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Vers une éthique pour les médias numériques. Défis entre le public et le privé – que faisons-nous en fin de compte avec les mots?

*Towards an ethics for digital media:
challenges between the private and the public
(What, after all, are we doing with words?)*

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PhD Thesis

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Résumé

Notre problématique centrale concerne le défi éthico-discursif d'une communication qui soit appropriée aux sociétés démocratiques, sur la base de la distinction entre argumentation légitime (persuasion/appropriation) et manipulation (abus/violence). Dans un monde compris comme « globalisé », un tel défi rencontre le problème cognitiviste de traiter les dichotomies entre universel/contextuel, objectif/subjective, public/privé (etc.) dans notre vivre-ensemble, lequel se trouve maintenant largement médiatisé par les technologies numériques. Il faut noter également que tout ce qui vaut pour des actions, en général, vaut également pour la discussion en tant qu'action fondamentale et constitutive des sociétés humaines, où les interlocuteurs sont supposés s'exprimer ouvertement, ainsi que tenir bien compte de leurs points de vue réciproques afin d'arriver, d'une façon simultanément raisonnable et critique, à un accord en suivant une discussion critique (Habermas 1992). La communication légitime aurait ainsi ce pouvoir, malgré le défi du « paradoxe de l'argumentation » tel que souligné par Philippe Breton (2008), de dépasser les points de vue individuels des interlocuteurs, afin d'arriver à un résultat partagé qui consisterait en une intégration dans un tout universalisable (*consensus* – Apel 1994). (Ex.: la constitution d'un pays, les lois internationales comme la Carte des Droits Fondamentaux de l'Homme et qui sait, par la suite, une *Magna Carta* pour l'Internet.) Ces éléments, posés dans la première partie du texte, viennent nous préparer pour la seconde partie, consacrée à une éthique pour les médias numériques. Notre objectif est donc de lier une préoccupation d'éthique et de philosophie politique, incluant une préoccupation centrale pour l'argumentation, avec celle de la question des mécanismes dont nous disposons, ou devrions disposer, sur la question complexe et difficile de ce qu'on peut appeler l'éthique de la protection de la vie privée de la personne sur Internet. Les premiers points sont traités dans la partie A, pour en venir à l'éthique des médias numériques dans la partie B.

Conclusions :

- Le paradigme proposé par l'éthique discursive offre une approche possible de la communication, afin de la comprendre de façon moins réductionniste (c.-à-d., plus holistique), ce qui est mieux approprié à un monde qui se comprend de plus en plus comme « globalisé ».
- La synthèse du modèle triadique « composé », selon Peirce-Mead-Grize-Breton, se présente comme un outil éclairant pour cette prise en compte, dans la mesure où elle peut fournir un cadre interprétatif et critique, en soulignant l'autonomie et la réflexivité des individus.
- Selon ce cadre théorique on analyse les régulations au Canada et au Brésil, en utilisant le model triangulaire adapté du triangle argumentatif de Breton.
- Une *Magna Carta* « universalisable » pour l'Internet devient une piste envisagée, en renforçant ces trois principes centraux:
 - neutralité de la toile;
 - protection de la liberté d'expression;
 - protection des données personnelles, liée au droit de la vie privée (« privacy »).

1. Introduction

The ethics being advocated throughout this work is one that wishes to shelter communal deliberation and dialogue through legitimate (genuine, authentic) discursive practices (comprehending argumentation and dialectics) towards shared understanding and knowledge. Departing from the paradigm proposed by Discourse Ethics (Part A), with its three main principles of openness, solidarity, and critique, a triangular framework is adapted to it, based on what has been suggested by Philippe Breton (inspired by Perelman's argumentation theory), and complemented by Peirce-Mead's semiotic "triadicity" concerning the autonomous self. Then, by also emphasizing the sense of *prise-en-charge* taken from Grize's natural logic (inspired by Perelman as well), we go on to apply such a framework of ethical communication to analyze the contemporary context of digital mediated interactions (Part B).

For one, as our societies keep developing around new technologies that promote multiple and faster ways to enable communication in a more global scale, we observe that their regulations still follow a rather confusing and considerably chaotic flux at the present time. Therefore, we address many challenges now confronting some of our hard-conquered democratic rights, such as freedom of expression and privacy, in the context of digital media. One of our main goals is to point out important consequences that such new media are bringing to our basic role as essential communicators (i.e., people who are able to share understanding and knowledge in a legitimate way), given that complex problems have emerged involving grey zones (e.g., between what to consider as *private* or *public* information and how much *transparency* should governments and regulators be required to demonstrate to their constituents and clients, *vis-à-vis* what information they are supposed to know and handle about regular citizens in general).

Such interactions are supposed to mirror the rhetorical exercise we are used to practise in conventional settings, in a way that counter imposition (whether by subtle manipulation or more explicit abuses of power), whenever we are concerned about preserving our established democratic rights in healthy societies. In other words, similar to what happens when we apply general rules of grammar, logic, and cultural values in our natural use of any human language, towards communicating legitimately (while keeping some flexibility and openness of mind for creation and innovation), when we speak and write using a common (shared) structured technical platform, we need to have general rules and guidelines (such as a bill of rights to regulate the handling of the information being accessed and shared) that may well represent and foster the requirements and values to be respected, which favour a free flourishing of communication.

The proposals by the creative commons and open source communities may represent this democratic ideal for the Internet, but how well they can be supported and protected from dangerous abuses, this still remains a big challenge facing all of us right now. It is no doubt a matter of great public interest urgently in need to be more broadly discussed and coherently dealt with, especially after Edward Snowden's revelations since 2013.

Our point of departure being the needed paradigm shift towards *co-responsibility* proposed by Discourse Ethics (i.e., Karl-Otto Apel's "transcendental-pragmatic" paradigm: 1994a, b), we focus on communication as essentially the bilateral (*dialogical*) praxis of ethical (legitimate) argumentation. For—one may wonder—how else can one appropriately (at least, democratically) focus on socially driven "communicative action" (Habermas 1987, 1992) towards reconciling expression and strategy (i.e. converging

rhetoric with dialectic), than through exercising our capacity for arguing legitimately (co-responsibly) with each other as equally rational beings? (Létourneau 2002, 2008; Lima 2012a)

This is the core sense of communication that we wish to highlight throughout this work by advocating legitimate argumentation as an essential way to bridge the gap between theoretical and applied ethics within democratic systems, i.e. by taking into account both the moral (normative, regulatory) and the ethical (adequate, appropriate) aspects involved in the approximation between descriptive-prescriptive and contextual-universal claims in our discussions (i.e., Apel's sense of "pretensions to validity"). A robust theory of argumentation is, however, needed in the background, which was neither developed by Apel nor by Habermas, but which we could find in the rehabilitation of rhetoric proposed by Chaïm Perelman (1958, 1977) and is applied to the domain of communication by Philippe Breton (2007, 2008). It comprehends as broad a spectrum as possible regarding persuasive discourse (encompassing both philosophical and scientific discourse as well as dialectics) that concerns a wide range of audiences.¹

Our standpoint is that of considering rhetoric in a less pejorative and rather essential sense, that is, as an ethical (responsible, legitimate) practice that is not only an important part of democratic deliberation, but also constitutes one of its most basic aspects of legitimacy by allowing people to express and interact among themselves as equal and free agents. After all: "Democratic faith is trust in rhetorical argument" (Garver 2004, p. 122).

If rhetoric is an essential part of (both private and public) deliberation, the legitimacy of its democratic use depends on the ethical purpose of interlocutors when

¹ As we shall see, many important insights from Perelman's theory will be taken up here, mainly through Philippe Breton's model as applied to the domain of public communication (see chapter 3 below).

communicating with each other in the process of deliberating together. Thus, the “formal” argument is no longer the only possible discursive matrix (as it had been usually held by the “cognitivist” tradition). There are other ways that should be acknowledged: a lighter normative aspect of what came to be named a “deliberative democracy” (Cohen 1989) or, yet, a “discursive (procedural) democracy” (Habermas 1998). A viable model of democracy needs to be worked out in order to promote possibilities for continued open discussion in order to avoid becoming just one more among the vehicles of potential new exclusions and manipulative abuses (Young 1996, Bohman 1996, Dryzek 2000, Garver 2004).²

We cannot avoid confronting the tension between legitimacy and manipulation in persuasive discourse, the old tricky *aporia* of argumentation, dating back to the ancient Greeks when they founded democracy. This has been recently highlighted by Philippe Breton (2008) as the subtle “**paradox of argumentation,**” which concerns the dynamics of human language as a valuable hermeneutical enterprise, one susceptible to (mis)interpretations as well as to phenomena of critical dissent and controversies.

Our main questions turn around the following central concern: *how we may promote democratic participation and discussion, in the era of the Internet, in ways that can work to motivate the improvement of our inter-subjective communicative performances in healthy and legitimate manners, instead of facilitating corruption via blunt censorship or other manipulative tricks?* To better reflect about this, we will integrate into Breton’s “triangle of ethical argumentation,” a Peirce-Mead semiotic

² For another informative discussion on this respect, see also: BLAUG, Ricardo, *New Theories of Discursive Democracy*, 1996, p. 49: “Traditional models of deliberative democracy have a tendency to presume deliberation as universally neutral. But ‘communicative democracy’ has also to be attentive to social differences and the ways that sanctions to power can penetrate discourse itself, thus, recognizing cultural specificities within deliberative practices as well as adopting more comprehensive models of communication.”

“triadic” approach (Norbert Wiley) that supports autonomy, so as to introduce a compounded model able to, on the one hand, encompass the rich possibilities of human communication and, on the other, delimit as much as possible the range of interactive dialogism, peculiar to human language, so as to foster ethical (legitimate) communication.

As we consider dialogue and argumentation to be the most crucial traits of the democratic enterprise, we will also discuss the role played by American pragmatism to the nourishment of such democratic ideal. For the distinctive pragmatic tradition also offers a structure that seems to be closely aligned to democratic institutions, and can thus shed light on a range of tricky issues confronting the world in which we live today. Particularly, we will focus on the theoretical approaches proposed by the founder of Pragmatism, Charles Sanders Peirce, and by its champion on education, John Dewey, who have both been concerned with the maintenance and development of the main axes for the good functioning of democratic societies, namely **education, science, and communication**.

As the reader will see, Peirce’s “triadicity,” central to his *pragmatism*, is of crucial importance for a pragma-transcendental approach aligned with Discourse Ethics because it focuses on “communicative rationality” (and here we also incorporate Mead’s concerns about “reflexivity”) as being one of the constitutive features (if not the most essential) of the individuality of human beings (Colapietro 1989). We wish to highlight what Peirce can offer as a complement to Mead’s notion of “reflexivity” (1929) that is so distinctive to our species. As sensibly suggested by Norbert Wiley (1994), taken together, the triadic semiotic structure of human language, strongly present in both Peirce and Mead (each in its own way) can bring up suggestive implications for supporting and

defending the value (or, yet, the need) of a theory about the unique nature of human beings, because of their focus on “autonomy.”

This turns out to be an important point for better managing what Milton Campos has called the “ecology of meanings” (2007; 2015)³ emerging from human communication processes. Such a path may not necessarily be followed in the name of a myth to find “absolute truths” or something to be individually developed (whether personally or professionally) within too isolated or specialized “communities of practice,” but rather as one engaging larger communities of interactive rational (reflective) beings who wish to promote, defend, and foster the legitimacy of democratic systems, within the apparatus of appropriate institutions (Habermas 1992, 1998; Apel 1994, 1999).

As relations of power play a role in no matter what kind of social interaction, there is always a complementarity and reciprocal support between the two main mechanisms of power formation identified by the main theories of power, namely **violence and discourse**. The former includes not only physical brute force but also all sorts of **manipulation** that may be applied to attain and sustain domination over others, such as Max Weber (1919, 1922) has well pointed out. This is why we will try to distinguish it as much as possible from legitimate (ethical) argumentation, considered important for the development of sustainable and healthy democratic environments.

Notwithstanding, we also have to face the so-called fundamental principles of Discourse Ethics.⁴ Unfortunately, they are still far from being widely exercised in

³ CAMPOS, Milton. *Traversée. Essai sur la communication*. Bern: Peter Lang. 2015.

⁴ Such principles can be summarized in the following way: Habermas 1991 (p. 65): *Principle (U)* – “All affected can accept the consequences and the side effects that the norm's general observance can be anticipated to have for the satisfaction of everyone's interests, and the consequences are preferred to those of known alternative possibilities for their regulation.” Apel 1999, 2001 (p. 48): *Principle (D)* – “Only

today's complex world in spite of the establishment of the United Nations and the adoption of the Declaration of Universal Human Rights accomplished in the 20th century. The formal acknowledgment of "universal" principles and human rights definitely constituted a first step able to serve as a reference for democratic societies and their diplomatic relations. However, as we usually witness, those principles meet numerous limitations at both local and international levels: from the sheer (brute) use of barbaric force to more subtle (disguised) forms of manipulation (e.g., false analogies, populist propaganda, consumerism, censorship, etc.).

As we will see in what follows, even accomplished so-called first-world Western democratic societies are still submitted to a corrupted logic in many respects. This element led us to address, more particularly, contemporary threats to some hard-conquered democratic rights such as freedom of expression and privacy in the context of digital media and its regulatory challenges nowadays. While we wish to focus on communication as a legitimate (co-responsible) *communal action* of shared understanding, the present state of innovation and rapid spreading of digital mediation technologies definitely unveil many important new challenges.

those norms can claim to be valid which meet (or could meet) with the approval of all affected, in their capacity as participants in a practical discourse, which means: (1) All possible discourse partners must acknowledge each other as having equal rights in representing their interests by arguments. (2) All possible discourse partners are supposed to bear equal co-responsibility for identifying and solving problems of the life world through argumentative discourse." [This second principle has usually been overlooked by traditional ethics that rather tend to equate responsibility more 'atomistically' to individual accountability for specific duties. But the principles U and D can together be understood to constitute a deep structure underlying rationally acceptable norms, that is: 'meta' not in the traditional sense of a meta-ethics but rather as one being only submitted to the meta-institution of all institutions, which is language, so as to avoid both extremes of arbitrariness on the one hand, and of dogmatism on the other. Apel thus reads U! , with the force of an imperative (not just as a test for universalization as Habermas prefers to do), so as to require stronger justification for departing from such norms as, thus, committing a pragmatic self-contradiction. But such subtle differences of emphasis between Apel (focus on consensus) and Habermas (focus on critique) do not substantially compromise their common basic point of departure (paradigm-shift) for Discourse Ethics as a theory of communication centered on legitimate (co-responsible) argumentation, which mainly concerns us here. (For more on this, you may refer to Lima 2012a.)]

Present societies are now immersed in a new and broader 'world ecology' that also includes a digital realm. We became capable of sharing much more information and of holding meetings and discussions, to an increasingly wider extent, via digital media. In such a context, we end up interacting on a daily basis through the mediation of "intelligent" machines relying on increasingly "smarter" algorithms. Considering the challenges that this context brings, we came to wonder whether the elaboration of general (internationally agreed upon) regulations and guidelines applying to such complex platforms may not be urgently needed. This, so as to guarantee that basic democratic rights (such as privacy and freedom of expression) are still respected and protected, in order to keep communication equal and free (hence, the relevant discussion about "net neutrality" in chapter 4). Therefore, we also address the call for a more global Digital Media Ethics (Ess 2009), towards arriving at a consensual *Magna Carta* for the Internet (Sir Berners-Lee 2016), which would be coherent with basic democratic requirements and still relevant and encompassing enough to an increasingly "globalized" (post)modern world.

1.1 Objectives

As contemporary societies keep developing new technologies that promote ways to enable faster and more global communication, however, their regulations still follow a rather confusing and considerably chaotic flux. The Internet does not have clear borders that explicitly delineate where one country's legal jurisdiction stops and the next country's begins. In the absence of a uniform global regulation, this tangle of local decision-making concerning the Internet raises complex issues.

Should countries abide by one another's laws? Should they refuse? Should they censor foreign websites that fail to comply? For example, if the USA is allowed to export its values and principles via the Internet, then why not Greece, Brazil, or Saudi Arabia? For advocates of an open Internet, it may be tempting to frame any threat to the independence of the Internet as one of doddering old governments trampling on the "creative spirit of innovation." On the other hand, some may argue that innovation, within capitalist markets, may just be another neoliberal attempt to pass on the ideology of "free entrepreneurs innovation for the sake of The God Capital."

Nevertheless, the dangers of not enforcing domestic laws are pretty real. As criminal threats move online, so must the tools that governments use to combat them. But how can a government protect the privacy of an email account held by a private company halfway around the world? We also wish to highlight some consequences that new media are bringing to the basic role of human beings as "essential communicators" (i.e., people who are able to share understanding and knowledge) as more complex phenomena emerge involving grey zones, namely those growing between what is to be considered **private or public** information and how much **transparency** should individuals, companies, governments and regulators make (and have) available to (and from) its clients and citizens.

This debate, however, given the extension of its scope, needs to focus on specific cases that are able to highlight the relevance of those complex grey zones. Some of them may emerge from the *public policies and legislation for protecting privacy rights concerning the use of digital media, for example in what regards Brazilian and Canadian regulations, as they may represent positions that enhance or refrain such critical debate.* We believe that observing these two cases is a matter of public interest and might bring

implications to a more global sphere, given that it is a subject that needs to be more broadly discussed and dealt with (especially since Edward Snowden's revelations regarding the American NSA practices, in conjunction with the Canadian and British agencies). Any contemporary democratic society that aims at keeping the legitimacy and relevance of its institutions and communications, in line with the challenges facing the techno-digital era, might profit from such a discussion.

A scenario emerging from the analysis of these two cases depends, among other factors, on whether the tentative ethics recommended in this text could have, or not, an influence, and be taken, or not, into consideration by designers, developers and users of such codes and tools, i.e., a to-be-required ethics that could induce the protection of people's privacy "by-design" (see section 4.3.2). The ethical triangle of communication briefly introduced above (which will be discussed in more detail later) is suggested as a thinking tool for guiding companies, institutions and governments, both at the interpersonal level and at the level of algorithm and application development, towards conceptualizing systems that can take regard for privacy and the protection of sensitive data "by-default." As we shall see, this is believed to be of paramount consequence for respecting citizens' integrity as autonomous, equally free, and co-responsible individuals, both within and among democracies of the so-called civilized world.

1.2 Methodology

My approach comprehends two parts, following these introductory remarks: **(A)** the philosophical reflections about deliberation and communication is presented in chapters 2 and 3; **(B)** the empirical situation of such viewpoints into contemporary issues regarding interactions through the mediation of Digital Media are dealt with in chapters 4 and 5.

Part (A) introduces the historical and philosophical context of complementary approaches in studies of argumentation and communication, deemed appropriate for legitimate deliberative democracies through shared understanding, ranging from Philosophies of Language and Ethics (Peirce, Mead, Dewey, Apel, Habermas, Grize, Letourneau) to more specific informational viewpoints treated by Information and Communication Sciences (Breton, Floridi, Burk, Ess, Bok, Lever, Campos). Then, in **Part (B)**, we introduce empirical observations and closer analysis regarding some issues peculiar to the contemporary “communicators of the Internet era” (or, as Floridi prefers to call it, as “inforgs”). After all, human communication now takes place, unprecedentedly, through various levels of symbolic forms and mediation, as we experience and exchange a much larger amount of information and communication practices.

