

(Privacy)

Secrecy and the Private Sphere

A report on the Progress Foundation Conference in Schwarzenberg, 26-29 October 2000 (based on excerpts from colloquium documents and on personal notes)

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Epigraph:

"I believe there is a limit beyond which free speech cannot go, but it's a limit that's very seldom mentioned. It's the point where free speech begins to collide with the right of privacy. I don't think there are any other conditions to free speech. I've got a right to say and to believe anything I please, but I haven't got a right to press it on anybody else. Nobody's got a right to be a nuisance to his neighbors."

H.L. Mecken

At the invitation of the Progress Foundation, individuals from a broad range of professions spent two days discussing the issue of privacy. Among those present were university professors, staff members of think tanks specialising in economics, ethics (philosophy), anthropology and law, a theologian and minister, a physician, two bankers, two leading government administrators, two journalists and the director of an industry association.

The organisation of the conference, tried and tested at other events, was based on the prior study of selected key writings on the subject, a deliberate avoidance of speeches and prepared reports, and a programme which left sufficient time and opportunity for personal contacts. The texts which provided the basis for discussion were drawn from the following works:

Charles J. Sykes, "The End of Privacy" (New York, 1999); Lawrence H. Tribe, "American Constitutional Law" (Ann Arbor, 1989); Richard W. Rahn, "The End of Money and the Struggle for Financial Privacy" (Seattle, 1999); Ron Paul & Mark Skousen, "The Closing Door" (Bethel, 1987); Murray N. Rothbard, "Die Ethik der Freiheit" (St. Augustin, 1998), plus various press clippings.

The Right to Be Left Alone

The opening debate established the conceptual framework. Serving as guidelines were two statements: U.S. Supreme Court Justice Louis Brandeis' definition, "Privacy is the right to be left alone," and the Preamble to the Australian Privacy Charter, which includes the following observations: "Privacy is a key value which underpins human dignity and other key values such as

freedom of association and freedom of speech. Privacy is a basic human right and the reasonable expectation of every person."

There is a relationship of tension between arguments based on the idea of the rule of law and the constitutional basis for fundamental rights on the one hand, and on the other hand the basic attitude of "self-ownership," on which is based the free decision as to the secrecy or publication of one's own knowledge as an aspect of personal autonomy and the self-imposition of moral limits. The tension between those two basic positions cropped up repeatedly during the discussions and no position reconciling them could be found. It became clear in the first round of talks that the "right to a private sphere" is not an absolute right, like freedom of expression; it must be weighed against other basic values, such as freedom of information, economic freedom, national security and the public's legitimate right to information.

According to Hannah Arendt, the private and the public are in a dialectical relation to one another. "Without the wall between public and private, a public realm could no more exist than a piece of property without a fence to hedge it in; the one harboured and enclosed political life and the other sheltered and protected the biological life process of the family. ...The only efficient way to guarantee the darkness of what needs to be hidden against the light of publicity is private property, a privately owned place to hide it" ("The Human Condition," cit. in Sykes, p. 225). Given this dialectical tension between secrecy and transparency, between the right to publish and the right to non-publication of personal data, it becomes clear why reservations about "excessive data protection" are expressed both from the "right" and the "left" — for a wide variety of motives — and also why, on the basis of various justifications and with varying focus, there are calls both for making the private sphere "absolute," fenced off against all public intrusion, and for its "relativisation." The public law approach, "privacy as a human right," relies more on a generally binding, democratic separation of public and private interests accepted by most people. The "law-of-the-individual" approach, while admitting an eminent public interest in a fundamental protection of the private sphere, leaves it up to the individual when, where and to what extent the right to privacy is to be autonomously — i.e., contractually — waived. In this latter view, freedom of contract and protection of property take precedence over data protection.

Private and Public Interest in Secrecy and Transparency

In the case of data protection, it proved impossible to find a response satisfying to all participants to the basic question of whether, and to what extent, it is possible to formulate a generally binding and universally applicable "public interest" which would have priority over private interests either generally or in specific instances. The weighing of "private interests" against "public interests," as well as the valuating and weighting of diverse public interests, is a delicate undertaking which leaves a great deal of latitude for political judgement. Since there are both public interests in privacy and non-privacy, and private interests in openness and concealment, a great many options are possible with respect to data protection, for which a broad range of motives may be put forward. Moreover, especially for those sceptical of government, it is questionable whether something like "the public interest" can be objectified and defined in a generally valid manner.

