want anonymity on the Internet." (Academic)

"If I´m browsing the web, for example, I understand that I am in a public environment. If I'm sending an email I understand that it is private. It depends. If I keep my Facebook open to anyone and I connect with the contacts of a contact of a contact, I have to understand that I'm in a public enviroment. I don't know. I think it depends on that." (Prosecutor)

"That's why I tell you, Facebook is not the street, Facebook is a building that is in the street." (Public Defender)

Among the arguments maintaining that people should not have privacy on the Internet (Point I), there is one arguing that every action made online is registered, which implies the posibility that almost any movement or conversation that has taken place on the Internet can be accessed. The argument is held since, by definition, privacy implies the posibility of excluding third parties or, as Solove says, the right to be left alone:

> "There are a lot of myths about the Internet. Among all those myths the principal one is the one we have talked about, the one that says that the Internet is private, a private channel of communitacion. The Internet is not a private channel of communication. It is a public channel, because it needs the permission of the state to work as a channel. It is like the streets. And secondly, the functioning, the mechanics of the Internet are totally contrary to any idea of privacy, because it rests on the perpetual reproduction of that which is… and the perpetual reading through electronic devices". (Academic)

That said, the opposite position holds that the Internet works this way not because of its nature, but only because it is been decided to work this way. The idea is that technology per se does not infringe privacy, but its use is what creates the infringement. In that sense, the argumentative approach is to denaturalize the idea that we can´t have anonymity on the Internet. In the same way, it is necessary to create laws protecting people from the sale and purchase of personal data by big companies like Facebook and Google.

> "There are some countries that have had policies of persecution against Internet providers who offer random systems that don´t leave an IP register, thus making IP addresses untraceable. I know in Europe the issue was pretty much resisted. I know that Switzerland still offers that service but the difficult thing is that no one offers that way to access the internet, so the problem is not the Internet itself. The Internet could allow anonymity to surf the net in some way."

2.2.4. Perceptions of the role of the state

Equally, we observed two kinds of discourses regarding the role of the state in its supervisory function, emphasizing on the one hand the control of the law and on the other hand the limitation of possibilities for increasing power. It is not possible to attribute these differences to the position of the interviewees within the criminal process.

The first position is expressed in these quotes:

> "Say they decide to hit each other because one of them said something about the other's wife. So they are fighting, and they decide to hit each other. No? They do what they want with their bodies. Well, but the law doesn't accept that." (Academic)

> "I don´t think we should have cameras in every house, nor should the state be able to read your email, but I do think there are public spaces where the control of the state is reasonable." (Academic)

Meanwhile the necessary limits for the state are expressed in sentences like this:

> "The truth is that I think at least in Chile (many of us) are not in a position to give our own life, our own intimacy, for the sake of a supposed common good - the state - because nobody knows how this would be made public, and nobody know what kind of treatment it would be given." (Academic)

> "No, with the things we have it is sufficient, and it is thus how the rights and guarantees of the accused are infringed everyday. And tomorrow we could be the accused. You never know and it is free. I think what we have is enough". (Public Defender)

It is important to stress the lack of an extreme perception on the state control in the discourse, avoiding to have more vestings and bringing to the front the idea of a "big brother".

The idea of control is most tangibly related with surveillance cameras. Cameras often appear spontaneously in conversation, associated with discourses about crime prevention. Video cameras directly highlight the tension between state surveillance and privacy, understood from the perspective of biopower:

> "Who gives the power to the state, to the goverment, to any person, to be watching that little camera, to say what is good or what is bad?" (Defender)

> "Given that, if they ask me, there is no need for greater power on the part of the state. I think we need more control over the authorities who have the ability to watch and, by the way, the thing I consider most miserable is that I really disagree with the use of surveillance cameras in public spaces." (Academic)

> "That is the function of the video camera, the surveillance of public spaces. It doesn't prevent sexual abuse, it doesn't prevent homicides, it doesn't prevent the most serious crimes of society, given that is an essentially sensationalist measure, and that the cost it has is simply a general panopticon. Instead of having everyone living in one prision, we build a prision out of the city." (Academic)

It is interesting to find such a direct relationship between state control and

surveillance cameras in the streets, which seems to be a topic that the interviewees have reflected on seriously before.