The main parallel made from Part A to Part B will, thus, be between what essentially happens in genuine (legitimate, ethical) communication (which is basically dialogical and argumentative), to what is supposed to happen and be promoted by the elaboration and application of regulations, policies and recommendations to mirror a rhetorical exercise within democratic societies, so as to replace imposition, fierce manipulation, and barbarism. When we apply general rules of grammar and cultural tendencies in the use of any language (while, at the same time, keeping flexibility and openness of mind for creation and innovation, as we speak and write within a common shared structural framework—i.e., keeping an “agreed upon” basic framework as the common referential background—for conveying to others an understanding or point of view, and so as to discuss with others specific matters in a coherent and comprehensive way), we also need general rules and guidelines (such as the text of a constitution) to serve as a common referential framework for values and rights to be respected in society.

Nevertheless, the legitimacy of democratic life rests on the possibility of openly discussing main problems of common public interest (including through the means of a free media). This requires a closer look at the requirements for ethical (legitimate) discussion. It also demands an assessment to know if they are being respected by contemporary mediated platforms. For example, we may ask: As for the kinds of platforms for discussion currently available, do they meet the requirements needed for nurturing legitimate democratic societies? Do they enable solutions related to the issues brought up by Digital Media? These considerations serve to underline the deep relationships between symbolic forms of discussion (both from a semiotic and an ethical perspective), with respect to the mediation and appropriation of information (consequently, of knowledge), and its potential margins of risk for abuses that are involved in open and collaborative communication, currently allowed by the Internet.

Breton's "triangle of argumentation" (2007) is taken as an initial thinking tool (incorporated within a semiotic perspective, also triadic, about the "autonomous self") to illustrate more explicitly the two main contrasting approaches with respect to digital media platforms and tools, namely those of opt in *vs.* opt out. Illustrating the two extreme approaches, this triangular model also highlights, among other points, an overt split that has become much more salient and debated worldwide since 2013 (due to Edward Snowden's revelations), between the European and the American approaches about privacy. In this regard, the triangular framework for ethical (legitimate) communication highlights the limits to be respected by genuine free democracies, also indicating the related potential risks and doors for abuses.

Such an elastic model for autonomous and co-responsible selves is deemed appropriate for the functioning of legitimate democracies, and for fostering cultural

variations within democratic institutions. In a digitally mediated world, where the Internet allows the overcoming of physical barriers, challenging confrontations among cultures and values may inevitably arise with more frequency, which brings to the forefront a variety of discussions concerning democratic notions such as privacy and freedom of expression. We attempt to show that, as it happens to genuine (legitimate, ethical) communication in general, whenever there are breaches and/or extrapolations to such benchmarks (the triangular model suggested helps illustrating such limits for legitimate interactions more explicitly), there usually comes with it the danger of power abuses (whether through manipulative tricks or more explicit authoritarian impositions) that work to further increase the threatening of democratic rights and freedoms (as in the old “slippery slope” argument classically used). We also refer to related literature on this matter, as I reflect on the fast “globalization” and the accompanying regulatory challenges for ICTs (Information and Communication Technologies) in the techno-digital era (Baym 2010; Papacharissi 2010; Ess 2009, 2013; Floridi 2010, 2011).

As the reader will note, striking clashes of principles promptly appear as we observe, for example, the two main conflicting approaches to privacy and regulations to protect it. Consequences of such clashes, even among considerably open and democratic governments, are well illustrated by the ongoing controversies involving State Surveillance, recently brought up by the scandals involving the **FIVEYS** (Five Eyes group, referring to the Anglo alliance comprising US, Canada, United Kingdom, Australia and New Zealand). The present work also attempts at highlighting the main problems involved on this issue, especially in what regards the dilemma between transparency and secrecy as it relates to public communication and State accountability and surveillance (Bok 1989, Burk 2007).

The main argument commonly used by governments, towards justifying privacy intrusions, is based on national security grounds and the need to protect national borders and its citizens from terrorist threats. Although such a point can be reasonably justified, another right to self-defence remains a legitimate one: that related to particular policies involved in the enforcement of “security measures” that might lead to unacceptable abuses. One can thus reasonably wonder about the limits of how far national security threats can indeed be stretched by a government in order to legitimately justify indiscriminate surveillance on its citizens (i.e., mass surveillance) as well as on other State leaders of even fellow, “allied nations.”⁵

A significant number of academics, politicians, cyber-experts and general concerned users from a variety of countries are managing to get represented by civil society organizations (e.g., openmedia.org, www.opensocietyfoundations.org, www.codingrights.org, www.pewinternet.org, www.webfoundation.org, www.itsrio.org, among others) to express their concerns about what is being perceived as an imminent threat of “power abuse” and “censorship” via Digital Media resources. After all, lest we forget, to grant any particular state the right and power to mass surveillance (i.e., to lurk indiscriminately in people’s lives) constitutes a first dangerous step towards making it also able to repress, more particularly, those who may not agree with its agenda and status quo.⁶

⁵ See, e.g.: CBCNEWS, “CSEC exoneration a 'mockery of public accountability'” [Online], by Greg Weston, National Affairs Specialist, Posted on Feb 14, 2014, 5:00 AM ET (Last Updated on Feb 14, 2014 11:24 AM ET), <http://www.cbc.ca/news/canada/csec-exoneration-a-mockery-of-public-accountability-1.2536561>

⁶ See, e.g.: HUFFINGTONPOST, “Les écologistes sous surveillance” [Online], Publication en 03/02/2014 00:32 EST (Mis à jour: 04/04/2014 05:12 EDT), http://quebec.huffingtonpost.ca/karel-mayrand/ecologistes-sous-surveillance_b_4705199.html

Many concerned people, besides Mr. Edward Snowden (including the World Wide Web creator, Sir. Tim Berners-Lee), have been attempting to highlight the importance of keeping the Internet a “free environment” for fostering knowledge and innovation worldwide. An important question in such a context is: *How can democratic societies keep up with openness and, at the same time, protect its citizens’ privacy rights and the security of its borders from undesired intrusions?*⁷

As we came to realize, the implications of intrusive actions over people’s communications may indeed turn out to have a significant impact, both now and in the future, as large amounts of information become increasingly digitalized. The use of such information, which has the potential to turn into rather “sensitive data,” depends, of course, on the intentions of those able to store, control, and use them with vested interests. This concern leads to another significant question: *Which information should be considered “private” and therefore in need of stronger protection, when circulating via digital media?* However, in order to address such questions, we will introduce to the reader the theoretical background on which we rely, so as to provide the hermeneutical framework that we are applying throughout our discussions and analysis.

⁷ The Berlin Declaration on Open Access has so far served as the main source of reference on this respect. Refer, e.g., to: WIKIPEDIA, *Berlin Declaration* [Online], http://en.wikipedia.org/wiki/Berlin_Declaration_on_Open_Access_to_Knowledge_in_the_Sciences_and_Humanities. (Accessed on October 2015.)

PART A

2. Democracy, Pragmatism and Communication

2.1. Can *science* and *moral philosophy* be reconciled?—a historical context

The uprising of liberalism, as a political and an intellectual movement that started in the 17th century, as well as the so-called “linguistic turn” in philosophy, have both contributed to the revival, in the 20th century Western societies, of a stronger focus on language and on legal systems. The goal was one of attempting to implement some moral consensus about social and political problems, not only domestically, but also globally, aiming the establishment of peace and order (especially after WWII).

While Anglo-American philosophers have prominently focused on the more formal aspects and epistemological instrumentalities of language (i.e., language as a “tool” of knowledge), the Germans, on the other hand, attempted to break with what they regarded as the assimilation (reduction) of language merely to its formal function. Probably, their concern was to avoid compromising the richer and broader communicative and pedagogical functions of language, seen as a dynamic medium for shared understanding. In other words, according to German philosophers, language does not only play an essential role in our relationship with a so-called “objective” world considered to be external to us (i.e., its referential relation), but it is also pivotal to social relations among people and to their own selves (i.e., its propositional relation). Both functions were considered important because they saw them as constitutive to the building of life experiences. Language is also to be taken (as some distinctive German thinkers such as Humboldt, Gadamer, Apel, and Habermas emphasize) in its dynamic and

multidimensional reflective, interpretative, disclosing, and pedagogical aspects (Lafont: *Linguistic Turn & Hermeneutics*, 1999).

Moreover, the development of legal systems and their enactments through positive law became a central issue for the establishment and maintenance of more democratic societies throughout the modern era. With regards to the enlightenment philosophers (e.g., Locke, Hobbes, Smith, Mill), they are given credit for having shaped liberal ideas and principles driving their legal implementation towards becoming a matter of practice as well. Thomas Hobbes (1588–1679), for example, attempted to determine the purpose and the justification of governing authority in post-civil war England by using the idea of natural law to construct the concept of *social contract*, though concluding that absolute monarchy was still the ideal and fairer form of society. Then, John Locke (1632–1704) adopted Hobbes’s idea of natural law and social contract that bestows **life, liberty, and property** as natural rights for all. He argued that, whenever the monarchy goes out of bounds to become a tyranny, it violates the social contract, concluding that, in such cases, people also have the right to overthrow the tyrant monarchy. By placing natural rights as the supreme values of law and authority, Locke formulated the basis of what came to be known as the liberal social contract theory.

Agreeing on the basic natural rights was not a problem for early Enlightenment thinkers. However, they still had to come a long way towards agreeing about the best *form of government* in order to secure those rights for all, given that their restrictions needed strong justification (especially after Kant’s critique of metaphysics in the late 18th century). It required the formation of a sovereign authority with legitimacy and universal jurisdiction in order to form a common and supreme power capable of arbitrating between competing human interests and powers.

Such an authority therefore had to be formed in the framework of a civil society that allowed individuals to engage in voluntary allegiance to the sovereign. Transferring their representation to that authority was done in return for its continued support and protection. But instead of becoming openly hostile to religious belief itself, most of them rather concentrated their opposition on the union of religious and political authority, arguing that faith was a separate affair and should not be officially sponsored or administered by the state at all. The groundwork for the separation of church and state was thus laid down. The first sons of the Enlightenment argued that any social and political order emanated from human interactions rather than a divine will.

As part of this project to limit the powers of government, liberals then conceived the notion of their *separation*, designing a system able to equally distribute governmental authority among executive, legislative, and judicial branches. Generally speaking, we can perhaps still say today that liberalism defends limited government intervention. Later liberals such as Rawls, Dworkin, Kymlicka reinforced this idea, supporting a somewhat limited constitutional government, while also advocating (influenced by a more broadly social conception of liberalism) that state services and provisions also needed to ensure fairness and liberty in terms of *equal rights* for all.

Liberals still seem to largely share the conviction that formal or official guarantees of equal rights are only relevant when individuals do not lack the resources to use and benefit from those rights. Many of them also came to call for a greater role of government with respect to the administration of economical and judicial affairs in such issues. We may even venture to say that John Rawls's *veil of ignorance* for "justice as fairness" and Jürgen Habermas's *ideal speech situation* concerning "discourse ethics," share some important resemblances inasmuch they both envisage an idealized point of

reference, placed towards eventually reaching agreement (consensus) about valid normative principles which could be justifiably acceptable and applicable to all rational beings.

With respect to justification, more pointedly, Rawls's conception of *public justification* became the most valuable point of reference to anyone or any democratic system truly concerned with ethical issues about justice. The following passage from his masterpiece, *Theory of Justice* (1971), is illuminating:

Being designed to reconcile by reason (ing), justification proceeds from what all parties to the discussion hold in common. Thus mere proof is not justification. A proof simply displays logical relations between propositions. But proofs become justification once the starting points are mutually recognized, or the conclusions so comprehensive and compelling as to persuade us of the soundness of the conception being expressed by their premises. Justification, then, cannot be based on a moral vacuum and a minimum of moral consensus has to be present. This is the nature of justification!⁸

Unfortunately, by the time of its publication, a considerable number of scientists and epistemologists had rather chosen to neglect, or overtly deny, their joint *intellectual responsibility* alongside political and moral philosophers (probably for fear of letting philosophical relativism sink the very promising scientific enterprise, partly driven by the dream of a “universal logic” capable of unifying science such as advocated by logical positivists). They ended up wasting a great opportunity for coming together towards better depicting the *interconnectedness* (which we may call a “principle of synergism,” following Peirce terminology) between science and moral philosophy, that is, to acknowledge their relationships as issues of public interest, as they both constitute essentially connected rational operations that affect a wide range of human interactions.

However, a pretty radical sort of “scientific purism” got established instead, which has rather worked to organize the basis of many overtly specialized professional

⁸ RAWLS, J. 1971, pp. 580-581.

disciplines, creating thus a vast array of job opportunities that attracted most of specializing academics throughout the modern period up to now. These developments unfortunately led to a considerable exclusion of discussions about *moral issues* from the positivist scientific agenda.

If we wish to better understand how science came to part from the foundations and concerns of moral philosophy, we need to consider more carefully the history of scientific specialization in the past two centuries. This schism, after Thomas Kuhn's important contributions about scientific revolutions and paradigm shifts (1962) as well as the developments in Quantum Physics, isolating a so-called objective rationality of scientific truth (with its presumable value-neutrality and political autonomy) from interactions and issues concerning social life as a whole, has slowly started to be challenged once again.

In such a context, the conception of *casuistry* has also been changing considerably throughout enlightenment and modernity. Generally speaking, casuistry is conceived as a method of case reasoning, especially useful in treating cases that involve moral dilemmas. It became the basis of case law and the standard form of reasoning applied in issues of common law, especially in Britain and its domains, mainly through the influence exerted by John Stuart Mill's utilitarianism (1848) and William James's pragmatism. But it has also turned more recently into branches of studies in Applied Ethics, such as Bioethics and Business Ethics.

Casuists therefore attempt to take a more immediate, practical approach to ethics. Instead of using theories and principles as starting points, they rather begin with an examination of the cases *per se*. Then, by drawing parallels between paradigmatic situations (so-called pure cases) and a particular case at hand, they try to determine an

appropriate moral response to the problematic case in question. Casuists do not want to be pressed about agreeing on more general ethical theories, principles or evaluations in order to make up their own policies and recommendations. Instead, they are just required to agree about some case similarities in order to perform analogical inferences (i.e., analogies that rely on the so-called “warrants” between paradigmatic cases and the case under examination).

The method is not new, mainly based on arguments by analogy, actually prone to abuses because analogies between cases can easily turn out to be false analogies, tendentiously driven by and manipulated towards particular results or ends-in-view (as many ancient sophists used to do so well). An argument from analogy is thus weakened if it is inadequate in any of the above respects, among which one should highlight those concerning relevance, choices for samples, and study groups, perhaps the most problematic ones.⁹

As this method is still widely practised nowadays, it does not come as such a big surprise that the focus on economics by most late politics is posed overwhelmingly on attempting to bring concerns about growing GDPs towards creating “strong markets,” while other approaches, at least as essential (concerning so-called “externalities”), such as preserving a healthy ecological environment and guaranteeing basic universal human rights, have been consistently left aside (when not completely neglected) from economic models, as if they pertained to a second rank of less urgent or not so important issues. We thus need to put more “eco” into our *economy* in order to bring moral philosophy, science, and politics altogether towards attaining more sustainable societies. No wonder a

⁹ For more on the big question of relevance, the reader can also refer e.g. to the works by Alvin Goldman (1979) and Frans van Eemeren (2010). We will come back to it in relation to casuistry later on, in Ch. 2.

reputable magazine like *The Economist* felt the urge to include in its 2013 end-of-year issue a striking and worrisome analogy in their article entitled “**Look back with angst,**” as we were about to complete a centennial since World War I:

A century on, there are uncomfortable parallels with the era that led to the outbreak of the First World War. As New Year approached a century ago, most people in the West looked forward to 1914 with optimism... Yet, within a year, the world was embroiled in a most horrific war. From being a friend of freedom, technology became an agent of brutality, slaughtering and enslaving people on a terrifying scale. ... The most troubling similarity between 1914 and now is complacency. Businesspeople today are like businesspeople then: too busy making money to notice the serpents flickering at the bottom of their trading screens. Politicians are playing with nationalism just as they did 100 years ago ... so to assume that reason will prevail is to be culpably complacent. That is the lesson of a century ago.¹⁰

We have to admit that democracy is going through a rather difficult time right now. Wherever authoritarians have been driven out of office, opponents have mostly failed to create viable democratic regimes. Even in some already established democracies, flaws in the system have become worryingly visible and disillusion with politics has mounted high. For example, consider the case of Brazil, a young democracy (first popular elections there only happened in the '80s) that has been struggling to maintain the harmony among its three supposedly independent State powers (legislative, executive and judiciary).

Since then, it had already two presidents impeached, including very recently, a considerably socialist government (that started with President Lula who was in power for 8 years) under the lead of former President Dilma Rousseff (a technocrat from Petrobras—Brazil State oil company—though from the same party as Lula, namely PT, the workers party). Her administration has been pretty disastrous as a replacement for Lula's, as she did not manage to control the collapse of the valuable work previously

¹⁰ THE ECONOMIST, “The first world war - Look back with angst” [Online], Published on Dec 21st 2013 (accessed on June 2015), <http://www.economist.com/news/leaders/21591853-century-there-are-uncomfortable-parallels-era-led-outbreak>

done by him, thus ending up being overtaken by its own vice-president, who is accused to have plotted a coup for getting market liberals to take over power once again in Brazil, after twelve years of a more leftist social government.

Yet, not too long ago (in the second half of the 20th century), democracies had taken root in the most difficult circumstances possible such as in Germany (which suffered the trauma of Nazism), in India (which had and still has the world's largest population of poor people), and in South Africa (which had been disfigured by apartheid). Decolonization created new democracies in Africa and Asia, and autocratic regimes gave way to democracy in Greece (1974), Spain (1975), Argentina (1983), Brazil (1985) and Chile (1989). The collapse of the Soviet Union created many fledgling democracies in central Europe.

These events also explain why so many people around the globe continue to feel attracted by a rules-based democracy. Democracies, on average, are richer than non-democracies, less likely to go to war, have a better record of fighting corruption, and perhaps, even more fundamentally, allow people to speak their minds and shape their own future more freely. No wonder why people in so many different parts of the world were prepared to risk a lot for this idea in testimony of its "enduring appeal".

Curiously, after the fall of Athens, where democracy was created and developed, as a political model, stayed pretty dormant until the Enlightenment. In the 18th century, only the American Revolution has produced a sustainable democracy, while during the 19th century monarchists fought a prolonged struggle against democratic forces. In the first half of the 20th century, nascent democracies collapsed in Germany, Spain and Italy. By 1941, only 11 democracies were left standing and its flame didn't look very strong

against barbarism until after WWII. It then impressively revived as the preferred system of advanced capitalist societies, and across the rest of the 20th century.

However, the progress seen in the late 20th century seems to have stalled in the beginning of 21st. The global democratic advance is coming to a halt in the midst of another crisis of capitalism, even though around 40% of the world's population is reported to live in countries that now declare to hold free and fair elections.¹¹ What we seem to be witnessing is that many “nominal” democracies are slipping into autocracies, maintaining an appearance of democracy through holding elections, but without the rights and institutions that are equally important aspects of a well-functioning democratic system. Recent past elections in Russia, for example, keep perpetuating those in power, by just alternating the same people from one role to another in government. And even in a more acknowledgeable democratic environment like Brazil,¹² election campaigns are making great use of public money for publicity, which worked just to maintain the same party in power for over 12 years, despite the many corruption scandals, which recently have led to the impeachment of former President Dilma Rousseff (seen by many as a conspiracy coup).¹³ Brazilian intellectuals are divided in favour and against the impeachment, but the fact is that both the Congress and the Senate houses have voted for

¹¹ See, for example, the graphics from Freedom House on Global freedom scores in The Economist special report at: THE ECONOMIST, *Special Report On Democracy* [Online], Published on 2014 (accessed on July 2015), www.economist.com/democracy .