Formulated 2,500 years ago, the Hippocratic Oath certainly documents that there is a deeply rooted interest in secrecy with respect to medical treatment. On the one hand, that interest is

accentuated today because access to medical data can be highly advantageous for government officials, for insurers, and also for the purveyors of a broad range of products; but that same openness can work to the lasting detriment of the people to whom those data refer. At the same time, the interest in medical confidentiality has been relativised because medical care today takes place in the context of a network of institutions and specialists in which the greatest possible transparency, and deliberate, open, worldwide access to such data, can also be in the best interests of the patient. A waiver of confidentiality may also be to a person's financial advantage: for example, such a waiver may be the subject of a contractual agreement in dealing with insurance companies. A "personally administered" handling of a limited waiver of confidentiality on medical data requires, on the one hand, that the individual have a great deal of information about the risks and advantages of limited dissemination, and on the other hand it calls for technical facilities which make reliable control of access to the data possible. In the course of the conference discussions, it became clear that those two requirements are not met today — and may be incapable of ever being met. Various opinions were expressed as to whether the technology of data protection through encoding has already outstripped the technology for lawful and illegal decoding and control, or whether the race is still undecided.

Controversies and Borderline Cases

The decoding of the human genome has given rise to far-reaching, and possibly quite new kinds of, interest in data protection — though they do not lie outside the realm of what is already legally protected in Switzerland. The question of whether a worldwide ban on trade in human organs is desirable and possible was the subject of extensive discussion. Such a ban would conflict with the individual's right to dispose of his own body as he sees fit, which in turn is the very core of the private sphere. Also under dispute was to what extent stored personal data, communications surveillance and the international exchange of information should and may be used in combatting crime, and how worthy of protection welfare recipients' claims to anonymity should be vis-à-vis the "public" which finances their welfare payments.

Three further, conceptually linked rounds of discussion dealt with the barriers between state power and the private sphere. Here in Switzerland during the 1980s, the so-called "fiche scandal" aroused widespread scepticism concerning the intelligence service and government surveillance. At that time, as it turned out, files were being kept on thousands of "leftists potentially dangerous to the state," with records kept on subversive or ostensibly subversive activities and contacts, all on the basis of observations and suspicions. This served to intensify the public aversion to the government as "snooper." Yet today, in a show of inconsistency, there are calls for preventive personal surveillance of right-wing extremists.

There is an irreconcilable conflict between, on the one hand, crime fighting, maintaining security and protecting property against vandalism, and on the other hand such surveillance practices as the use of TV security cameras in public transportation facilities and in parking garages. These examples make manifest the varying priorities which can be given either to protecting the private sphere (even in public places) or preventively deterring dangers to persons and property. There are certainly also gender-specific differences in evaluating such priorities, because women are more often the victims of personal attack. A compromise solution would consist of giving users

(both male and female) their choice between areas under camera surveillance and areas not under such surveillance.

Moderate Taxation and Civic Trust

The state's interest in its citizens' finances is as old as the necessity for taxation. The heavier the taxation, the more determined the resistance to it. In a global, electronically connected world with a wide diversity of tax systems, the legal possibilities of avoiding taxation have expanded massively. "Technology has developed in such a way that it is not only of great use to the state, but also to the individual who wishes to protect himself or herself from predatory states or individuals" (R. Rahn, p. 24).

The question of whether technological developments — and particularly global electronic networking — bring more risks or more benefits with respect to privacy and individual freedom was raised again and again, from many different angles, and was answered in as many different ways. In this regard, too, Richard Rahn expresses more optimism in his book than was felt by many participants in the colloquium. "With today's technology, it would have been hard for Hitler and Stalin to keep their concentration camps off the world's TV screens. If both the media and the financial sector can be kept largely free of government control, such atrocities as the organized, systematic killing machines that operated over the course of several years in the mid-twentieth century might well be prevented from ever occurring again" (Rahn, p. 21).

In the course of the conference discussions, however, some more pessimistic scenarios were developed and justified, based on the assumption that technology can always also be used in favour of centralisation, to strengthen rather than weaken all kinds of power centres ("Big Brother is watching you..."), and that the individual definitively loses the possibility of defending himself unless effective protections are built into the system.