2.2.5. Practical functioning of the criminal justice system

In relation to action within the different profesional profiles, we found distinct references to different practices and opinions about the exercise of privacy. In general terms, there is a certain degree of a transversal agreement that the right to privacy must not be easily infringed:

> "I think the necessary reasons are the needs of the investigation and in this equation I would also include the crime to be investigated. Between me and you, those are the two decisive criteria, the criteria actually governing the law." (Academic)

> "The law says: they must be serious crimes and there has to be no other way to gain access to that." (Public Defender)

> "But, then, to the question, I think the system recognizes certain situations in which it is justified and valid to infringe upon privacy, and yet on the other side, it is seriously punished, in the context of the criminal justice process, when the prosecution denies that guarantee without judicial authorization." (Prosecutor)

In this case, there also seems to exist an agreement that the law is sufficiently clear in defining the legal practices in which an infringement of the accused´s privacy is permissible.

Moreover, the discourse of the defenders clearly expresses conflict in terms of respecting the privacy of the accused. For example:

> "But where there is power, power is going to be exercised and consequently the police, the state prosecution body, they are focused on solving crimes and they act as if it was a fight and the others were resisting, the other group resist sand is there. So the state tries to solve this dispute, but in it there is also a dirty war, there are dirty wars, and we can't see it because we are away from it. (Public Defender)

The police and the prosecutors seem to be the actors who most frequently interfere with the privacy of the acussed, according to the defenders:

> "So the infringements of rights happen everyday, which is to say, I hope they never receive more authority. If the police have a lot of power in the streets, people don't understand it, because they aren´t aware, they don´t know it." (Public Defender)

> “We have cases of prosecutors asking for orders with fake info, a lot of things. But generally prosecutors go a step ahead, and you as a defender have to go and tighten the reins a bit. How? We can´t go and do it directly, we have to go to the Guarantees judge and tell him, “Come on, Judge, tell the prosecutor he can´t do this, or tell him this detention is illegal.” (Public Defender)

These perceptions are rather expected considering the role of the defenders in the criminal justice system, where its main work is to attend to any kind of rights infringements on behalf of the accused.

2.2.6. Practical situations

As mentioned in the methodological section, questions were posed in each interview as to whether the privacy of the accused would be legitimately infringed in a given situation, according to the opinion of the interviewee. The importance of this exercise rests in finding the reasons for disagreement among interviewees.

We will now analyze the main reasons used to hold that there is no need for a court order in the most controversial cases.

a) Requirement of someone’s location information from the triangulation of cell phone antennae.

The interviewees from the defenders office were most likely to argue that a court order is not required in this case:

> “But at first, and while we don´t have any evidence that complements the personification of this device on someone, we don´t have the right answer. As I tell you, the prosecutor can ask for anything he wants, but when he’s accusing certain people whatever you are saying on the phone… sure, you can be following a thing, but you aren´t necessarily following a person.” (Public Defender)

> “Now, whether I’m standing here at the corner or in the middle of the square, there is no expectation of privacy. They are going to know where I am, but for my privacy that´s not the same finding out with whom did I talk. Those are different levels.” (Defender)

> “There is no interception of communications even though you are located”. (Public Defender)

It can be noted that we find here three totally different arguments, one about people´s expectations of privacy, another saying that location is not part of

privacy, and the third, a bit more complex, referring to devices for which privacy is not extended to people.

b) Asking for IP adresses

In the case of access to IP adresses, it is the defenders who present the most arguments for the absense of a judicial order in the procedure:

> "For example, you know which IP adresses have accessed to any website, but you don´t know who is using the computer." (Academic)
>
> "And for that they haven´t gone into my house, nor have they possessed my computer. I think they don´t need permission for that." (Public Defender)
>
> "I think that in the abstract, no, there are no bigger complications. But the topic is how we appoint that person... The access from an IP doesn´t show that I entered." (Public Defender)
>
> In this case two arguments surface: The impossibility to individuate a person through an IP adress, and the definition of the IP address as something separate from the private sphere.

c) Police pursual of a person using photographic record and activity log

In this case most interviewees opine that a court order is not needed, and we did not receive widely varying justifications for this. It tends to be the case that when the situation seems to be common knowledge it does not have to be justified.