¹² India has survived as a democracy since 1947 (apart from a couple of years of emergency rule) and Brazil since the mid-1980s for much the same reason: both have put limits on the power of the government and provided some guarantees for individual rights since then.

¹³ Let us note that companies like **Petrobras, BNDES, Eletrobras, Banco do Brasil, Correios** (among others to which the corruption scandals are related) are all federal (public) companies yet. The operation ‘Lava-Jato’ being conducted by the Federal Police of Brazil continues to investigate into all those cases and has already got many politicians and business people in jail at this point in time. For more details, please refer to the articles provided at subsequent footnotes.

the replacement of former President Dilma Rousseff by her vice-president Michel Temer, until new elections happen in 2018.¹⁴

Another setback was Russia, though after the fall of the Berlin Wall, in 1989, the democratization of what was before the Soviet Union seemed inevitable. The country took some steps in the direction of democracy under the lead of Boris Yeltsin in the 1990s. However, Yeltsin resigned nine years later, handing power to Vladimir Putin (former KGB head). Mr. Putin has been in power since then, as prime minister or as president. According to the Economist, as a postmodern tsar style who has been successful in destroying any democratic substance in Russia by “muzzling the press and imprisoning his opponents, while preserving the show everyone can vote, so long as Mr. Putin wins.”¹⁵

One more disappointment was the Iraq war, led by America, which started in 2003 and ended up deposing Saddam Hussein from power under false accusations, which misled world public opinion in the name of freedom and democracy. The answer, which can still be counted in thousands of deaths, turned out to be disgraceful for both countries, a recipe for instability. Many left-wingers accused America of showing-off its

¹⁴ See, e.g., on this subject:

THE GUARDIAN, “Dilma Rousseff impeachment: what you need to know – the Guardian briefing” [Online], Published on August 31 2016, <https://www.theguardian.com/news/2016/aug/31/dilma-rousseff-impeachment-brazil-what-you-need-to-know>;

LE MONDE, “Brésil : la présidente Dilma Rousseff destituée” [Online], Published on August 31 2016, http://www.lemonde.fr/ameriques/article/2016/08/31/bresil-la-presidente-dilma-rousseff-destituee_4990645_3222.html;

TERRA (Brasileiros), “Marilena Chauí: Não tem golpe? Está brincando comigo, companheiro?” [Online], Published on July 31 2016, <http://brasileiros.com.br/2016/08/marilena-chaui-nao-tem-golpe-esta-brincando-comigo-companheiro/>;

BLOG DO GABEIRA, “Fim de Jogo” [Online], Published on September 1 2016, <http://gabeira.com.br/fim-de-jogo/>;

YOUTUBE, “Leandro Karnal: Por que Dilma caiu?”, Published on Jul 29, 2016 <https://www.youtube.com/watch?v=2v2DPqpA-Fg>;

AGENCIABRASIL, “Favorável ao impeachment de Dilma, Cristovam Buarque é hostilizado no Senado” [Online], Published on September 1 2016, <http://agenciabrasil.etc.com.br/politica/noticia/2016-09/favoravel-ao-impeachment-de-dilma-cristovam-buarque-e-hostilizado-no-senado> .

¹⁵ THE ECONOMIST, *Special Report On Democracy* [Online], Published on 2014 (accessed on July 2015), www.economist.com/democracy .

imperialism, its desire for oil control, a clear “proof that democracy cannot put down roots in stony ground,” as the American political scientist, Francis Fukuyama has claimed. The mess in the Middle East is strongly related to these events, the crisis of contemporary capitalism and of other political systems around the world.

Adding to all this, the financial crisis of 2007-08 and the astonishing rise of the Chinese economy have both revealed fundamental weaknesses in the West’s political systems which worked to turn the Washington Consensus rather into a symbol for undermining self-confidence and reproach all across the emerging world, although it was previously used as an inspiring reference to developing countries. The Chinese elite argues that their model of tight control by the Communist Party coupled with a relentless recruiting of talented people into its upper ranks is much more efficient and less susceptible to gridlock than democracy. China’s critics rightly condemn the government for controlling public opinion in all sorts of ways as well as imprisoning dissidents and censoring freedom of expression, which is an unacceptable behaviour for democracy supporters.

However, many Chinese seem to be prepared to live up with their system if it can deliver enough growth. Indeed, some of its intellectuals (such as Zhang Weiwei of Fudan University, as well as Yu Keping and Wang Jisi of Beijing University) argue that capitalist democracy is destroying the West, particularly America. This because it institutionalizes gridlock, trivializes decision-making, overtly complicates simple matters, and put in power what they see as second-rate leaders (like G. W. Bush Jr. and now Donald Trump) into the presidency, as it allows sweet-talking and populist politicians to

mislead their people. According to them, this mess led many developing countries into disorder and chaos, instead of making them flourish as robust democracies.¹⁶

How then are we able to prove such intellectuals wrong about all this, in order to defend the Western democratic model, which enshrines values so cherished by Westerners such as freedom of expression, autonomy, dignity, and other so-called universal human rights?

The Arab Spring in Middle East countries, bringing together ideas of democracy via the Internet, lightened perspectives, but soon turned out to be delusions. The collapse of Hosni Mubarak's regime in 2011 amid giant protests that led to Egypt's ensuing elections, ended up putting in power the Muhammad Morsi's Muslim Brotherhood which treated democracy hopelessly as a "winner-takes-all" system. It granted almost unlimited powers, and led the army to step in (2013) and arrest its first democratically elected president. Current war in Syria and anarchy in Libya have also contributed to dashing the hopes that the popular arousal of the Arab Spring was leading to a democratic flowering across the Middle East, especially with the late uprising of the Islamic State and its atrocities all over Europe. Even Turkey, which once seemed to combine moderate Islam with prosperity and democracy, is now descending into corruption and autocracy.

The same trend, though less violent, has been followed by autocrat leaders in Latin American countries such as Venezuela, Argentina, and Brazil, all countries that have been struggling to overcome dictatorial regimes from not too long ago. Concerning

¹⁶ The 2013 Pew Survey of Global Attitudes showed that 85% of Chinese were "very satisfied" with their country's direction, compared with 31% of Americans. Some Chinese intellectuals have become positively boastful. Yu Keping of Beijing University argues that democracy makes simple things "overly complicated and frivolous". Wang Jisi, also of Beijing University, has observed that "many developing countries that have introduced Western values and political systems are experiencing disorder and chaos" and that China offers an alternative model. Source: THE ECONOMIST, *Special Report On Democracy* [Online], Published on 2014 (accessed on July 2016), <http://www.economist.com/news/essays/21596796-democracy-was-most-successful-political-idea-20th-century-why-has-it-run-trouble-and-what-can-be-do> .

Brazil, in particular, since the 1980s the country is managing to hold presidential elections and rebuild democratic institutions. The last elections there, however, resulted in the maintenance of the same ruling party at the presidency for over 12 years (PT— *Partido dos Trabalhadores*, meaning Workers' Party), thus, perpetuating a rather perverted simulacrum of democracy, without alternations of power, despite all the overt corruption scandals that have surrounded the country during that period up to now (through a huge and expensive marketing campaign for PT's re-election for the presidency that covered up most of the country's social and structural problems, as well as its huge unemployment rate and budgetary deficit).¹⁷ Not much more promising, since the introduction of democracy in 1994, South Africa has also been ruled by the same party, the African National Congress, which has become progressively more self-serving as well. In Bangladesh, Thailand and Cambodia, opposition parties have boycotted recent elections or refused to accept the legitimacy of their results.¹⁸

All this can serve to illustrate that building robust and manageable institutions to sustain democratic systems is a very difficult process, dispelling any hopeful pretensions that democracy may be a universal aspiration that would blossom rapidly and spontaneously once its first seeds are planted. These events suggest instead that democracy is a cultural practice. For example, rich Western countries have extended the right to vote only long after the establishment of sophisticated political systems (with

¹⁷ THE ECONOMIST, "Lessons of the fall – Impeachment may give the Brazilian Workers' Party a brighter future" [Online], Published on May 21 2016, <http://www.economist.com/news/americas/21699180-impeachment-may-give-brazilian-workers-party-brighter-future-lessons-fall?zid=309&ah=80dcf288b8561b012f603b9fd9577f0e>;

THE ECONOMIST, "Does the ousting of Dilma Rousseff weaken or strengthen Brazil's democracy?" [Online], Published on September 8 2016, <http://www.economist.com/news/americas/21706552-does-ousting-dilma-rousseff-weaken-or-strengthen-brazils-democracy-impeachment> .

¹⁸ THE ECONOMIST, *Special Report On Democracy* [Online], Published on 2014 (accessed on July 2015), <http://www.economist.com/news/essays/21596796-democracy-was-most-successful-political-idea-20th-century-why-has-it-run-trouble-and-what-can-be-do> .

competent civil services, institutions and entrenched constitutional rights) within societies that cherished crucial notions such as individual basic rights and independent judiciaries. Although such original model has also been considerably perverted, with a whole marketing industry now surrounding elections and transforming it into a big spectacle (sometimes rather ridiculous, like the current one happening in the USA, with a candidate like Donald Trump still risking being elected). But the essential feature of democracy rights, as originally envisioned, is that the power of the state needs to be balanced so that basic individual rights such as freedom of speech must be guaranteed, avoiding the temptation of majoritarianism, the idea that winning an election entitles the winner majority to do whatever it pleases.

If we are to fight legitimately for the democratic ideal of freedom of expression and other so-called universal human rights, in order to avoid the spreading of barbarism and destructive wars (such as that of the “Islamic State” or that of the brutal Latin American elites who allow dozens of thousands of children starving or being killed by drugs or guns in the streets) there is a need to learn, support, and develop social habits and constraints based on *mutual respect*, *responsibility* and *trust* among equal, engaged and autonomous agents. Concerning what regards supposedly free interlocutors within and among democratic societies (that is to say, in both domestic affairs and foreign relations) nourishment of *empathy* and *diplomacy* might be developed.

Taking by what people are using right now (computers, phones, planes, clothes, rooms, etc.), hard systems that require technology and expertise (even more if we consider the prospects for the so-called Internet of Things), if specialized parts are missing, they might not work at all. Everything we do is complicated, but not dynamically complex in the sense of being self-organizing nor self-renewing as natural

organisms and human organizations can be. Making an analogy with education nowadays, there is ever more pressure at specialization. The higher level you attain, the more you have to concentrate on narrower subjects... The fact is that such division of knowledge into fields of expertise has made general common understanding and coordinated actions not simple at all, near impossible to gather them together, or too complicated to the point of being despised and distrusted. So, it seems that the whole system must be reworked, and the entire methodology rethought, especially with respect to politics and social issues.

With regards to the financial and environmental crises affecting the world in this century, the pressure is mounting, to separate intellectual (formal) demands of *good practices of science* and *ethical demands* for a more just and sustainable *global social life*. Thus, despite specialized professional areas, scientists have become more and more exposed to ethical problems and tough dilemmas concerning the broad applications and implications of their work, including technologies. The determination and expansion of the human place, function, and powers within nature promptly requires a rather urgent acknowledgment of our interconnectedness from within the system (Peirce's principle of synergism), as Stephen Toulmin has already emphasized decades ago: "Acknowledging the interconnectedness between human conduct and natural processes is already a very important step; though agreeing on what constitutes their harmony is another, much harder task. But we just cannot afford giving it up!" (*Can Science and Ethics be reconnected?* - 1979.)

Now, *what is the relationship between a collective language of ethics, on the one hand, and individual systems and concerns of positive law, on the other?* Such conciliation between *ideal unity* and *practical diversity*, which is specially challenging in

democratic and pluralistic (multicultural) contexts, has also been addressed by Jürgen Habermas (*Struggles for Recognition*, 1994), precisely in his exchanges with Charles Taylor's *Politics of Recognition* (1992). Habermas has chosen to consider the matter in a more proceduralistic way which does not take such a question to be fundamentally problematic (though still very challenging), once we keep in mind the *two levels of political integration* involved in the dialectics between legal (*de jure*) and actual (*de facto*) equality within modern democratic societies: the continuous exercise that mirrors communicative action (i.e., the rhetorical and argumentative exercise in our terms) in approximating and accommodating individual (private) interests to more collective (public) ones.

We are thus reminded that there is *reciprocity* involved in this, such as Peirce has indicated, as those two levels are to be defined in relationship and interconnectedness to each other. Yet, if such levels were to collapse non-distinctively into one another, most cultures would certainly usurp state prerogatives at the expense of equal rights of other cultural forms of life, thus, violating the claim of *mutual (reciprocal) recognition* between them (Honneth 2000). Habermas, moreover, highlights that the *neutrality of the law*, vis-à-vis internal *ethical differentiation* stems, therefore from the fact that citizenry as a whole, especially in complex (pluralist) societies, can no longer be held together by a substantive *consensus on values*, but only by a *consensus on procedures*, so that the legitimate enactment of the laws can still be able *to represent a legitimate exercise of authority at all*. (On this respect, see also: Honneth 2000, Apel 1994a, b, and Garver 2004.)

More briefly, a supposed *universalism of legal principles* is to be reflected in a *procedural consensus* that is embedded in contexts of historically specific political

cultures through some kind of, say, *constitutionally determined boundaries as citizens*. In the end, we come to realize that it is not a matter of unifying scientific paradigms (as logical positivists first believed to be possible), in a progressive way towards eventually coming to establish absolute truth(s) (as metaphysicians and some epistemologists may still hope for). Rather, it comes down to finding some critical “overlapping moral consensus” for our political discourses towards *legitimately and justifiably co-constructing* sustainable democratic societies.

We have in mind Habermas’s work entitled *Struggles for Recognition* (1994), in which he responds to Charles Taylor’s *Politics of Recognition* (1992), for example, concerning the conciliation between *ideal unity* and *practical diversity*, especially challenging for democratic pluralist (multicultural) environments. According to Habermas, a proceduralistic way is not a *fundamentally* problematic question (although he acknowledges that it is challenging nonetheless), as seen above.

Also, as we shall see later in more detail, Karl-Otto Apel had already prescribed such a paradigm shift since the 1990s, when discussing the *logos proper to human language*.¹⁹ The proposal, formulated in collaboration with Habermas, led to the writing of a *History-Related Discourse Ethics*, work that take-up the call for a more conciliatory doubled-structured approach to communicative ethics, one by which we could, more appropriately, deal with the many conflicting forces and interests involved in the discussions’ dialectical movements and interactions as rational, responsible, and equally free interlocutors.

¹⁹ APEL, K-O. *Le logos propre au langage humain* (translation by M. Charrière and J.-P. Cometti). L’*éclat*. 1994a.

As Létourneau has also emphasized, inspired by Gadamer's *Truth and Method* and in connection with Dewey's own refraining from separating ethics and morals, the relationship between these two could be seen as a "hermeneutical relation" involving a continuous movement of criticism and appropriation with regards to past life forms (2013, p. 16). This movement—as will become more explicit later—can be illustrated by the rhetorical exercise performed by human language as a legitimate (responsible) *praxis* of meaning co-construction and sharing understanding (Perelman 1958, Grize 1996).

Philosophical discourse (whether political or scientific) may not make people test critically and didactically the adequacy of their past with regards to present self-awareness, but can make them more aware of different perspectives equally articulated by other people, that is, if we could indeed keep ourselves open to such differences and to those equal "Others" (Ess 2009). This constitutes, according to Garver (2004) the crucial core of our faith in democracy.²⁰ This is, as we shall see later, the hope that an increased focus on a more global sense of Digital Media Ethics could bring, one that would be centred on respecting basic universal principles and rights to any and all, no matter who and where, but which would be flexible enough to adapt to a plurality of cultural differences at local levels. One way would be that of setting up guiding standards such as that of expanding the Chart of Universal Human Rights to include rights in the digital domain so as to eventually write what the World Wide Web creator, Sir Tim Berners-Lee, advocates as a global "Magna Carta" for the Internet.²¹

²⁰ Unfortunately, however, it's becoming a practice that is being increasingly left aside for the sake of profit, even in reputable democratic 1st world countries such as Canada. Refer, e.g., to: HUFFINGTONPOST, "Le Future de la Science au Canada" [Online], http://quebec.huffingtonpost.ca/jean-patrick-toussaint/futur-de-la-science-au-canada_b_4738027.html .

²¹ See, e.g.: THE ECONOMIST, "The Wider World Web" by Sir Tim Berners-Lee [Online], Published on 2016, <http://www.theworldin.com/article/10648/wider-world-web> .

2.2. Dewey's approach: education, public opinion, and communication

John Dewey (1859 – 1952) wrote what we consider to be one of his most important texts, “Theory of Valuation,” in order to contribute to Otto Neurath’s editing work, entitled the *Foundations of the Unity of Science*. Otto Neurath was a member of the logical positivist group that formed the Vienna Circle during the 1920s and 1930s. Those so-called “logical positivists” generally abided to the *principle of verifiability* (or *verification principle*) which basically states that sentences gain their meaning by appealing directly or indirectly either to some form of sense experience (synthetic truths) or to the meaning of the words and the grammatical structure that constitute them (analytic truths).

They were almost science-intoxicated, some used to say, as for them philosophy was basically synonymous with philosophy of science and the study of the logic (language) of science per se. Their philosophy thus tended to be “atomistic” rather than “holistic” in nature, given that each foundational claim of science, being more verifiable than other claims, was thought to have its own truth value in isolation from all others, thus, posing a lot of weight to the fact/value distinction. Such atomism would later also come under strong attack by prominent thinkers such as Quine, Goodman, Austin, Putnam and Rorty.

It is at least quite an interesting fact that Neurath felt the need to convince Dewey to take part in his *Encyclopedia* and that, conversely, in order for the second to end up accepting such an invitation, the first had to come in person to Dewey’s home and swear that the logical positivists did not necessarily subscribe to the belief in “atomism” (“atomic facts” or “atomic propositions”). It is Ernest Nagel, who accompanied Neurath

on his visit to Dewey, who tells us this interesting anecdote of how he finally came to be successful in personally persuading him:

When he [Neurath] realized that his efforts at explanation were getting him nowhere, he then got up, raised his right hand, as if he were taking an oath in a court of law (thereby almost feeling Dewey's entire living room with a strong voice), and solemnly declared: "I swear, we don't believe in atomic propositions!" This pronouncement won the day for Neurath, for Dewey finally agreed to write the monograph, and ended their meeting by saying: "Well, we ought to celebrate!"²²

It is no doubt strikingly illuminating that Dewey's engaging himself into contributing to such a project resulted rather from an act of *trust* and *respect* for Neurath's visit and word as a *responsible* representative (however disputed by some) of the positivist group and a person who Dewey sympathized *personally*. It was not therefore a decision arrived at by Dewey out of a thoroughly scientific analysis of the positivists' own arguments and explanations, as they previously failed in persuading Dewey in many respects. Notwithstanding, under Neurath's oath, Dewey finally decided to contribute to it, and thus wrote his brilliant monograph about value attributions in general, including, to some extent, those deriving from critical and ethical judgments. For these are, according to Dewey, neither mere expressions of emotions nor revelations of any transcendental order, but rather powerful *statements of human ideals* that emerge from and can be testable by our *experiences* in dealing with each other accordingly.