In Switzerland, the tax system that has evolved over centuries is founded on the principle of self-declaration based on trust. As was explained in the course of the discussion, this is why the more or less "intentional forgetting" of parts of one's income or aspects of one's assets on a person's tax declaration, though it violates the tenets of civic virtue as well as administrative rules, has not been made a criminal offence in this country — at least not yet. And that is also why, on the principle of equal treatment, the Swiss authorities deny legal assistance to foreign tax collectors when criminal charges for tax evasion are involved. In combination with Swiss banking secrecy, this non-criminalisation of tax evasion constitutes a uniquely Swiss position in the world, one which is not always understood elsewhere and is not completely uncontested even in Switzerland itself. On this subject, Richard Rahn writes:

"Banking privacy in Switzerland is not absolute. It can be waived in cases in which it is proved that a criminal act (as defined under Swiss law) has occurred and involves funds that have been deposited in a Swiss banking institution. The Swiss assert that there are some acts which are considered crimes in other jurisdictions, that are not, in the Swiss view, real crimes. The most frequent are 'revenue crimes,' such as tax avoidance and violations of currency and exchange controls. For the most part, such acts are criminalized by governments which have engaged in financial malfeasance and have thereby created conditions that harm their citizens and make it

difficult for citizens to protect their savings. The Swiss recognize that individuals have the inherent right to protect themselves against governments that make their currency worthless through inflation and impose currency controls, and from punitive tax regimes that are used to inflict pain on political enemies or use tax revenues for the direct benefit of those in power or their cronies" (Rahn, p. 135).

It is an open question whether what we must expect in the near future is an intensification of international pressure for a criminalisation of tax evasion and a concomitant loosening of banking secrecy through forced or extorted reporting obligations, or whether there will be a race in a different direction. Once again, Richard W. Rahn: "Benign governments will face the digital age by legalizing financial privacy, redesigning their tax systems, and shrinking their own economic social roles. Oppressive governments will face the digital age by attempting to abolish financial privacy, and then drown in a sea of corruption and disrespect" (p. 137).

From that standpoint Switzerland, with its system of taxation based in part on self-declaration and trust, is acting as a vanguard. In future, the question will not be so much "How high should and can we set taxes?" but rather "How can we keep accurate track of tax-relevant transactions and assets?" Here Rahn notes: "The Swiss are the furthest along this route to freedom and prosperity, and thus are most likely to be one of the earliest beneficiaries of digital liberation. Fortunately [in the view of this American writer], others are learning these lessons and are likely to be strong competitors to the Swiss, particularly if the Swiss continue to give ground to the demands of countries like the U.S. Also, the Swiss have been slow to embrace the Internet and 24-hour banking, and hence are in danger of seeing their market share drop if they do not move quickly to the digital age" (p. 141). The following quote about the USA and financial privacy was taken from the readings for the conference: "There is no question that unless something is done soon, the closing door on personal and financial privacy is shut" (Skousen, p. 14).

During the discussions, there was general agreement that current political and legislative developments, at least in Europe, are tending in the direction of more harmonised and intensified controls, and that Switzerland, now on the defensive, must propose solutions which can gain acceptance both at home and abroad. Some participants regarded this trend positively, others negatively.

The success of Swiss banks (and the banks of neighbouring Liechtenstein, which has comparable regulations and the lack thereof) is not based solely on the above-mentioned special case, that is, on the combination of non-criminalisation of tax evasion, refusal of information to other tax authorities and of international legal assistance in such cases, and full confidentiality for bank clients. In fact, the observation was brought into the discussion not by representatives of the Swiss banks patting themselves on the back, but through the reading of American sources:

"Switzerland has become a major world financial center because over the centuries it has developed the reputation, among such clients as governments, corporations, and individuals, for political stability, responsibility, quality of service, privacy and financial freedom. In addition, the country has an outstanding transportation and telecommunications infrastructure. Many Swiss banks have a tradition going back centuries for international service and unparalleled financial integrity" (Rahn, p. 136).