Nonetheless, we can summarize the main argument about the relationship between the public space and privacy:

> "In the public world, the public sphere, I believe that we don´t need a greater analysis. It´s different if we enter private places. There is protecction there, because you reduced your private sphere, you closed it more if you entered private spaces". (Public Defender)

In this sense, people in public spaces should not wait to satisfy their expectations of privacy.

d) Record of garbage left by people in the street.

Finally, in the case of recording garbage, the main argument is the definition of garbage as something outside the sphere of privacy:

> "Trash is something that people get rid of. No, that doesn´t need an authorization. That´s the problem if you throw away garbage, you can burn

> it or whatever, but if you throw it in the street then you can´t complain about it anymore." (Trial Lawyer)

> "I think you gave it away when you left it in the street, in the public street. Because you took it out from your sphere, which is your address in this case, you submitted it to public knowledge, for anyone to watch it." (Public Defender)

In this case those who do not believe they need a judicial order recognize that people do not expect garbage to be private.

Conclusions and recomendations

Bennett (2011) agrees with Solove that the concept of privacy does not seem to have a common denominator with reality. He says privacy:

> "Is not related by a common denominator or core element. Instead, each problem has elements in common with others, yet not necessarily the same element, they share family resemblances with each other" (Bennett, 2011;486).

Our interviews with the actors from the criminal justice system show that the hypothesis of Solove and Benett seem to be correct, since we can observe a multiplicity of factors that the interviewees include under the concept of privacy.

Indeed, the perceptions of privacy among the actors associated with the criminal justice system are diverse in nature. For some, the private sphere refers to the level of control people maintain over their personal data (subjectivist theories). For others, the private sphere is determined by structural elements that elude the subjects (objectivist theories).

The results offer a wide amount of justifications and definitions about for different perspectives on the concept of privacy, offering an actual counterbalance to the idea of privacy as a multidimentional phenomena for which it is difficult to find a common foundation.

Even though there is general agreement regarding privacy as a valuable interest, its protection is not uniformly important for all interviewees. Some believe that the state should have more power to control personal data, while others highly value privacy, saying we must offer more protection for people´s privacy and diminish state authority over private matters.

We see a relatively larger disagreement about the definition of the public space and the expectations of privacy that people should maintain in public spaces. This is an especially volatile subject because the creation of new services and applications that affect our privacy in different ways makes it very dificult to reach one common framework. However, it is possible to notice that our daily Internet practices have already sparked heightened levels of reflection among different actors in the criminal justice system.

The current investigation has produced evidence that actors in the Criminal justice system presently value and appreciate privacy, albeit with in reversing infringements of privacy on the part of large private corporations and bodies responsible for penal proceedings. Additionally, dissenting opinions appear in opposition to the unequal distribution of the right to privacy, with large com-

pany owners enjoying total anonymity and the vast majority of the population under constant observation.

That said, this does not mean that the common person places much importance on privacy-related rights. In fact, many of the interview subjects said that citizens are not generally worried about waiving their rights to privacy in order to use social networks such as Facebook or messaging systems as Gmail.

Additionally, the references to surveillance cameras in Santiago turn out to be interesting. It would be useful to further analyze their effects on the prevention and penalization of crimes, and the sentiments of Chilean citizens regarding their mass use.

The questions about practical situations indicate that there are no standarized criteria for judgment shared by all main actors within the criminal justice system. This situation warrants the introduction of specific definitions for concepts so as to give precise criteria to actors working in the criminal justice system.

Upon conclusion of this study, which has not aimed to be more than a first effort at increasing our knowledge of the concept of privacy, two clear lines of inquiry remain open and warrant further investigation. First, a study should be performed to investigate the perceptions of the concept of privacy and its relationship with new technologies among common people. In this sense, we still need to investigate the real expectations of privacy that Chileans employ through an in-depth study of their perceptions and daily behaviour.

And the second line of investigation pertains to the nature of the Internet in public and private spaces. A study dealing with this topic would contribute to better understanding the Internet´s potential in forming public opinion and interfering with the main topics of discussion in the political community.

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