What is *desired*, therefore, may not prove *desirable* once due consideration is given both to the *means* needed to achieve certain *ends* as well as to the *consequences* of those ends themselves. Such is, we believe, the very core of Dewey's insights on valuations. For one of Dewey's main preoccupations were to counter, on the one hand, what was back then a very strong tendency towards an exaggerated psychologism with respect to values, which made them increasingly confusing and obscure under the tag of

²² DEWEY, J. *The later works of John Dewey (volume 13:1938 – 1939)*, ed. Jo Ann Boydston). Southern Illinois University Press. 1939, p. xi.

being just mental events and thus inaccessible. On the other hand, Dewey also wished to counter an equally exaggerated scientism that would rather neglect completely the importance of valuation by equally tagging it as just a subjective mental process being therefore non-scientific because considered just an ideal.

Dewey's response aimed to highlight *the double character of valuation*, including both *prizing* (attachment or care) and *appraisal* (evaluation or estimation) in order to show that *propositions of valuation* are, as such, factual propositions that result themselves from "matters of facts" through a continuum between *means* and *ends*. They are, therefore, both observable and testable empirically. For, given also the observable and testable character of human conduct, one can *evaluate* propositions with respect to already existing valuations by considering their actual conditions and consequences. Such evaluations, in their turn, will help constitute future valuations, and so forth.

Dewey drops fact/value, objective/subjective, intrinsic/extrinsic, means/end distinctions that had been tirelessly emphasized by Cartesians, Metaphysicians, Positivists, and previous Empiricists alike, as all their doctrines tended "to pulverize society and experience into a number of atomic constituents, highly individualistic, having only external relations with one another."²³ According to him, instead of being considered disjunctively, such notions should be seen as continually and cooperatively interacting within encountered environmental conditions. He further observes that the emphasis on such a *continuum (relational character)* between means and ends, for example, does not prevent them from having their own "intrinsic" (immediate or inherent) qualities, given that what is "intrinsic" should not be identified in an extreme way to what is deprived of all relations. In other words:

²³ *Ibid*, p. 215.

Strictly speaking, the phrase “extrinsic value” involves a contradiction in terms. Relational properties do not lose their intrinsic quality of being just what they are because of their coming into being is caused by something “extrinsic.” (...) The extreme instance of the view that to be intrinsic is to be out of any relation is found in those writers who hold that, since values are intrinsic, they cannot depend upon any relation whatever, and certainly not upon a relation to human beings.²⁴

Such a notion of *continuity* is therefore of crucial importance for Dewey’s project and is also one that serves as a reference to his defence of a similar relationship between organic impulsive tendencies and more elaborate notions of *desire* and *interest*. Desires would be causally related to rawer impulses (i.e., being impulsion-driven), but functioning motivations to the formation of interests (chosen or reflected desires), resulting in due *deliberation* about the means available towards the “ends-in-view.”

Taken in such an *existential* context, valuation can be more safely considered in terms of “liking” and “disliking” if seen, therefore, as being closely connected to the words “caring” and “caring for” which are observable modes of behaviour under *specifiable existential situations*.²⁵ In this way, Dewey attempts to separate valuations from more ambiguous notions such as enjoying, which tends to suggest that no *affective-motor* action is exerted in order to receive gratification from something already taking place and apart from any *effort* employed as a condition of its production or continued existence (i.e., possibilities of existence—E&N, p. 416). Desires and interests, as far as they are causal conditions for the results of our actions, are therefore *potential means*, which should be *evaluated* as such. Such a point takes us then to the central part of

²⁴ *Ibid*, pp. 215 - 216. French version (translated by A. Bidet, L. Queret, G. Truc, 2011): pp. 109 -110.

²⁵ ‘Existential’, in Dewey’s sense, is not to be taken as directly identified to the ‘real’ and sharply opposed to the ‘ideal’, but rather in reference to chapters 2 and 10 of his other work *Experience and Nature* (1925, 1958, see especially ch. 10: pp. 405 - 416). There he refers to the *existential* as a particular conception that comprehends environmental arrangements, and which unites the precarious and the stable, the event and its structure, the recurrent and the changing, the contingent and the necessary, the incomplete and the accomplished, etc. Such a conception being therefore in line with his opposition both to sectarian atomists and dualists as well as with the crucial notion of continuity already stressed above.

Dewey's monograph that concentrates on the second signification of valuation, namely that of *appraisal* and its related propositions of evaluation.

The main idea objected by Dewey in this respect is that *appraisal* (evaluation) is a secondary (derived) affair that applies to things as just means, that is to be set apart from prizing and valuation in a fuller pregnant sense, as it applies to things as ends. As already mentioned above, Dewey responds to this idea by defending the idea of a relation of *continuity* (rather than one of independence) between *means* and *ends*, in which the formation of ends-in-view is influenced by the evaluation of means to be used towards arriving at them:

Observation of results obtained, of actual consequences in their agreement with and difference from ends anticipated or held in view, thus provides the conditions by which the desires and interests (and hence valuations) are matured and tested. ... It should not be necessary to point in evidence to the spoiled child and the adult who cannot face reality. Yet, as far as valuations and the theory of values are concerned, any theory which isolates the valuation of ends from appraisal of means, equates the spoiled child and the irresponsible adult to the mature and sane person.²⁶

Evaluations, in their turn, thus comprehend:

* evaluations of accomplished facts: done in a retrospective way by analyzing our experiences;

* evaluations of particular situations: presented to establish the available means towards arriving at the ends-in-view;

* evaluations by future reference: constituted by recommendations and predictions made through projections about what would or should happen, certain conditions applied. These are precisely the ones that allow us to form rules which can serve as criteria or 'norms' (in a relaxed sense) for judging the value of different forms of conduct.

²⁶ *Ibid.*: p. 218. (French version: p. 115.)

Every rule of action has to be general, but they are not thereby universals or absolutes, as we should always leave some room for a continuity of enquiry.²⁷ Now, a crucial question presents itself to Dewey: *Are such general propositions capable of announcing existential relations between means and ends, which can be attested empirically such as it happens to the causal relations dealt with in science (i.e., from cause to effect)?*

Dewey's answer is yes, due precisely to the relation of *continuity* from our impulsive tendencies (immediate or non-reflected desires) that are then transformed into interests (chosen desires) as a result of a critical enquiry. He therefore arrives at the following general conclusion: propositions of appraisal about means are testable empirically and they enter in the formation of desires and interests that consequently form the valuation of ends in their turn; this latter is thus the object of verifiable empirical affirmations and refutations.²⁸

The experimental method of enquiry can therefore *inform* valuation insofar as intelligent choices need to be made by taking into account empirical considerations and conditions so as to *promote the union between prizing and appraisal*, a union which thus reflects the dual meaning of valuation to comprehend *affective-ideational-motor* conditions and activities. We see that the activity of *deliberation*, as being the one responsible for transforming our impulsions into *informed interests* by taking into account the results arrived at by critical enquiry, is therefore the one highly prized by Dewey to be capable of countering oppressive custom and reactionary tendencies.

²⁷ *Ibid.*: pp. 212 – 220. (French version: pp. 99 – 105.)

²⁸ See, e.g.: *Ibid.*, pp. 217 – 220. (French version: pp. 112 - 114.)

We don't believe that Dewey is advocating that everything that may work in practice is to be straightforward and non-reflectively taken as good and correct. After all, functionalities and utilities are not to be taken as absolute ethical criteria either. However, there is a danger of misinterpreting him on this point. In this respect, we should notice that he emphasizes the role of philosophy as a critical activity that should walk hand-in-hand with science so that *experience can come to be permeated by social values as well*. In other words, his suggestion is rather that we adopt a *general scientific attitude* by taking the scientific method of enquiry as the common ground from where to start, that is, as a point of departure that can turn out to be very productive and constructive, instead of disruptive and destructive, *if we can manage to keep our bearings under sight*.

Problems begin precisely when we are confronted by incompatible interests (dilemmas), or with “ends-in-view” and principles of action that are not commonly shared by all (or at least by most of all), or when we cannot even agree on the evaluation of a given situation (even less about the available and adequate means to handle it), or when we are not capable of anticipating the results of a given course of action, but are pressed to act anyway, and so forth... The question remains whether or not the scientific method of enquiry can itself play a self-regulatory ethical role with respect to practices and, by extension, to human conduct in general, especially when dealing with moral dilemmas.

Or, otherwise, would one have to rely on some auxiliary method (say, the more basic argumentative method) that could play some ethical guidance from without science itself, so as to evaluate the practice and application of technologies developed within science through the use of some sort of a metalanguage? A hint of an answer to this problem is important to our goal of conceiving some ethical guidance for digital media

usage, as new Information and Communication Technologies (ICTs) increasingly challenge people today with respect to their wide applications, not only in science but in every domain. Some are the prospects and capabilities of tools for allowing societies to benefit from more deliberative and participative democratic systems (through more transparent institutions and representative governments, for example), pretty much in line with what Dewey envisioned that could happen in a great community.

For one thing Dewey's approach already indicated that philosophy, insofar as it is a critical activity, is capable of sorting out this problem by constructing a non-dogmatic alliance with science so as to make the best possible use of our *intelligence* (or, better yet, our rationality). After all, according to him, we need to make intelligent choices and to leave room for a continuity of enquiry. We believe that Dewey envisaged such a hint when he warned about the dangers of an *antisocial spirit*:

[T]his same spirit is found wherever one group has interest "of its own" which shut it out from full interaction with other groups, so that its prevailing purpose is the protection of what it has got, instead of reorganization and progress through wider relationships. It marks nations in isolation from one another; families which seclude their domestic concerns as if they had no connection with a larger life; schools when separated from the interest of home and community; the divisions of rich and poor; learned and unlearned. The essential point is that isolation makes for rigidity and formal institutionalizing of life, for static and selfish ideals within the group. That savage tribes regard aliens and enemies as synonymous is not accidental. ... The devotion of democracy to education is a familiar fact. The superficial explanation is that a government resting upon popular suffrage cannot be successful unless those who elect and who obey their governors are educated. Since a democratic society repudiates the principle of external authority, it must find a substitute in the voluntary disposition and interest; these can be created only by education. But there is a deeper explanation. A democracy is more than a form of government; it is primarily a mode of associated living, of **conjoint communicated experience**.²⁹

The above considerations on Dewey's insights about valuation could further strengthen our appreciation towards the rich dynamics of human communication as a communal action through dialogue (*duo logos*). In other words, we have to highlight the fact that we

²⁹ DEWEY, J. *Democracy and Education*. Digireads.com Publishing. 2005, p. 52. (Our emphasis!)

inescapably need to address communication (with its basic argumentative and dialogical nature) as an essential human praxis that permeates all others, including that of science itself, as we shall see below. We suspect, something like it would be required towards achieving “more intelligent human associations,” hoped for by Dewey with regards to his visions of a Great Community.

Such visions were explored in earlier publications, namely *Democracy and Education* (D&E 1916, 2005), *Experience and Nature* (E&N 1925, 1958), and *The Public and its Problems* (P&P 1927, 2012). Dewey’s answer relies heavily on his idealism about education towards forming “mature and informed agents” and on equating human intelligence to the ability of “observing consequences.” It seemed plausible to him, at that point in time, to apply the experimental method used quite “effectively” in the physical sciences, also to the social and political domains (*E&N* 1925: ch.1; *P&P* 1927: ch.1).

He initially referred to this proposal as “experimentalism,” although he would eventually become one of the three major figures of the so-called American pragmatism, along with [Charles Sanders Peirce](#), who invented the term, and [William James](#), who popularized it. Yet, the term “transactional” may better fit Dewey’s approach overall, as he came to emphasize the term when describing his theories of knowledge and experience. Anyway, the overriding and persisting themes throughout Dewey’s works were mainly those of *democracy* and *education* (1916), given his profound belief that the former constitutes “the one, ultimate, ethical ideal of humanity” to be accomplished through the latter, a good (effective) system of education.³⁰ We definitely wish to keep up with Dewey’s hopes for more deliberative and participative democracies, although we

³⁰ DEWEY, J. *Early Works* (1:128). Southern Illinois University Press, also famously cited in Douglas R. Anderson, *The Journal of the American Academy of Religion* (Vol. 61, No. 2). 1993, p. 383.

may differ substantially from his departing “transactional” paradigm for approaching the matter.

We are not suggesting by these remarks that Dewey necessarily abides to consequentialism, as one may well indicate that there are also some virtue components in his general ethics. However, we consider important nonetheless to highlight the distinction—which Dewey himself acknowledges—between deliberate vis-à-vis non-deliberate causal connections for phenomena in general. This distinction is significant for ethical assessments and the attribution of responsibility to people for their choices and actions, especially within ‘co-responsible,’ democratic environments such as those advocated in this work (according to the main principles of Discourse Ethics).³¹

Thus, it is important to avoid a fatal general mistake common to consequentialist approaches, in general, as they tend to neglect a fact about the dynamics within complex social systems and, accordingly, attempt to adopt an inappropriate “transactional” methodology (mainly subject-object oriented), insistently and non-distinctively applicable to all phenomena, even though some others may spring from different relations and sources of agencies. There are *causal connections* in all of them, but while some may not involve deliberate choices, reactions, and resentment (at least not directly), others may overwhelmingly and decisively do so. Dewey came himself very close to acknowledging such an important distinction when he says that

the prestige of the mathematical and physical sciences is great, and properly so. But the difference between facts that are what they are independent of human desire and endeavour, and facts that are to some extent what they are because of human interest and purpose, and which alter with alteration in the latter, cannot be got rid of by any methodology. The more sincerely we appeal to facts, the greater is the importance of the distinction between facts which condition human activity and facts which are conditioned

³¹ Consider, also, the paragraph right after the next quotation about natural and artificial events.

by human activity. In the degree which we ignore this difference, social science becomes pseudoscience.³²

In fact, it has ever since become indeed increasingly more difficult to draw a line between 'natural' (physical) and 'artificial' (human-made) entities/facts/phenomena, and the prospects do not look much different in the future just because we have machines interacting and affecting considerably our environment and daily-life routines. Yet, it's precisely due to such a distinction that we may still assume (with respect to "natural" events) the so-called *explanations* by "impartially" (i.e. descriptively, objectively) observing their consequences (retroactively). On the other hand, with respect to "artificial" (human-made) ones, we are or should be supposed to provide *justifications* before-and-after hand (prescriptively and responsibly). That is, in order to account for our choices and actions, which are supposedly taken according to ethical (legitimate, generally accepted) social norms and moral principles.

It is also a matter of good education, such as Dewey advocates, but (as he would probably agree) not in a sense of mere inculcation (i.e., indoctrination or conditioning). For we need to learn how to think for ourselves in a 'multi-sourced' way and using our intelligence (rationality) BOTH to learn from experiences AND to develop our foresight and improvisation skills, not just "effectively," but also in innovative and responsible ways, to better cope with unpredictability. The big question then turns out to be a double question in many fronts, as it is not only a matter of method (*how*), but also a matter of content (*what*) regarding the education of the youths, so as to prepare them for becoming sufficiently good, both professionally and as citizens. This is, indeed, not an easy task at all! Dewey definitely shares such concerns when he remarks, for example:

³² DEWEY, J. *P&P* 1927, 2012: p. 43.

The dual capacity of every officer of the public leads to conflict in individuals between their genuinely political aims and acts and those which they possess in their non-political roles. When the public adopts special measures to see to it that the conflict is minimized and that the representative function overrides the private one, political institutions are termed representative. (...) Custom consolidates what accident may have originated; established power has a way of legitimizing itself. Alliances with other potent families within and without the country, possession of large landed estates, a retinue of courtiers and access to revenues of the state with a multitude of other things irrelevant to the public interest establish a dynastic position at the same time that they divert the genuine political function to private ends.³³

Discerning such relations for accepting alliances and negotiations as being legitimate or not in politics is significant to define what we understand as representative democracy, which is connected to Dewey's views about it, explained in *The Public and its Problems*. Another serious tension can be found in another distinction that between *private* and *public*:

The distinction between private and public is thus in no sense equivalent to the distinction between individual and social, even if we suppose that the latter distinction has a definite meaning. Many private acts are social; their consequences contribute to the welfare of the community or affect its status and prospects. In the broad sense any transaction deliberately carried on between two or more people is social in quality. It is a form of associated behaviour and its consequences may influence further associations.³⁴

He develops here the ambiguous notion of “public interest,” supposed to result from multiple variables and convergences, among affected groups, in a continuous work of self-constitution through our socially constructed institutions. Dewey's terminology, despite the undeniable technological achievements of humanity throughout the (post) modern period, can still resonate badly among Europeans, especially once we consider historical events and harsh consequences such as the WWI, the American depression of the 1930s, and the horrifying “experiments” of Nazi Germany leading to the WWII not

³³ *Ibid*: pp. 82-84.

³⁴ *Ibid*, p. 46.

very long afterwards (not to mention the recent global financial crisis enacted by *Wall Street* as well as the global unprecedented environmental disaster).

Dewey's central hypotheses were also inevitably caught into a dilemma between his (somewhat Platonic) rationalism about democracy, *vis-à-vis* the persistent realities that kept knocking at his door. Given his own place in history, he could have never anticipated many of the 20th century horrors. Even though, he readily wrote an afterword (dated 1946) for a later edition of *The Public and its Problems* (Afterward 1954, Introduction 2012), in which he reinforces the main statements made in his book:

We commonly speak of some government as representative in contrast with others which are not. By our hypothesis all governments are representative in that they purport to stand for the interests which a public has in the behaviour of individuals and groups. There is, however, no contradiction here. Those concerned in government are still human beings. They retain their share of the ordinary traits of human nature. They still have private interests to serve and interests of special groups, those of the family, cliques or class to which they belong. Rarely can a person sink himself in his political function; the best which most men attain to is the domination by the public weal of their other desires. What is meant by representative government is that the public is definitely organized with the intent to secure this dominance.³⁵

He also felt the need to bring up in this afterword (which has been unfortunately considerably neglected and not very often translated into other languages) an acknowledgment of the need of political responsibility across nations, alongside with moral responsibility in people's private relationships, given their dangerous denial under the influence of the so-called doctrines of sovereignty, which both world wars had bluntly shown (*P&P* 1954: p. 223; *P&P* 2012: p. 36):

The change of attitude is not fundamentally an affair of moral conversion, a change from obdurate immorality to a perception of the claims of righteousness. It results from greatly intensified recognition of the factual consequences of war. (...) It is no longer possible to argue that war brings positive good. The most that can be said is that it is a choice of the lesser moral evil. (...) The same problem of where the line is to be drawn between affairs left to private consideration and those subject to political adjudication is formally a

³⁵ DEWEY, J. *P&P* 1954: pp. 81-82.

universal problem. But with respect to the actual content taken by the problem, the question is always a concrete one.³⁶

We are glad that Dewey added such an amendment, given that those tragic events also served to illustrate a problem with experimentalist approaches in general. If we are to take any of them as a consequentialist application into the dynamic and complex social and political domains (which we don't think he wished to be the case), then not only some consequences will end up being neglected (those considerably *unpredictable*, especially in the long run), but others may turn out to be just *irreversible* to the point of, once experiments start, further damages could only get cumulatively worse as time passes by (the famous "slippery slope" situations).