Financial privacy plays a central role because it is inseparable from the rights of a free society and limited government power. To quote from Ron Paul in the foreword to Mark Skousen's book: "Like so many other issues, the case for financial privacy depends at its very core on a sound understanding of individual rights and the limits of government." Richard Rahn, too, emphasises the importance of financial privacy: "Financial privacy cannot be isolated and stripped from other forms of human privacy. In the modern world man's means of providing food, shelter and self-esteem are mostly translated into financial concepts — money, earnings, spending, investing and wealth" (p. 59).

The Private Sphere: Component or Adversary of the Common Good?

In the conference's closing discussion, there was again extensive talk of the non-financial aspects of the private sphere. One context among others was the four very different directions taken by fundamental criticisms of privacy, as mentioned by Sykes in his book (p. 221 ff.): the conservative moralists, who are irritated by the fact that immoral things may take place in the private sphere; the feminists, who see the private sphere of the home as the fundamental ground on which unequal treatment and repression occur; the libertarians, who see free access to data and the free use of data as components of individual liberty, and the communitarians, who lament that protection of the private sphere is given too much priority over the common good. An excerpt from the writings of libertarian Murray Rothbard documented a proposal that professional secrecy and the right of lawyers, physicians and clergy to refuse to give testimony involving clients (on the grounds of confidentiality) should be expanded to "a general right to either use and disseminate the knowledge a person has in his own head or to keep silent about it" (Rothbard, p. 133), and to leave all restrictions to the unrestrained judgement of the individual. For most participants at the conference, that carries things too far. Everyone agreed that the deliberate, individual handling of discretion and indiscretion, of what is generally accessible and what is confidential knowledge, in the financial realm (e.g., credit) and in social relations (e.g., gossip), plays a crucial role which can never be entirely covered by the law. But views differed widely as to whether this is a positive or a negative thing, and to what extent there is, in this regard, a need for additional regulation or deregulation.

[Appendix on the subject of Swiss banking secrecy]

Switzerland as a Financial Centre

Hans-Dieter Vontobel

One of our country's most powerful trump cards is its role as a financial centre — in particular as a financial centre which offers refuge to assets, both foreign and domestic, which are in search of a degree of discretion — combined with legislation punishing the abuse of this discretion. By European standards, this legal underpinning is (and I put special emphasis on this particular

point) exemplary. Whenever people talk about banking secrecy, there is always a moral component contained in what they say. Today I can definitely state, as a representative of a bank which has become well-known for being a trailblazer in its strict interpretation of the concept of due diligence, that I believe it is absolutely justifiable from a moral point of view to protect the assets of fiscally persecuted persons from confiscation on the part of the authorities where they live. Anyone who has to pay more than 50 percent of his legally earned income in taxes and other fees is, for all intents and purposes, a slave to the state and deserving of special sympathy and assistance. It is high time we rid ourselves of our defensive attitude towards this issue and swing over to the offensive.

By adopting an uncompromising stance with regard to banking secrecy and the non-criminalisation of tax avoidance, Switzerland has much more to accomplish than to keep a profitable business. As a fairly regulated and competent offshore centre, we can make an important contribution to the discipline of politicians who have gone tax-mad, especially here in Europe. After all, the funds entrusted to us in our financial centre are not exactly buried or even consumed, but rather, they flow back into the international economy — and what's more, an increasing amount is flowing into private hands in the form of venture capital. These funds are therefore fully capable of creating more prosperity all over the world.

If we only wanted to, Switzerland could even point the way to the future by putting our own house in order and preserving the merits of our financial centre. This would be a sign that we do not feel the need to wait around in a state of fatalistic resignation for some crisis to release us from the present situation, but instead that we can courageously set out on the path that will lead us, thanks to a sense of mutual sacrifice, back out of the dead end we are in.

If Switzerland — a country which is loose in terms of its institutional bonds but which has resulted from having grown together over the span of several centuries — cannot manage to do this, then the prospects which I see for the more ponderous and (for the immediate future) extremely heterogeneous EU and its satellite countries are not very promising. If our small nation does not seize the opportunity to put its budget in order and reduce the burden of taxes and social charges to well under 50% for everyone, while also making good on such elementary tasks as guaranteeing security and order, and if it fails to ensure that individual rights are given priority over the claims on our freedom by third parties, then it will have forfeited its historical as well as its political legitimacy.

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