Moreover, we are also sympathetic to Dewey's vision of more participative and deliberative democracies, a vision that now has finally become possible, thanks to new Information and Communication Technologies (ICTs). Considering such a connection, it's worthy mentioning a couple of points about his philosophy of science, which is based on his theory of enquiry. In this respect, he had little patience for distinctions such as "the context of discovery" and "the context of justification," or between pure (basic) vs. applied (practical) science, or with any other (epistemological, cognitive, or logical) dichotomy framework that could draw a gap between enquiry and practice, science and action. In its place, he conceived a sophisticated, normative theory of enquiry, a distinction between cognitive objects of propositions and judgment, and the corresponding cognitive attitudes of affirmation and assertion, as well as a theory of

³⁶ *Ibid*, p. 224; *P&P* 2012, p. 37.

truth, without the extrapolations usually associated with more general, so-called pragmatist theories (Brown 2015).³⁷

If we look at human organizations (be it a family, a hospital, or a school), some of them can certainly be effective while also being part of complex systems, precisely because they are composed of many self-organizing agents, dynamically interacting among themselves towards common goals—though, also presenting what is called “emergent properties” that might come up without being planned (i.e., non-intentionally), depending on their own enactive structures. These comprise both the body (as a biological and personally experienced system) and the external world with which the body interacts (including other similar bodies, of course). Therefore, something in the lines of what is suggested by Francisco Valera, under the influence of his mentor prof. Humberto Maturana, via their *Integral Institute* dedicated to the multidisciplinary cross-fertilization of ideas (Maturana and Varela 1987).³⁸

Such dynamic (and to a certain extent unpredictable) cross-fertilized properties and variables turn out to generate various and, in many cases, excellent results, despite also bringing wicked problems (not necessarily meaning that they are amoral), in situations that are extremely difficult to solve. This is one of the challenges of pluralism (see Part B, chapter 4), as mutual co-operation towards solving such problems may even become the primal goal for its members within many organizations. However, as the old *dictum* goes: where there’s a will, there is a way. This is precisely why, generally speaking, new scientific insights and discoveries should not just be assumed, adopted, and imposed upon people through indoctrination or mere ‘modism,’ but implemented

³⁷ BROWN, Matthew J. "John Dewey's Pragmatic Alternative to the Belief-Acceptance Dichotomy" in *Studies in History and Philosophy of Science* (Part A 53). 2015, pp. 62–70.

³⁸ MATURANA, Humberto and VALERA, Francisco. *The Tree of Knowledge: The Biological Roots of Human Understanding*, Boston: Shambalah Press. 1992.

through education, via which societies as a whole might wisely (prudently) come to embrace them more consciously and reflexively. The other way may not only be dangerous but also bluntly counterproductive!

Within socially complex systems such as human organizations and institutions (societies consisting of conglomerates of them), we inevitably have to face not only unexpected new situations, but also tough dilemmas (including ethical and moral ones) involving decision-making processes that often involve, besides unpredictability, tough conflicts of interest, not to mention sensible cultural and religious differences and shocks. With respect to these, especially in critical moments (i.e., when we most need some moral guidance for reference), consequentialism can but be mute. After all, in dealing with complex, dynamic, and sensitive systems or organisms, we'd better not even start some sorts of experimentation.³⁹

Another significant acknowledgment that appears in Dewey's 1946 afterword, regards the ambiguous notion of "public interest":

And just as in the case of domestic political affairs, there will be the problem of discovering something of common interest amid the conflict of separate interests of the distinctive [national] units. Friendship may not be the cause of arrangements that serve the common interests of several units, but it's the outcome of the arrangements. General theory might indeed be helpful; but it would serve intelligent decision only if it were used as an aid to foreseeing factual consequences, not directly per se. (...) The position that economics is the sole conditioning factor of political organization, together with the position that all phases and aspects of social life, science, art, education and all the agencies of public communication included, are determined by the type of economy that prevails is identical with that type of life to which the name "totalitarian" justly applies. Given the view that there is but one form of economic organization that properly fulfills social conditions, and that one country of all the peoples of the earth has attained that state in an adequate degree, there is in existence an outstanding and overshadowing practical problem. (...) The problem of adjusting the relations of states sufficiently democratic to put a considerable measure of trust in free enquiry and open discussion, as a fundamental method in peaceable negotiation of social conflicts, with the point of view that there is but

³⁹ That is, mainly by remaining aware of cases (such as wars) where we cannot, eventually, just abort the system to re-start experiments all over again on a blank slate, as if nothing had happened previously at all.

one Truth, fixed and absolute and hence not open to the enquiry and public discussion, is now a vital one.⁴⁰

Dewey's approach is best to be taken as substantial for his views of democracy as a deliberative and participative exercise that requires, upfront, good education, leading to citizens who can demand better representation from their officials. Publics could also handle open discussions in a civilized way, despite their particular frustrations or disappointments concerning any system or method, in order to render participation and co-operation more effective. This is in line with what is supposed to happen with scientific research. Within scientific environments, we expect to have co-operation towards better results and analysis, but with critical spirit and the least indoctrination and partisanship possible, there is always room for revisions. This is one of the main points concerning his approach about democracy and education that we wished to emphasize here. We believe that he envisioned what has become possible in contemporary democracies, thanks to tools such as the Internet, which allows more collaboration among researchers, and also enables more participation from the general public with regards to their representatives, and more transparency from governments to their constituents.

However—let us not forget—we still have to keep up with another distinction by Dewey, the one between democracy as a social ideal, and political democracy as an actual system of government: “The two are, of course, connected. For the idea remains barren and empty save as it is incarnated in human relationships. Yet, in discussion, they must be distinguished. The idea of democracy in general is a wider and fuller idea than what can be exemplified by any particular State. To be realized, it must affect all modes of human association, the family, the school, industry, and religion.” (*P&P* 1954: p. 143;

⁴⁰ DEWEY, J. *P&P* 1954: p. 225-227; *P&P* 2012: pp. 37-38.

2012: p. 119) Alas, the toughest part lies precisely on deciding about rather complicated conflicting cases as well as developing foresight and being able to appropriately improvise in new situations. These seem to be challenges that human communication skills can so impressively deal with, namely when they have to face each other in a variety of situations in their daily social interactions. As Dewey came himself to emphasize more explicitly, there is a unique and dynamic duality, peculiar to human language:

Discourse itself is both instrumental and consummatory. Communication is an exchange which procures something wanted, i.e. the cooperative assistance of others. (...) Language is thus always a form of action and a means of concerted action, while at the same time, it finds in itself all the goods of its possible consequences. For there is no mode of action as fulfilling and as rewarding as concerted consensus of action: it brings the sense of sharing and merging in a whole.⁴¹

We also wish to stress that such acknowledgment about the dynamics of communication (*E&N* 1925, 1958: pp. 183–184; *P&P* 1927, 2012: pp. 160–218), as well as Dewey’s central focus on “good” education for more sustainable democratic societies, can both work as important reminders, however subtle and considerably neglected they may still be, of the fact that scientific methodology is already inserted in the broader argumentative logic within humans’ *communicative praxis*. Interlocutors, in democratic contexts, have to be respected as equals and let free to enable articulation.

With regards to “educating ourselves towards becoming mature and informed agents”, we need to talk about developing discursive and argumentative abilities in dealing with each other through “the winged words of conversation in immediate intercourse” (*P&P* 1954). As Dewey also acknowledges towards the end of *P&P*, communication is of vital importance in the formation of what he emphasizes as a “true”

⁴¹ DEWEY, J. *E&N* 1925: pp. 183-184 (our emphasis).

(organized) public that can only come out from the shadows through articulation and participation, given that:

Signs and symbols, language, are the means of communication by which a fraternally shared experience is ushered in and sustained. But the winged words of conversation in immediate intercourse have a vital import lacking in the fixed and frozen words of written speech. Systematic and continuous enquiry into all the conditions which affect associations and their dissemination in print is a precondition of the creation of a true public. But it and its results are but tools after all. Their final actuality is accomplished in face-to-face relationships, by means of direct give-and-take. Logic in its fulfillment recurs to the primitive sense of the word: dialogue. Ideas which are not communicated, shared, and reborn in expression, are but soliloquy, and soliloquy is but broken and imperfect thought. It, like the acquisition of material wealth, marks a diversion of the wealth created by associated endeavour and exchange to private ends.⁴²

If the idea is that of applying one single paradigm to all sorts of phenomena as in a *continuum*, for the sake of simplicity and of avoiding paradoxical dichotomies, a shift towards departing from a more prudent and broader (doubled) paradigm can be more carefully tuned to complex cases (i.e., subject-subject oriented) and may, eventually, fall subsequently into simpler cases (i.e., subject-object oriented). That is, whenever situations may be presented in which subject-matters can justifiably, appropriately, and responsibly (i.e., ethically) come to be treated as “instrumentalities” (objects) intended to fit “agreed-upon” interests (ends-in-view).

The good news is that such a broader paradigm, which we shall be advocating in what follows, can also be more naturally and appropriately receptive to abolishing antitheses (subject/object, individual/social, contextual/universal, etc.) that Dewey had desired to get rid of, through the *hypothesis of a continuum*, but could not actually accomplish. His own experimentalism remained however captive of the instrumentalist transactional paradigm (subject-object oriented) that he wished to escape from, as it could only work out the trick for the required convergences (i.e., approximations and

⁴² DEWEY, J. *P&P* 1954: p. 218, *P&P* 2012: p. 160.

transactions) by objectifying some externalities through making them collapse (adapt) somehow to intrinsic potentialities. Though, indeed, not by unilaterally converging them towards generally accepted interests (ends-in-view), in a typically instrumentalist way. Yet, the most liberating trick (the scientific inquiry ideal) was supposed to do just the reverse, i.e., to make subjects reach out, through opening up their own subjectivity (comprising their limitations), coming to see other entities (subject matters or objects of knowledge) from other (different) perspectives, by letting them openly “talk back to us.”⁴³

Thus, as Georges Dicker ⁴⁴ points out: “The most that can be said, I believe, is that Dewey does not clearly distinguish between ‘the object of knowledge’ and ‘knowledge of the object’. Consequently, he does not clearly distinguish between asserting that inquiry produces our knowledge of objects, and asserting that it produces the objects of knowledge. Nor does he clearly distinguish between denying that we can have knowledge of objects before and independently of inquiry, and denying that objects exist or have the properties we know them to have before and independently of inquiry. This may be seen from examining a group of passages in *The Quest for Certainty*, where Dewey shifts in a perfectly transparent way from denying (a) that the conclusions of inquiry are valid only if they conform to some prior and immediate *knowledge*, to denying (b) that the conclusions of inquiry are valid only if they conform to what *is the case* prior to and independently of inquiry.” (Dicker 1972, p. 160)

⁴³ Again, here, it was hard for Dewey to have anticipated such a reversal as it only became clearer after Thomas Kuhn’s groundbreaking work on scientific revolutions and the subsequent developments in quantum physics.

⁴⁴ DICKER, G.: “John Dewey on the Object of Knowledge” in *Transactions of the Charles S. Peirce Society*, pp. 151-166. 1972.

In any case, whenever we choose to objectify subject matters (i.e., objects of knowledge), to deal with them as manipulated entities to fit our own interests (whether or not these are other living creatures, rocks, or clever machines), we may not only curtail many of their additional possibilities (or potentialities), but also embark in a risky path of absent-mindedness and lack of respect, especially if we do not, from the start, continuously keep in mind and pay attention to their interconnectedness to us (and *vice-versa*). Thus, we can learn much more easily and thoroughly from whom and what we truly *care about*!

Now, with regards to scientific knowledge, more specifically, Dewey concludes his afterword of P&P by saying that

Aspects of the moral problem of the status of physical science have been with us for a long time. But the consequences of the physical sciences, though immeasurably important to industry, and through industry in society generally, failed to obtain the kind of observation that would bring the conduct and state of science into the specifically political field. (...) Science, being a human construction, is as much subject to human use as any other technological development. But, unfortunately, “use” includes misuse and abuse. Holding science to be an entity by itself, as is done in most of the current distinctions between science as pure vs. applied, and then blaming it for social evils is of no benefit.⁴⁵

As Létourneau has well remarked in connection to the balance required by the human sciences: “If Dewey didn’t talk of *hermeneutics* but rather of an ‘empirical naturalism,’ it was not, however, without recognizing that, by approaching new elements (i.e. ‘objects of enquiry’) with our own old concepts, we come to operate sometimes a profound renewing of our vision about such old concepts. This may represent a critical radicalization of hermeneutics, as enquiries can thus allow us to transform our very concepts about things. Such an empirical radicalization of enquiry is therefore what

⁴⁵ P&P 1954: pp. 230-231, 2012: pp. 39-40.

makes possible a precious hermeneutical exchange with our past without getting imprisoned by its rulings.” (Létourneau 2013, p. 10)⁴⁶

As we shall see later (Chapter 3), such an envisioned liberation through critical interpretation is a significant aspect that Apel and Habermas have picked up from pragmatism, mainly from Peirce’s semiotic approach, so-called pragmaticism. They have both been attempting to promote, by the bias of Discourse Ethics and Critical Theory, that the “logic of enquiry” is also a hermeneutical process still immersed into tradition and intrinsically dependent on argumentation communities, of which the scientific institution constitutes perhaps the most important and explicit contemporary example, so as not to fall back into the same pitfalls of a “naturalistic fallacy”.⁴⁷

The facts look indeed just undeniable: humanity faces at the present time an unprecedented environmental, economical, and humanitarian crisis, which surmounts the pressure for better decisions and actions of philosophical and political systems worldwide. As we reach the 18th year into the 21st century, and already completed 100 years since WWI, revisiting some pragmatic basics, with its critical supporting foundations for democratic systems, may sound at least a prudent thing to do. A long period of economic recession with serious material consequences has already become a rough load. A mixture of difficult identity issues such as race, ethnicity, class and gender, that usually questions western values and lifestyles, can definitely become the overload

⁴⁶ *N. of T.*: free translation from original French version entitled “Une connaissance valide sur les questions d’éthique est-elle possible?”, by Alain Létourneau, 2013.

⁴⁷ The term was first introduced by British philosopher [G. E. Moore](#) in his book *Principia Ethica* (1903, 1968), where he argues that it’s irremediably fallacious to explain that which is *good* reductively, in terms of natural properties such as ‘pleasant’, ‘desirable’, ‘admirable’, etc. The naturalistic fallacy is also more generally related to the equally fallacious ‘appeal to nature’ towards claiming that what is natural is inherently good or right, and that what is unnatural is inherently bad or wrong.

number 2. The result may be the worst of both worlds, and Dewey's words can be inspiring in this respect.

2.3. The Semiotic Approach: a Peirce-Mead synthesis

The individual mind can exist only in relation to other minds with shared meanings. (Mead 1982: 5)

The distinctive American pragmatic tradition was inaugurated and its name invented by **Charles Sanders Peirce (1839–1914)**, who came to be known as the father of pragmatism. He offered a structure able of shedding light on a range of issues regarding democratic systems. Educated at Harvard, Peirce was the son of one of its mathematics professors. He was both a logician and an experimental chemist. It is stated that Immanuel Kant's works exerted an important influence on him, although, he was later also influenced by Thomas Reid and other commonsense philosophers.⁴⁸ All of them thus have contributed to the development of his so-called anti-nominalist 'critical common sensism' or 'critical realism.'

According to Vincent Colapietro (1989), his semiotics should be regarded less as a formal model of linguistic analysis (in the lines attempted and failed by logical positivism) than as a broader and sufficiently flexible epistemological tool to approach, conceptualize, and describe events in any communicative (i.e., expressive) way. In this sense, the logic of scientific enquiry constituted Peirce's main preoccupations. Taking this into account, we follow Colapietro in advocating Peirce's so-called pragmatism to be complemented by George Herbert Mead's emphasis on the notion of "reflexivity"

⁴⁸ *The Philosophers – Introducing Great Western Thinkers* (ed. By Ted Honderich). Oxford University Press. 1999.

(Mead 1929). By means of this notion, Peirce's insights about **self-control, agency, and autonomy** could all be strengthened, as Colapietro sensibly suggests (1989).

This combination might achieve a balance able to take into account the radical singularity (i.e., uniqueness) of the human capacity to communicate and interpret, which may end up being regretfully lost by the rigidities of convention and its hegemonic framing if left alone. This proposed semiotic synthesis, with its wide range of possibilities, might help us better comprehend the logic implicated in the process of language constitution and, consequently, of the very reasoning process. It might offer a conceptual map for understanding the dynamics embedded in human beings' communicative interactions and capabilities.

According to C.J. Hookway (1999), Peirce's early epistemological works (1860s—1870s) stems from a rejection of Cartesian strategies in philosophy. Hookway explains that they were not in accordance with our ordinary practice of carrying out investigations, which is a cooperative venture, instead of a solitary cognitive venture (as Descartes had envisioned). As we suspect, ordinary enquiry takes some propositions for granted (instead of skeptical doubt contrary to common-sense, as suggested by Descartes) and is impressed by a number of various arguments supporting a certain conclusion (instead of a single indubitable train of thought to ground any belief, such as in the Cartesian fashion).

On these lines, Peirce proposes to investigate norms that govern cognition on the basis of our everyday and scientific experiments of enquiry, which only begins when one or more previously settled beliefs are disturbed. Doubt is thus replaced by other settled beliefs, and errors inevitably emerge. As Hookway (*Ibid*, 1999) also reminds us, Peirce

was thus one of the first philosophers to arrive at a satisfactory understanding of statistical reasoning, central to his account of science.

As Cheryl Misak puts it, Peirce's philosophy was an attempt to: "take what he saw as spurious metaphysics out of transcendental idealism. He thinks there are indeed preconditions for some of our central capacities. But these preconditions are not necessary, as Kant thought they were. They are simply regulatory assumptions of our practices—things that we have to assume are true, if we are to carry on in the way it seems that we must carry on."⁴⁹ Misak points out, moreover, that Peirce was mainly aligned with British empiricists because he advocated a kind of "verificationism" (2013, p. 28).

Misak also explains that his famous pragmatic maxim, according to which theories and concepts must be linked to experiences, expectations and consequences, was elaborated as part of his theory of enquiry in the second paper of the series entitled *How to Make our Ideas Clear*. Peirce states the principle as follows: "Consider what effects, which might conceivably have practical bearings, we conceive the object of our conception to have. Then our conception of those effects is the whole of our conception of the object... The opinion which is fated to be ultimately agreed upon by all who investigate, is what we mean by the truth, and the object represented in this opinion is real." (CP 5,465 - 467)⁵⁰ Peirce put forward his so-called *pragmaticism* as a method of ascertaining the meanings, not of all ideas, but of so-called intellectual concepts, that is to

⁴⁹ MISAK, Cheryl. "Charles Sanders Peirce (1839-1914)" in *The American Pragmatists* (Part I, ch.3). Oxford. 2013.

⁵⁰ References to Peirce's collected papers are to *Collected Papers of Charles Sanders Peirce* (vols. 1-8, Harvard University), mentioned as 'CP' (followed by vol. # and paragraph #). To *Writings of Charles S. Peirce: A Chronological Edition* (vols. 1-3, Indiana University) as 'W' (followed by vol.# : page #). As for his manuscripts, the numbers are according to the catalogue by the Houghton Library at Harvard University and are indicated by 'MS' (followed by manuscript # and pages).

say: “of those upon the structure of which, arguments concerning facts may hinge” (*Ibid*, p. 467):

The above-mentioned principle definitely bears some resemblance to the famous verification principle of Logical Positivists, but there are important differences nonetheless, namely: **(a)** Peirce expected the content of a conception or hypothesis to develop as our scientific knowledge advances, indicating that by clarifying conceptions we list only conditional expectations that are “true by definition” (nominalism); **(b)** he insisted that the principle could only be taken seriously by those sharing his realism about natural necessity with conditionals (would-bes) that report “real facts about the world” looking for conceptual clarifications (Hookway 1999, Misak 2013).

We understand Peirce’s logic as a theory of cognitive norms comprehending methods of inquiry, standards of inference, rules for identifying plausible hypotheses, and principles for clarifying meanings. It is taken by some of his commentators to somewhat “correct” the Kantian framework through a kind of phenomenological investigation, with a sophisticated approach to philosophy, based on a classification of the sciences organized around three normative sciences, namely: **ethics, aesthetics, and logic** (Hookway 1999, Misak 2013). His system of categories is thus to be understood from the perspective of his logic of relations, where properties and relations are classified according to the amount of “*relata*” that they have, i.e.: one-place predicate, two-places (dyadic) relation, or three-places (triadic) relation (Misak 2013).

Accordingly, we may be entitled to say that he classified phenomena and elements of reality in a numeric-temporal way, depending on whether there are forms of *firstness* (i.e. raw and unique qualitative character of spontaneous and possible manifestations of experience in the *present*), *secondness* (i.e. interaction relations against

one another within a context including the *past* history that led to an actual situation), or *thirdness* (i.e. continuity of intelligible interactions mediated by linguistic interpretations of generality and categorization into laws—third mediating facts or patterns—that serve as a referential predictive guidance to the *future*).

As far as we understand it, the irreducibility of *thirdness* to any of the other two forms is a distinctive part of Peirce’s philosophical proposal, which aligns realism in opposition to nominalism, as triadicity is non-escapable from human experience, but rather helps constitute it, while *firstness* (the possible) implies *secondness* (actuality, presentness). These categories, running in parallel to the temporal notions of present, past and future, are thus to be considered as interconnected, given that they do not act in isolation: humans are affected by them and apply them altogether in their interactions, both with each other and with the rest of the environment (Colapietro 1989, p. 81–83).

Furthermore, the most important forms of *thirdness* involve meaning and representation through “signs,” as all Peirce’s work seems to be underpinned by his sophisticated theory of meaning, that is, his semiotics. Although everything is a sign, strictly speaking, the most interesting ones for him were thoughts and assertions of a scientific (rational) intelligence. This because they only denote an object by being understood or interpreted as “standing for another object.” The key to his account of *thirdness* thus seems to be his notion of interpretation, whose alterations in its modes correspond to “alterations in habits of action.” Accordingly, his semiotics can perhaps be summarized, primarily, as a theory of understanding, that is, an account of how humans arrive at their interpretations of signs: “as autonomous interpreters (or rational minds) wedded to ideals and regulated by norms.” (*Ibid*, p. 111)

Moreover, allowing the creative possibility of meaning invention and expansion within “semiosis” (i.e. sign creation activity), human beings not only can depict the most precious contribution that the arts can offer (i.e. its creative aspect), but the same applies to the sciences as well as any other form of human authentic communicative interaction (*Ibid*, pp. 84–85). The condition is that they should constitute legitimate “transmitters of information and understanding” regarding the world of our experiences, given that the interpreting thought is what mediates between the sign and its object. Thus, based on the possibility of different nuances of meanings, concepts, and perspectives, Peirce argues that the dynamics of human language can flourish as the events “present them to us,” so-to-speak, within the diversity of nature (*Ibid*, p. 87). In this way, we may say that human beings incorporate (or integrate) other selves and the environment into the experiences of their “intelligible world.” And such a variety and richness of possibilities is what keeps language alive, that is, dynamically active (*Ibid*, pp. 96–97).

For Peirce, then, there seems to be only *aspects of predominance* by one or another of the three categories, depending on the context and conditions of each particular situation, as they are never completely isolated, that is, without a considerable loss of understanding and possibility of (cognitive) knowledge and (communicative) explanatory capacities. For that would mean a curtailment of dialogue, i.e., a shrinking indisputability (“out of discussion” *status quo*), such as promoted by radical fundamentalists of all sorts, that leads to the establishment of some sort of “strike of events” with pre-established models of interpretation (*Ibid*, pp. 112–116).

Also, it is important to point out that objective explanation (such as aimed by the logic of scientific enquiry, which particularly preoccupied Peirce) is not to be confused with a “distance from the source,” but rather with welcoming diversity, variety of

meanings and possibilities, in order to select the best, in the sense of those most rationally acceptable (Toulmin 1961). Analogously, we may be allowed to say that what can considerably limit genuine communication (e.g., in the practice of journalism) is the premature codification and tailoring (so-called “framing” or “boxing”) of events that would rather close doors for other possibilities and for the incorporation of other voices and interpretations for such events.

According to Colapietro (1989), Peirce’s semiotics considers that all human experiences are interconnected to each other, as well as to “meaning constructions” through language, because it is a normative account of reasoning that entails a “commonsensical understanding” of human agency. As Peirce explains, regarding *agencies* and *autonomy*, in the context of semiotics as a theory of reasoning (reasoning being the form of semiosis in which he was most interested), self-governance is rooted in self-observation and self-criticism (“The Basis of Pragmaticism”, c. 1905: MS 280). Agents thus have the power to exert real, albeit limited, control over the course of their conduct, an understanding that constitutes the core of the notion of an “autonomous agent” (Colapietro 1989).

In “How to Make our Ideas Clear,” as Misak (2013) points out, Peirce dedicates himself to clarify ideas so that they are not subject to metaphysical deceptions, stating the following: “Consider what effects, which might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these is the whole of our conception of the object” (W3: 266, 1878). His aim was “to come down to what is tangible and practical, as the root of every real distinction of thought, no matter how subtle it may be; and there is no distinction of meaning so fine as to consist in anything but a possible difference in practice” (W3: 265, 1878).

As we had mentioned above, Peirce apparently categorized the so-called normative sciences into aesthetics, ethics and logic, which collectively lead to Peirce's maxim and to his indicating "how feeling, conduct, and thought ought to be controlled" (MS 655, 24, c. 1910). Accordingly, the functioning of signs, both as we reason to ourselves and communicate with each other, can be understood as an exchange between a 'graphist' and an "interpreter," that is, the producer of signs and his/her receiver. Then, when this exchange operates at the level of argumentation (MS 280):

The two minds must be capable of coming to an understanding and of observing when it is reached. This supposes a power of deliberate self-controlled thinking. Now, nothing can be controlled that cannot be observed while it is in action. It is there a requisite that both minds, but especially the 'graphist-mind,' should have a power of self-observation. Moreover, control supposes a certain complicity (or passivity) to be controlled by acting in accordance with definite general tendencies of a tolerably stable nature, which implies a reality in this governing principle... But these habits must also be capable of being modified according to some ideal in the mind of the controlling agent; and this controlling agent is to be the very same as the agent controlled, the control extending even to the modes of control themselves, since we suppose that the 'interpreter-mind' under the guidance of the 'graphist-mind' discusses the rationale of logic itself. Taking all these factors into account, we should come to the same conclusion that common-sense would have jumped at the outset; namely, that the "graphist-mind" and "interpreter-mind" must have all the characters of personal intellects possessed of moral natures.⁵¹

Moreover, as Colapietro (1989, Introduction) points out: "the repudiation of the Cartesian starting point means a recovery of flesh-and-blood actors who are continuously defining themselves through their give-and-take relationships with both the natural world and each other." In this respect, his refusal to eliminate the "acting subject" (agent) along with the Cartesian *cogito* defines the superiority of semiotics vis-à-vis the anti-humanist orientation of Saussure (structuralist) and his offspring's decentering of the subject that amounted to nothing less than the liquidation of the agent.

⁵¹ PEIRCE, C.S. *MS 280*: pp. 31-32.

On the other hand, Colapietro adds: “in opposition to a then-dominant *mentalist* tradition that has defined signs as the ‘expressions of minds,’ Peirce proposed a thoroughgoing perspective in which the reality of mind is seen as essentially the development of a ‘system of signs’” (1989, p. XX). Accordingly, instead of explaining ‘signs’ in reference to a mysterious and occult faculty referred to as mind, signs themselves could be used to better explain such a rather private power, via those “manifest and inherently intersubjective processes,” called by Peirce *semioses* or sign activities (Colapietro 1989).⁵²

Now, according to C.J. Hookway (1999, p. 187 - 194): “this is because a ‘realist’ account of law involves finding ‘mediation’ in the natural world, and sign interpretation is our best model of mediation.” In his interpretation, Peirce’s understanding of the universe is not governed by determinist laws, as observation could never be so exact as to avoid allowing “slight deviations,” thus, appealing to what he called “chance spontaneity” of events. Otherwise, we could not make sense of growth and the increasing complexity of nature (Ibid, p. 194).

Georg Herbert Mead (1863–1931), a social pragmatic American philosopher and a pioneer of sociology at the University of Chicago, was a prominent member of the Chicago School. For him, the social aspect of humans can be understood as “sociality,” the capacity of being several things at once as they enter into systematic relationships with other structures. Besides, human beings also have the capacity of “taking the role”

⁵² Karl-Otto Apel argues however that this conceptual revolution advocated by Peirce does not however entail a ‘reductionistic’ view of human consciousness in the lines of structuralism or positivism, for it does not commit one to an ‘epiphenomenalist’ position and as it can still account for the inwardness and autonomy characteristics of human agents that define human selfhood. (See his “Peirce’s approach to the self”, 1989, chapter 5.)

of others, as we keep interacting with different people. This is, after all, how each self can arise in “experience”: as minds capable of occupying other systems as well as their own.⁵³

Mead thus speaks of “role-taking” in an interpersonal sense, referring generically to two kinds of roles in ordinary conversation: that of “communicator” and of “communicatee,” a distinction that can be seen in the infant’s acquisition of language as (s) he seems to learn how to understand the language of others (communicator role-taking) even before (s) he learns to initiate speech (“communicatee” role-taking).⁵⁴ During ordinary conversation, interlocutors engage in these two kinds of roles, alternatively, as we will see below in more detail (such as depicted by Piaget’s model of interaction - 1965—see section 3.2.2 below).

Our purpose at this point is to emphasize the “*communicator-communicatee*” distinction as the birth and use of interpersonal or linguistic meaning, which become possible because of the “communicatee” role-taking (i.e., as a receiver) emerges. In contrast, the origin of the “reflexive self,” which can be seen as an object to itself, becomes in its turn possible because the “communicator role-taking” (i.e., as sender), emerges. Presumably, these two may emerge together, in some sort of “bundle of capacities,” as the child develops her/his cognitive abilities further with time, such as Piaget has well observed.⁵⁵ Nevertheless, Mead depicts them as having distinctive theoretical functions in his scheme for the “modes of reflexivity” as shown below (Wiley 1994):

⁵³ Source: *Internet Encyclopedia of Philosophy* [Online], Accessed on July 2015, <http://www.iep.utm.edu/mead/>

⁵⁴ WILEY, Norbert. *The Semiotic Self*. University of Chicago Press. 1994.

⁵⁵ PIAGET, J. *Plays, Dreams and Imitations in Childhood* (1945), *Sociological Studies* (1965).

	<u>Intra-subjective</u>	<u>Interpersonal</u>
<u>First-order</u>	1 Ordinary thought	2 Ordinary conversation
<u>Second-order</u>	3 Thought about thought	4 Conversation about conversation

Figure 1: Mead’s modes of reflexivity.⁵⁶

The two-by-two layouts of the table is intended to show the relationships between the two main modes (intra/inter subjective) and the two orders (1st/2nd), where each one of them can function in each order, given that intra-personal reflexivity can either be about ordinary objects and thoughts or about earlier reflexive acts (thoughts) as depicted in boxes 1 and 3. The difference between boxes 2 and 4 refers to when a conversation “turns back on itself” and people begin reflecting and talking about the way they communicate, thus, becoming of second-order (*Ibid*, pp. 87–88).

According to Mead (*Ibid*, pp. 90–93), these two orders are then related to each other by four different modes and corresponding “kinds of solidarity” concerning the *structure-content* distinction and its relations to the two orders. This happens in such a way that they can be restructured (rearranged) temporarily so that the “me” (past reference) or the ‘you’ (future reference) in the semiotic triad can each come to occupy the temporal place (and speak as) the “I” (i.e., the agency of the present). Mead depicts such relations as follows (*Ibid*, p. 94):

⁵⁶ Source: WILEY, Norbert. *The Semiotic Self*. 1994, p. 87.

	<u>First order</u>	<u>Second order</u>
<u>Structure</u>	1 I-you-me structure	2 Restructurings (rearrangements) of the I-you-me structure
<u>Content</u>	3 Ordinary thought	4 Thought about thought

Figure 2: Structure-content vs. orders. ⁵⁷

Therefore, although the speaking role is, strictly speaking, held exclusively by the “I” (agency of the present), the table above represents the possibility allowed by our powers of memory and of abstraction to find ways in which the “me” of the past, and the “you” of the future, can also “speak through the I of the present” (*Ibid*, pp. 93–94). When the speaking podium rule is thus somewhat loosened and the past or future self is allowed to occupy to a certain extent “the speaking position of the present,” the structure of the self, gets (temporarily) restructured and goes into a second-order stance (*Ibid*, p. 94).

As Norbert Wiley (1994) further explains: “When the contents become second order, the thought process interferes with and changes the thought of the first order. And when the structure becomes second order, it changes the structure of the first order, specifically by allowing the two non-present agencies—the ‘me’ and the ‘you’—to occupy the structural location of the I” (p. 94). Moreover, the unique qualities of “first-order reflexivity” is considered both by Mead and the pragmatic tradition in general, as

⁵⁷ Source: WILEY, N. *Op. Cit.*, p. 94.

being intrinsic to the knowledge systematic process, given that they are necessary conditions for knowing anything at all (*Ibid*: introduction). According to Mead (*Ibid*, pp. 94 – 96), more specifically, all consciousness and thought is semiotic, and all semiotic is reflexive. This squarely contrasts to the Cartesian or (postmodernist) de-constructivist traditions which both presuppose that there is no reflexivity at the first order, this being rather “intuitive” (i.e., non-reflexive).

The distinction between those two orders also operates at the upper semiotic levels of *social organization and culture*. The culmination of such “sociality” is emphasized by Mead (*Ibid*: introduction) to be also found, to some extent, throughout the universe as each emergent object belongs to different systems in its passage from the old to the new. Given to such a systematic relationship with other structures, thus, such objects possess the characteristics they have precisely due to their memberships in these different systems. This is, of course, in line with the *principle of synergism* that constitutes the heart of Peirce’s metaphysics as well (refer to section above about Peirce).

Therefore, as sensibly suggested by Wiley (1994), the understanding of “selfhood” as arising in the process of social experience and activity constitutes a common trait in the philosophies of both Peirce and Mead (*Ibid*: introduction). In addition, we see that the recognition emphasized by Mead of the essential role of language in humans, in the form of reflexive communication, can (together with Peirce’s semiotic “triadicity” of the self), bring up important implications for supporting and defending the value (or, yet, the necessity) of a theory of our unique self as human beings. For, although most communication is linear between “*communicator*” and “*communicatee*,” Mead’s concept of “reflexivity” reasonably requires us to acknowledge that it is, in part, also reflexive between him/herself and the communicator, in considering

the full dynamic semiotic stream of communication, that is: one that goes out not only to the listener (or audience), but one that also comes back (reflexively) to the speaker him/herself, thus further fomenting the cycle of communication.

Wiley (1994) uses the metaphor of a “container” to express the structure of “contents,” albeit recognizing that it may be misleadingly spatial and not able to catch the way in which the semiotic dynamic structure and contents fully interpenetrate each other (pp. 26 – 28). It is thus as loose as the manner in which a person may say that (s) he has something in mind as visualizing this “in-relationship” as resembling that between a container (the mind) and that which it contains (the contents). We should keep in mind that this relation of “containment” (spatially depicted in figure 3 below), involving Peirce’s abstract semiotic triad of the “sign-interpretant-object” and the communication-embedded relationship capturing Mead’s concept of “reflexivity,” is not spatially physical but rather semiotic and abstractly meaningful. This process is depicted by Wiley through the following “hexad”:⁵⁸

⁵⁸ A point that shall be most useful in the particular cases of Internet interaction we deal with later (ch.4), as the actual ‘physical presence’ of the interlocutor became somewhat loose or ‘virtual’.

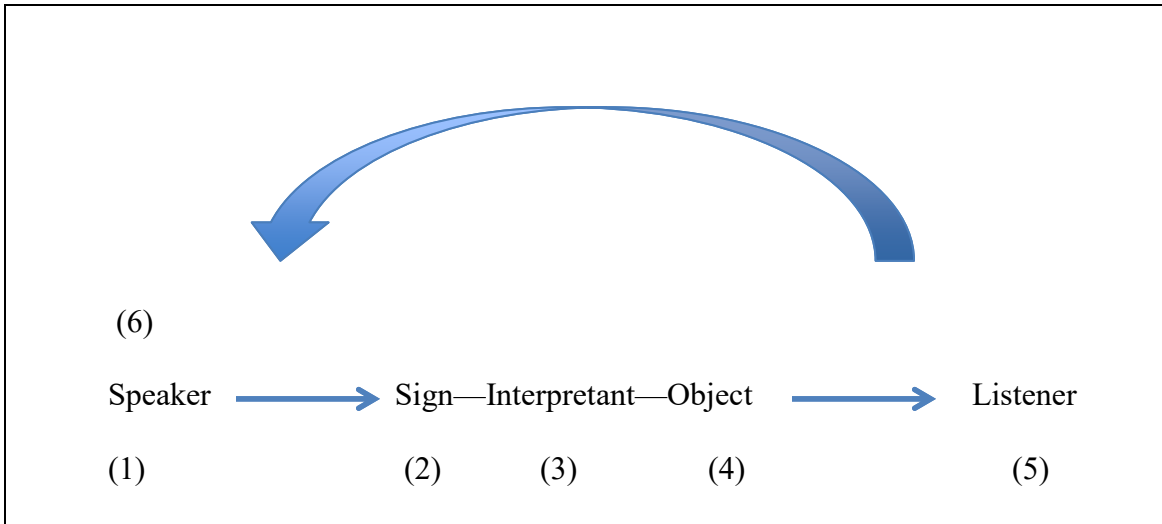


Figure 3: The communicative *hexad*.⁵⁹

This six-place relation may include an actual “addressor-addressee,” in more concrete situations when the “triadic meaning” is actually communicated to someone else, but it does not necessarily imply an “utterer-interpreter” distinctively physical presence, as it also incorporates the notion of “reflexivity” that adds the place (6) to the scheme. The speaker communicates to the listener via “semiotic triads” (sign-interpretant-object) in a somewhat linear manner, but at the same time the speaker, using the listener as a kind of mirror, communicates back to him or herself, counting twice in the hexad, that is, both as *communicator* and as a reflexive “*communicatee*”.

Such a “synthetic” Peirce-Mead model incorporating the semiotic triadic self-structure is therefore suggested for taking into account the peculiar singularity of individuals as reflexive beings that can experience past-present-future through symbolic language, abstraction and interpretive capacities, so that it can appropriately keep up with the continuous and endless process of our dynamic linguistic interactions. Also, it is one that can be both encompassing and flexible enough to avoid slipping into self-deceptive

⁵⁹ Source: WILEY, Norbert. 1994, p. 28.

and counterproductive dyadic models (in spite of neo-Cartesianisms or any variety of downward/upward Reductionism attempting to counter it) that do not take reflexivity into account, giving room for elitism and racism, and leading to endless wars instead of enabling human liberation.

We defend that such an elastic model of the “semiotic self,” with its inviolable uniqueness, may consistently explain a concept such as “cultural variation,” that could help us better understand our relations to each other as well as deal with our democratic institutions in a more participatory way. It may be, we suspect, the best option available to explain both class and status politics democratically. In contrast, neo-Hegelian options and cultural-linguistic reductions (e.g., Wittgenstein 1953; Carnap 1967; Rorty 1988) have turned out to be just over-adapted to status quo politics and to cultural differences, without, for example, being able to explain and cope with class conflicts.

In the populist-progressive period (early to mid 20th century), downward reductions of the self such as social Darwinism, strongly opposed equality by reminding us that our biological nature is not democratic but, rather, a matter of tooth and claw. Instead, German idealism, as strongly pointed out by Dewey (1915) and Mead (1929), proposed justifications for monarchy, aristocracy, and the corresponding inequalities of serfdom (i.e., a condition of bondage or servitude inherited from feudalism) through versions of upward reductions. More recently, however, reductionists do not *personally* wish to present themselves as contrary to equality or any other aspect of democracy, given that they now see themselves as politically progressive (in opposition to the rigidities of foundationalism) by being committed to the liberalizing effects of modern science (I have in mind here, especially, the post WWII movement so-called positivism, i.e. from the mid 20th century onward).

While the natural and hard sciences are supposed to be liberating us through downward reductions (such as biologism and cybernetics), conversely, the cultural “human sciences” are also supposed to be liberating us through upward ones (such as culturalism and interactionism). However, in the end, we seem to be stuck in a reductionist framework with no substantial prospect for real liberation at all. The suggested “neo-pragmatist” Peirce-Mead model can thus be a resourceful anti-reductionist approach in both fronts. Later on (ch. 3 below) we will complement this proposal even further by also taking into consideration Grize’s “schematization” (1997, related to Piaget’s model for dialogical interaction), in particular his natural logical “*prise-en-charge*” operation (1996 & 1997), and incorporating it all into Breton’s model for ethical (legitimate) argumentation (2007), also inspired by Perelman’s work on argumentation (1958 & 1977).

Let us admit that ideas may not be all that important in our complex world, and that democratic institutions can develop an inner toughness of their own. Given all the above, we need to make use both of theoretical and practical, of natural and cultural resources, as well as of more humanism and co-operation. Now, in our digitally mediated world, in which the Internet has allowed people to overcome physical barriers like ever before, democratic conceptions such as privacy and transparency are under threat by state surveillance and domination.

3. A reinterpretation of the transcendental-pragmatic approach to discussion

I start this chapter introducing some considerations concerning what could be required from a democratic system to be up to its most important tasks. In order for a democracy to function well, it needs not only a free media but also the attention and engagement of its citizens. Professional lawyers in their court rooms and politicians closed in their governmental offices are not the only ones expected and required to develop argumentation competencies able to contribute to the building and maintaining of sustainable democracies. Ordinary citizens also should devote some of their time and attention for implicating themselves in issues of public interest whenever necessary. This implies organizing themselves in effective ways, as well as voting for their representatives. A functional democracy would help create, regulate and sustain appropriate institutions through sufficiently transparent policy-making and management. A lack of some or of all of these criteria might be ruinous for democracies.

Participation requires that groups be organized in associations or parties, so that its members can both share their experiences and, through open discussion, articulate shared concerns so as to make sensible collective proposals. Dysfunctional civil society associations turn the state blind to the impacts of its policies, and decision makers become unaccountable, even when the formal apparatus of democracies are in place. That is why democrats in post-Communist Europe have tended to focus so much energy on the construction of civil society institutions, rather than on constitutional arrangements.⁶⁰ For, they had to overcome the legacy of totalitarianism, which systematically destroyed independent associations of citizens by forbidding independent political parties and

⁶⁰ See, e.g.: THE ECONOMIST, *Special Report on Democracy* [Online], Published on 2014, <http://www.economist.com/news/essays/21600451-finance-not-merely-prone-crises-it-shaped-them-five-historical-crises-show-how-aspects-today-s-fina> .

assemblies of citizens.

To realize the epistemic powers of democracy (i.e., the knowledge and understanding power both by the people and to the people, in order to require and help their representatives to make informed decisions in their behalf), citizens must respect norms that welcome or, at least, tolerate diversity and dissent, as these are its central features. They should do this while recognizing that, in discussions, participants are equal and should be respectfully heard, regardless of their social status or race. This ideal communication process would institute deliberation and reason-giving, rather than tolerating environments in which threats and insults. Democracy is not just a matter of legal arrangements and procedures, but also a way of life governed by cultural norms of equality, discussion, and tolerance (Anderson 2006).

As Richardson (1997) emphasizes, the comprehensive expression of diverse points of view is needed to define, through compromise, what counts as a problem of genuine public interest, rather than merely private or sectarian interests.⁶¹ Dissent prior to decision-making constitutes a necessary condition for the formation of any genuinely claimed “collective will” that would be consistent with the autonomy of each member (pp. 360-3).

The goal of this chapter is thus to complete our theoretical framework, based on the main principles of Discourse Ethics (solidarity, equality, co-responsibility) so as to legitimize and open the way for a sustainable and plausible Digital Media Ethics, which will be introduced on Chapter 4. The ethics that we propose is one that favours

⁶¹ Dr. Richardson’s biography and bibliography are extensive: he earned his degrees in law and public policy at Harvard (under John Rawls) and he’s also a senior research scholar at the Kennedy Institute of Ethics (see e.g.: <https://kenedyinstitute.georgetown.edu/people/henry-richardson/>). I rely here mainly on two of his important volumes about Deliberative Democracy (1997) and the Law in the Age of Pluralism (2007).

deliberative democracies through open discussion, participation, and collaboration among co-responsible citizens (generally seen as equal and free peers), in line, for example, with the “creative commons” and “crowdsourcing” approaches.⁶² We believe that the prospects and technical power that digital media have to offer support and enhance such approaches once we manage and prevent eventual abuses.⁶³

3.1. Discourse Ethics

A new paradigm, reversing the classic referential paradigm for linguistic interaction, needs to be introduced to integrate communicative praxis from the broader perspective we have just sketched above. Such paradigm, to counteract traditional approaches, departs from referential semantics that overwhelmingly dominated most studies on linguistics and philosophy of language since Aristotle. This point has been well made by Karl-Otto Apel (1994a) in a volume entitled “*The Logos Proper to Human Language.*”

Apel argues there for the appropriateness of an enlarged concept of humans’ linguistic *logos* in order to adequately articulate its *double “propositional-performative” structure*. The German philosopher considers a structure that encompasses not only the function of *representation* in general language use, so emphasized by the classical

⁶² For a briefing on how the Brazilian Bill of Rights for the Internet has been elaborated (with more details in section 4.4 below) refer, for example, to: ITS-RIO, “É possível aprovar uma lei por crowdsourcing?” [Online], Published on October 31 2016, <https://feed.itsrio.org/é-poss%C3%ADvel-aprovar-uma-lei-por-crowdsourcing-47ec8af0a8ea#.uadkssluz>

⁶³ This subject will be further discussed throughout chapter 4 below, but for now, consider some thoughts about the issue from the World Wide Web creator, Sir Tim Berners-Lee, which can be found at: THE ECONOMIST, “Happy birthday world wide web” [Online], Published on March 12 2014, <http://www.economist.com/blogs/graphicdetail/2014/03/daily-chart-7> .

propositional paradigm, but also the functions of *expression* and *appeal*⁶⁴, pertaining to communicative (“performative”) language.

Such a *complementary* double structure takes language from a fuller and more dynamic perspective: the *transcendental-pragmatic* approach from which we base our argument.⁶⁵ Figure 1 (below) presents the schema proposed by Apel to represent such a complementary structure that encompasses both the propositional (“referential-semantic”) and the communicative (“performative”) dimensions of the *logos* of human language:⁶⁶

⁶⁴ Though the representational is not ignored either, but also taken into account by Apel’s suggested ‘complementary double structure’, as we shall see in the following.

⁶⁵ Such an approach proposes itself to be *pragmatic* by being explicitly inspired by Peirce’s ‘pragmatism’ (cf. *The Essential Peirce* 1967) in the light of Austin’s speech act theory (cf. *How to Do Things With Words* 1962), which have both oriented the so-called ‘pragmatic turn’ within the more general ‘linguistic turn’ that came as a major philosophical development, notably in the German tradition in the last century. We think especially of the later Wittgenstein (also considered a founder of analytic philosophy) as well as of Gadamer, Apel, and Habermas. That is to say, a development through which language came to be deemed to be a central element for the human social condition, with its broader *communicative* function (i.e., a more socially focused and dependent on *inter-subjectively shared understanding* and *interpretation*) to counterbalance the more exclusive and restrictive *cognitive* function (i.e., one mainly focused on *knowledge* about an *objective* world) that had been overwhelmingly emphasized by the analytic tradition. But Apel’s approach also maintains a *transcendental* taste by going beyond mere ‘contingency’ to stay loyal to Kant’s groundbreaking conception of the human as a morally committed being, without however remaining imprisoned neither by its rigor nor its solipsism.

⁶⁶ Adapted from APEL, K-O 1994a: p. 44. We find the term ‘subject-matters’ more appropriate than ‘states of things’ for the schema above, but we wished to leave it as close as possible to Apel’s own terminology.

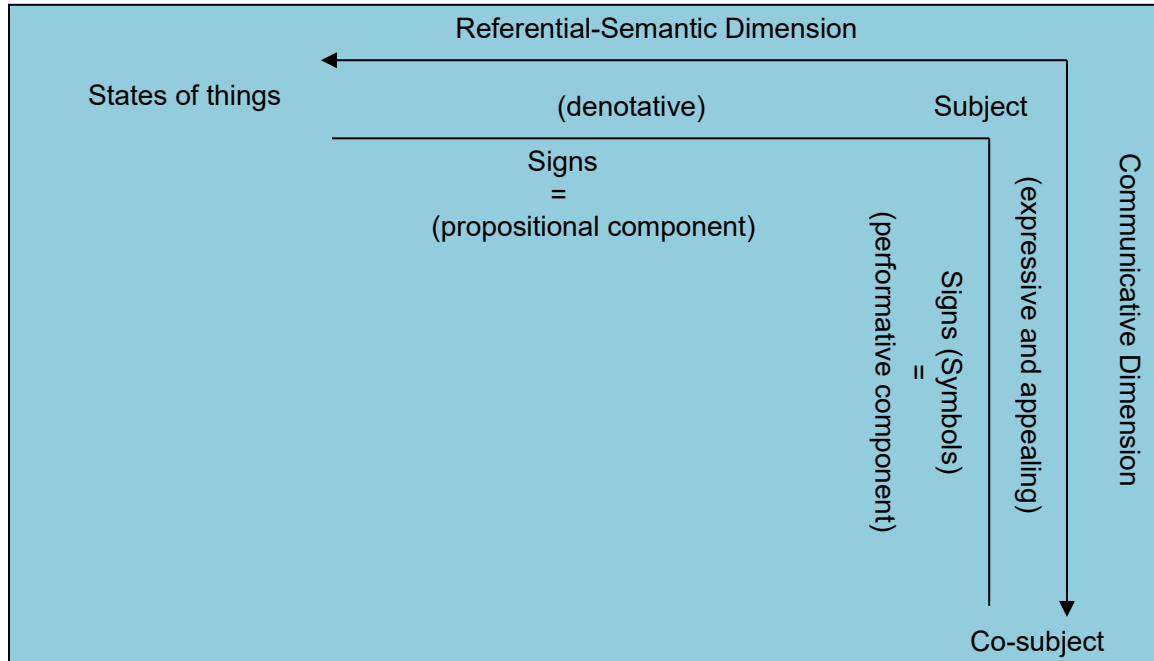


Figure 4: The double “propositional-performative” complementary structure.

Apel advances, in connection with the schema depicted in **Figure 1**, the following argument:

(This) enlargement of semantics (going beyond referential semantics) cannot be done but in the paradigm of a transcendental pragmatics of language (and without adopting the presuppositions of an “empirical” or “formal pragmatics” such as those conceived by Morris and Carnap). That is what one can see most clearly, in my opinion, when one analyzes the ambivalence of the concept of a “statement,” which Austin has struggled to deal with. ... For it is, on the one hand, the expression of a true or false proposition, while at the same time being the expression of an intention to assert such a proposition, which can then be made explicit at the “performative” dimension. It is this latter intention of meaning that has a pragmatic potentiality, that is to say, one that refers itself to a speech act, susceptible of being successful or not. What is at stake in the difference between a proposition and its assertion is the fact that only the latter expresses, in a reflective mode, the pretension to validity which a human being as an understanding subject can associate to a proposition.⁶⁷

Accordingly, we can promptly observe that we *do* share with other animals the simplest referential aspect of language by which we can point to things through emitting sounds and making denotative signs. This may already be called “communication” to a limited extent, though not in the broader human sense. What makes *human* language and communication not only richer and more powerful than that of other animals (though

⁶⁷ APEL 1994a: p. 46.

unfortunately more problematic as well) is precisely the ability to share *reasoning* through *intersubjectivity*, by advancing validity claims through interpretation and conceptual symbolism. This is precisely the point that, we believe, Apel's transcendental-pragmatic perspective emphasizes by also taking into consideration the expansive and dynamic *communicative* dimension of human language (1994a, 1994b).

Having provided a new paradigm, Apel has also introduced an insightful "***History-related Ethics of (Co) Responsibility***" (1994b, 2001, 2007) that proposes to transcend Kantian solipsism by giving due consideration to the very communicative dimension of *real practical discourses*. This, rather than just relating them to solitary subjects of morality, wherein the problems of real discourse (among concerned people and/or their advocates) are neither explicitly considered nor reflected upon. Along with his close colleague Jürgen Habermas (1992, 2001), Apel proposed *Discourse Ethics* as an attempt to reconstruct implicit *normative orientations* to guide rational individuals in their processes of communicating to each other through authentic argumentation.

Discourse Ethics addresses *both* ideal and real discourse communities whose approximation constitutes precisely what I see as the main rhetorical mission to be accomplished by *legitimate argumentation*: its departure point is the basic presuppositions of constructive arguments, which cannot be contested without a *pragmatic self-contradiction*, namely, *justice* (i.e., respect for the equality, integrity and dignity among interlocutors), *solidarity* (i.e., willingness to listen and to understand one another), and *(co) responsibility* (i.e., responsible mutual engagement or commitment in the discussion).⁶⁸ These are considered to constitute the "pragmatic norms" inescapably

⁶⁸ Apel 1994b, pp. 42 – 50. That is to say, an exercise of continuous approximation between such communities through the very rhetorical challenge of *responsibly adapting* one's argumentation, in order to

recognized by any agent of a communicational community,⁶⁹ if we are to have cooperative and constructive argumentation in the first place (the lack of these features make it just rhetorical manipulation).

In this respect, it is also interesting to mention that both Apel and Habermas emphasize such a crucial point while, at the same time, they remain true and consistent with their own views, which sets them apart in other respects. However, their disagreements appear to be neither in substance nor in method, but rather in emphasis (Mendieta 2002).⁷⁰ On the one hand, Habermas (1992, 2001) keeps up with his critical standing by stressing that argumentation lose its *raison d'être* whenever deprived of a continuous engagement in criticism (which has the goal of opening up alternatives and keeping alive the debate). He also wishes to avoid what he sees as an excessive transcendentalism that may resonate from Apel's approach. This precaution is consistently articulated in the two volumes of Habermas's *Theory of Communicative Action*. Besides, precisely to avoid prejudging charges of transcendentalism, Apel's contributions have also been linguistically (i.e., pragmatically) transformed with regards to the *hermeneutical question* concerning the communicative orientation of interpreting (and self-interpreting) agents and speakers in the confrontation between self-alienation and liberation.

bridge the gap between universal and particular audiences, such as had been indicated in Perelman's *Treatise* (1958).

⁶⁹ A community, thus, abstracted to a fuller degree (i.e., ideal) in theory and to a less-than-ideal (yet, sufficiently appropriate) degree in the very practice of real discourse.

⁷⁰ For more on their agreements and disagreements, as well as on Habermas' open appreciation and recognition of Apel's decisive instruction to his own thinking (that has unfortunately been omitted from English translations of Habermas' works), one can refer to MENDIETA 2002 (especially Chapter 4).

On the other hand, although agreeing with Habermas that argumentation does require criticism and self-reflection to keep itself free from dogmatism, Apel (1994b, 2001) still prefers to emphasize the point that it also loses its constructive *practical function* if it does not aim at an eventual agreement in the first place, if diverging paths can somewhat converge so as people could, at least, hope in sharing some common ground in order to develop a *fruitful communication*.⁷¹ Thus, whether putting more emphasis on the ideal of eventual *agreement* (Apel) or on the importance of continuous *criticism* (Habermas), Discourse Ethics reminds us that anyone who engages in legitimate argumentation is already, by her/his own doing, taking part in a *normative praxis*. Habermas (1992) also highlights this point by stating:

One departs from a false premise if one thinks that questions such as “Why be moral?” or “Why be logical” or “Why be reasonable?” would find an answer either coming from a deductive foundation or from an irrational decision. In fact, such a presupposed problematic situation does not even exist in the first place, i.e.: a situation where we would place ourselves yet before a decision of being rational, or being logical, or being moral, and still from where we would be able to argue—at least to be in a position to pose the question of why! Anyone who seriously poses this sort of “why” questions, has already touched the soil of discursive argumentation, which means to say: (s) he can only convince her/himself, by reflecting about the meaning of her/his actions, from the very fact that (s) he has already necessarily recognized the rules of cooperative argumentation and, hence, also the ethical rules of a communicational community.⁷²

We believe that Discourse Ethics took upon itself the responsibility of bridging the gap between theoretical applied ethics by plausibly responding to the call for a *global ethics of (co) responsibility*. Moreover, as we attempt to take into account Perelman’s indications about argumentation within such a new double-structured (bilateral) paradigm, in order to *rehabilitate* rhetoric as *the art of discourse (inter) action* (i.e., the art of sharing understanding), we claim that (Lima 2012a) Discourse Ethics is a new

⁷¹ Perelman has made a similar point and elaborated considerably upon it in the *Treatise* (Perelman & Tyteca), 1969: part II, ch. 1, § 15 – 27.

⁷² HABERMAS, J. 1992: pp. 165 – 166.

paradigm that takes rhetoric as a dialogical guide for human practical reason (ing), so desired and required by democracy (i.e., in engaging and respecting each other as “equal Others”).

Through his proposed pragmatic-transcendental paradigm, Apel (1994a), re-establishes pragmatics not as necessarily committed to the instrumentality of effectiveness (i.e., means towards ends-in-view), imprisoned by a unilateral “transactional” paradigm (i.e., subject-object oriented). For, when humans deal with each other socially, through communicative interactions, their practices involve historical, pedagogical, and “performative” dimensions that need to be appropriately and dynamically considered. As Apel has also remarked (1994b), “The thinking subject, rather than being principally solitaire and autarkical, is always the subject of argumentation linked to dialogue, given the very structure of our thought, mediated by language, with its pretensions to intersubjective validity: sense, authenticity, normative justice. As such, one is (even when thinking to oneself in an effective solitude) always a member of an argumentation community” (1994b: pp. 38, 19).

The main feature emphasized by Discourse Ethics that we would like to keep refers to the fact that any legitimate (cooperative, authentic, ethical) linguistic interaction is essentially “argumentative,” as it leaves open the possibility among speakers to disagree and, yet, respect each other as equal participants of communication. We shall later on (ch. 4) try to make this point more explicit: without enough transparency and respect for citizens’ rights about privacy, governments adopting such practices risk seriously compromising democracy. Threats of power abuses and infringements on citizens’ freedom of expression (including, very importantly, with respect to a free and critical press) must be avoided.

The main focus is to embrace “linguistic humanism” proposed by Discourse Ethics as a hermeneutical framework. It allows refutation of all solipsism, a-historicism (onto) logical atomism, as well as epistemological, experimentalist and utilitarian reductionism, at once (Mendieta 2002). We see this paradigm as capable of rescuing us from the dangerous occlusion of the doubled-nature function of human language (which Dewey also advised us against ⁷³). For, keeping open debate as a possibility within and among free societies is just too crucial for the development of **empathy** and **trust** within the engagements of autonomous *co-responsible* individuals, who may still hope to interact nonviolently through diplomacy. Discourse Ethics requires, however, support from a robust theory of argumentation, an endeavour that has neither been formulated by Apel nor by Habermas. Notwithstanding, the works of Chaïm Perelman, particularly Philippe Breton’s interpretations (1997), illustrated by his triangle of ethical argumentation regarding human communication (see section 3.2.1 below) might provide useful insights. ⁷⁴

However, we should also keep in mind, given the failures and challenges for democracy mentioned earlier that laws can, unfortunately, represent things both right and wrong, given the ambiguity and/or vagueness that their formulations may allow sometimes. Thus, even if the popularity of a law—i.e., the approval of its text by a majority—may make its enactment legitimate, it does not ensure that it will, indeed, be successfully interpreted and applied, which takes us to the issue of allowing for ethical argumentation. Moreover, whether the law succeeds in solving a problem for which it was initially drafted, it also depends on its external consequences—not, or not simply, on

⁷³ See section 2.3 above.

⁷⁴ For more on Discourse Ethics you may also refer to LIMA, K. A. 2012a.

the fairness of the procedure by which it was enacted. Thus, at least part of the criterion of success for laws is external to the decision-making process (Anderson 2006).

Now, if we look at the specific problem we shall be dealing with in chapter 4, namely, the challenge of convergence that could be satisfactorily called “an Ethics for Digital Media” or a “Digital Media Ethics,” finding some basic criteria for public approval vs. effective success concerning regulations for decision-making may become even more complex. For, we cannot judge the success of a law by external, instrumental criteria alone either. Whether a problem is considered or not to be of genuine public interest, is determined in part also by whether it is an actual object of public concern—i.e., whether citizens or their legitimate representatives affirm its place on the public agenda through procedural fair decision-making processes. Often, majorities converge on an inefficient solution because they fail to anticipate certain consequences of the policies they adopt. Hence, the criteria of success for democratic institutions and its accompanying regulations are partly internal and partly external to the decision-making process (Richardson 1997).

Democratic decision-makers need to recognize their own fallibility and work to institute feedback mechanisms—based on valid argumentation procedures—by which they can learn how to devise better solutions and correct their course in light of new information about the consequences of policies. Periodic elections are one critical feedback mechanism of this sort. Such concerns led us also to reflect about power and many (sometimes rather subtle) forms of abuse. *Manipulation* is a specific sort of abuse, often disguised with the goal to control the result of elections and/or laws. The use of propaganda, violent threats, lobbying, bribing (i.e., buying votes and power through money or favour exchanges) are other forms of abuse. Mechanisms for transparency must

be set in place, so as to provide clear information, for example, about sponsorships in political campaigns and in disputes for public contracts, which are crucial in such respect.

3.2 On Communication Power: Facing the Paradox of Argumentation

Power is the most fundamental mechanism of societies, as long they can be defined in terms of values and the institutions created around such values. What is valued and institutionalized is, in turn, defined by power relationships. As such (and we will define it more explicitly further on), manipulation can be seen as an extrapolation of the limits for legitimate argumentation, based on rhetorical discourse. On this point, the limits that Breton's triangle of ethical communication (2007) presents, is an attempt to delimit them more clearly. They facilitate, in a pedagogical way, respect for the integrity and equality among interlocutors, as opposed manipulating (violently) through impositions.

As relations of power plays a role in no matter what kind of social interaction, there is always a complementarity and reciprocal support between the two main mechanisms of power formation identified by theories of power, namely: **violence and discourse**.⁷⁵ Violence, of course, includes not only physical brute force, but also all types of **manipulation** (section 3.2.1 below: pp. 77–78) that may also be subtly applied to attain and sustain domination over others, such as Max Weber (1919, 1922) has well pointed out. This is why we will try to distinguish manipulation, as much as possible, from legitimate (ethical) argumentation, in the belief that the latter is crucial to sustainable and healthy deliberative democratic environments.

In such a context, the conception of casuistry, for example, has been in a considerable flux throughout the modern period. Broadly speaking, casuistry is conceived

⁷⁵ See, e.g.: WEIGAND, E. 2001 and 2011.

“as a method of case reasoning, especially useful in treating cases that involve moral dilemmas. It became the main basis for case law and standard forms of reasoning applied in common law practices, especially in English legislation.”⁷⁶ However, it has also turned into a branch of studies in applied ethics, such as bioethics and business ethics, mainly due to the influence of Mill’s utilitarianism in the past century.

Casuistry has thus taken a “relentlessly practical approach to morality” (*Ibid*), i.e.: rather than using theories as “starting points,” it begins with an examination of the cases themselves. Then, by drawing parallels between paradigmatic situations (so-called “pure cases”) and the particular case at hand, it tries to determine an appropriate moral response to the problematic case in question. In other words, casuists do not feel pressed to agree on more general ethical theories or evaluations before making their “policies.” Instead, they are just required to agree about some “case similarities” in order to perform “analogical inferences,” i.e.: analogies that rely on the so-called “warrants” between the paradigmatic cases and each case at hand (*Ibid*).

‘Casuist models’ are, however, prone to abuses as the analogies between cases can easily turn out to be “false analogies,” tendentiously driven towards particular goals in view (as sophists in ancient Greece already knew so well). For, several factors affect the strength of arguments from analogy, namely (*Ibid*): (i) the **relevance** of agreed-upon similarities to the ones *inferred in the conclusion*; (ii) the **amount** and **variety** of examples used in the analogy (i.e., the chosen sample study) as well as of the people studying them (i.e., the involved study group); and (iii) the **number of characteristics** that the cases being compared indeed have in common. Moreover, an “argument from

⁷⁶ See, e.g.: *The American Heritage® Dictionary of the English Language: Fourth Edition*. 2000. (Also accessible online at: <http://av1611.com/forums/showpost.php?p=3473&postcount=14>)

analogy” is weakened if it is inadequate in any of the above respects (i) — (iii), among which, those concerning “relevance,” including the people involved in their analysis and the choice of procedures, are perhaps the most challenging ones, as they always remain open to dispute.⁷⁷

Legal experts have, therefore, the advantage of discussing normative questions in connection with cases to be decided, so that their thinking is casuistically oriented towards a direct application (*Ibid*). This process allows them, among other things, to benefit from contextual excuses of having acted “under huge pressure to decide” whenever things turn out bad. But the pressure of time acts on philosophers in a reverted way, as these feel pressured to avoid such “decisionistic” calls, precisely because they have the responsibility to consider themselves as contemporaries of classical ideas extending over more than two thousand years.

Philosophers are participants in reflective (deliberative) conversations that have not only a strong past, but is also supposed to continue indeterminately; yet, political philosophers must, at the same time, attempt to grasp their own period into ideas, by showing the relevance of their philosophical insights to the pressing political questions of their *epoch*. Such challenges were confronted by Charles Taylor (1992) in a strikingly brilliant and unusual way, as he managed to defend communitarianism against the pitfalls of liberalism through hermeneutical politics of integration, without following the more fashionable and straight forward path of proposing a new casuistry.⁷⁸

This is precisely why we came to believe that the *process of legitimation* is key to

⁷⁷ See, also, the positions by Alvin Goldman and by Frans van Eemeren on relevance (note #7 above).

⁷⁸ See, e.g.: TAYLOR, Charles. *The Malaise of Modernity* (Taylor's Massey Lectures, reprinted in the U.S. as *The Ethics of Authenticity*). Harvard University Press. 1992; *Multiculturalism: Examining The Politics of Recognition*. 1994. [Online version accessible at: https://www.jstor.org/stable/20634713?seq=1#page_scan_tab_contents .]

enable States to stabilize the exercise of their own domination through procedures within constitutional democracies—a core point of Habermas’ political theory (1976). Representative democracy is a set of processes and procedures that rely on consent elicited by the construction of shared meaning towards goals of common (public) interest, rather than unrestricted policies intervening in the public sphere on behalf of specific (particular) prevailing interests and groups.

Such a view is supposed to sustain a government’s own legitimacy as an “institution of representation” through its legitimate exercise of power. Power here is understood as representation of the values and interests of citizens expressed by means of their debate in the public sphere (Habermas 1989, 1996). However, when there is a sharp separation between the State and a participative (deliberative, critic and engaged) civil society, the public space eventually collapses as its intermediate sphere is suppressed between the administrative apparatus and its citizens, which can lead to a legitimacy crisis and abuses of power (consider, e.g., the current political crisis in Brazil).⁷⁹

According to Michael Mann (1986):

In most social relations both aspects of power, distributive and collective, exploitative and functional, operate simultaneously and are intertwined. Indeed, the relationship between the two is dialectical. In pursuit of their goals humans enter into cooperative, collective power relations with one another. But in implementing collective goals, social organization and a division of labour are set up... The few at the top can keep the masses at the bottom compliant, provided their control is *institutionalized* in the laws and norms of the social group in which both operate.⁸⁰

Therefore, dissent prior to decision-making is a necessary condition for the formation of a genuinely collective will consistent with the autonomy of each member. This point may

⁷⁹ THE ECONOMIST, “Disaster Looms Latin America’s Biggest Economy” [Online], Published on January 2 2016, <http://www.economist.com/news/leaders/21684779-disaster-looms-latin-americas-biggest-economy-brazils-fall>

⁸⁰ MANN, Michael 1986: pp. 6-7.

sound surprising as we are tempted to think that for a collective group to genuinely want something, each of its members must already want it individually and wholeheartedly. The formation of a “collective will”, which would be consistent with “the autonomy of each group member”, unavoidably requires some resistance at the individual level to anyone else’s proposal, so that the eventual “object of joint willing” is the product of “mutual accommodation and compromise,” rather than simply blind subordination (Westlund 2003).

After all, pure deference to a leader who just claims to embody the “collective will,” however, wholeheartedly, is incompatible with the legitimate autonomy of individual members in a genuine democratic society. We thus seem to be in need of more than just an optimistic sort of ‘Rousseauian’ belief with regards to the supposed good nature of human beings. Instead, we might be better off with a more Hobbesian approach that reminds us to be always alert, though favourable, to the fact that as many concerned people (as possible) are to be listened to. That is, if we are willing to keep building and maintaining considerably decent (i.e., ethical) social contracts and institutions.

In such a context, modern complex and diverse societies can no longer be seen as much simpler communities that share common values and interests unanimously (as Dewey’s sense of “big community” may have presupposed—discussed in chapter 2 above). Contemporary societies consist of contradictory social structures enacted in conflicts and negotiations among diverse and often opposing social actors, that may never end. Temporary agreements and contracts are eventually transformed into stronger institutions so as to bring such social actors’ power struggles into a workable balance. Institutions of the State and, beyond that, organizations and discourses that help frame and regulate social life, are the expression of crystallized power relationships, that is,

“generalized means” that enable social agents to stabilize their conflicts, even if only temporarily (Parsons, 1992).⁸¹

Because collective decisions are so often necessary and urgent, conditioning decisions on the achievement of consensus often lead to undue pressure on, and even to coercion of, dissenting minorities. Such coercive pressure is objectionable in itself and also carries severe epistemic costs. For, because: “consensus generally implies that everyone agrees that all objections to a proposal have been met or at least overridden by more important considerations” (Anderson 2006). The parties to a consensus are therefore expected to hold their peace once a decision is made, on the pretense that all their reservations were met. However, such a norm suppresses public airing and responsiveness to the continuing reservations individuals may have about the decision.⁸²

The power of a majority rule, while it permits minority objections to be overridden, is not to be taken as having fully answered them. Minority dissent must not be suppressed, reminding us that any given decision remains “haunted” by unresolved objections. “For this reason, individuals must be free to dissent not just at the voting stage, but after a decision is made as well” (Manin 1987, p. 359). This requires the possibility of open criticism through the institutionalization of “loyal opposition”. Without such an opposition to remind the public of continuing objections to collective decisions, and to pose alternatives, accountability of decision makers becomes near impossible. For otherwise nothing would motivate decision makers to reconsider their decisions at all. Thus, as Manin (1987) discusses, “A power that faces no obstacle will

⁸¹ *Social Change and Modernity* (ed. Hans Haferkamp and Neil J. Smelser). UNIVERSITY OF CALIFORNIA PRESS: Berkeley · Los Angeles · Oxford. 1992.

⁸² See, e.g.: 3AMMAGAZINE, “Epistemology and Democracy” [Online], Published on December 25 2013, <http://www.3ammagazine.com/3am/?s=epistemology+and+democracy> .

have both less cause to deliberate on its decisions and less need to justify them. The true goal of the pluralism of counter-forces is not just equilibrium; it is deliberation itself.”
(p. 361)

Accordingly, borrowing from Touraine’s theory (1973) on the production of society, we can say that social actors produce the institutions of society under the conditions of the structural positions they hold, but with the granted capacity (ultimately) to engage in self-generated (autonomous), purposive, and meaningful social action. This is how structure and agency can be integrated in the understanding of social dynamics, without having to accept or reject the twin reductionism of either structuralism or subjectivism; nor having to deconstruct the autonomous self (agent) either. As Geoff Mulgan (2007) has explained, the capacity of the state to assume and exercise power is based on three main sources, namely, **violence, money, and trust:**

These three sources of power together underpin political power, the sovereign power to impose laws, issue commands, and hold together a people and a territory... It concentrates force through its armies, concentrate resources through exchequers, and concentrates the power to shape minds, most recently through big systems of education and communication that are the twin glues of modern nation states... Of these three sources of power, the most important for sovereignty is the power over the thoughts that give rise to trust. Violence can only be used negatively; money can only be used in two dimensions, giving and taking away. But knowledge and thoughts can transform things, move mountains and make ephemeral power appear permanent.⁸³

An accessible and plausible definition of “deliberative democracy,” so as to establish and nourish precisely *relations of trust* between the ones governing and those being governed can, therefore, be summarized as “a form of government in which free and equal citizens and their representatives justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the

⁸³ MULGAN, Geoff. “How to spread the word about radical ideas” in *THE GUARDIAN - Society* [Online], Published on Sep. 12 2007, <https://www.theguardian.com/profile/geoffmulgan> .

aim of reaching decisions that are binding on all at present but open to challenge in the future” (Gutmann & Thompson 2004: pp. 3–7). The kinds of reasons that citizens and their representatives are expected to offer one another in a democracy includes four main basic requirements:

Reciprocal: The reasons should be acceptable to free and equal individuals seeking fair terms of co-operation.

Accessible: The reasons must be given in public and the content must be understandable to the relevant audience.

Binding: The reason-giving process leads to a decision or law that is enforced for some period of time. (The participants do not “deliberate” just for the sake of deliberation itself or for individual enlightenment.)

Dynamic or provisional: The participants must keep open the possibility of changing their minds, and continuing a reason-giving dialogue that can challenge previous decisions and laws.⁸⁴

Moreover, a free press, public discussion, and mutual influence prior to voting are all constitutive, not accidental features of democracy. Without access to “public fora” for sharing information and opinions beyond their immediate knowledge, voters are uninformed and often helpless (“Epistemology and Democracy: The End Times”)⁸⁵. Accordingly, two complementary models of deliberation for legitimate (ethical) argumentation will be introduced. We consider these models to be in line with the requirements, mentioned above, towards the task of better deliberating together in democratic environments, for creating and sustaining robust democratic institutions.

We have to judge the success of institutions according to criteria that are both (partially) internal (proceduralist) and external (instrumentalist or consequentialist) to the

⁸⁴ See, e.g.: WIKIPEDIA, *Deliberative Democracy* [Online], Accessed on July 2015, http://en.wikipedia.org/wiki/Deliberative_democracy

⁸⁵ See, e.g.: 3AMMAGAZINE, “Epistemology and Democracy” [Online], Published on Dec. 25 2013, <http://www.3ammagazine.com/3am/?s=epistemology+and+democracy>

decision-making process. Hence, any assessment of the epistemic powers (i.e.: the power to understanding and knowledge by its, supposedly, equal and free—autonomous—citizens) of particular democracies must pay close attention to its institutions and norms of dissent (*Ibid*). Thus, one may sensibly ask: “Are there diverse, open, accessible channels for people from all quarters of life, in all social positions, to publicly express their dissent? Do social norms welcome the expression of dissent by all discontented parties? Do they require decision makers to take dissent seriously, and hold them accountable in case they don’t?” (Anderson 2006) Negative answers to these questions would indicate considerable epistemic weaknesses in political decision-making and their accountability.

3.2.1. The relevance of Perelman’s and Olbrechts-Tyteca’ s *New Rhetoric*

Democratic faith is trust in rhetorical argument.
(Garver 2004)

Having lived in a time strongly influenced by Cartesianism and Logical Positivism, marked by their search for absolute truths and methods, Perelman and Olbrechts-Tyteca (1958) invited us to retake some precious insights from Aristotle’s *Rhetoric* (2007) so as to look more soberly at the relation between logic and argumentation within our rhetorical practices.⁸⁶ The following passage from Perelman’s and Olbrechts-Tyteca’s *Treatise* (1977) summarizes some crucial points in his preoccupation with rehabilitating rhetoric by focusing on the rich dynamics of argumentation:

Philosophical, like juridical, argumentation constitutes the application to particular fields of a general theory of argumentation which we understand as a New Rhetoric. In identifying this rhetoric with the general theory of persuasive discourse, which seeks to gain both the intellectual and the emotional adherence of any sort of audience, we affirm

⁸⁶ ARISTOTLE, *Rhétorique* (translation with an introduction by Pierre Chiron). France: GF Flammarion. 2007.

that every discourse which does not acclaim an impersonal validity belongs to rhetoric. As soon as communication tries to influence one or more persons, to orient their thinking, to excite or calm their emotions, to guide their actions, it belongs to the realm of rhetoric. Dialectic, the technique of controversy, is included as one part of this larger realm.⁸⁷

By calling rhetoric an art and placing it in the broader realm of informal reasoning—which does not deal necessarily with explicit formal demonstrations, but rather with much vaguer, problematic and questionable “vraisemblances” (*verisimilitude*)—Perelman and Olbrechts-Tyteca do not mean to say, nor do we, that rhetoric is to be taken in a pejorative sense at the outset as an inferior, because illogical way of expressing ourselves. The crucial point is that rhetoric, being a dynamic and all-inclusive *argumentative practice*, as Perelman and Olbrechts-Tyteca see it (Ibid), cannot be appropriately treated in reductionist ways either by being disregarded as mere sophisms (illogical), or restricted to a rigid tool (strict formal logic). Instead, Perelman and Olbrechts-Tyteca acknowledge the dynamic and creative possibilities of rhetoric can offer us, which is also picked up by Eugene Garver (2004):

Seeing how reasoning can be the subject of ethical judgment will improve the practice of the ethical criticism of reasoning. As Aristotle himself observed, one can become unethical by being too logical (Rhetoric III: 17.1418a37-b1). To treat a practical problem as a purely technical one can be an ethical error. But it does not necessarily follow that therefore to be ethical is to be illogical. ... I make clear my own character and moral purpose in my argumentative choices, but I am not on that account being illogical. Logic relates propositions, while ethos relates assertions of propositions to each other. Ethical necessity replaces logical necessity. In this way, a rhetorical understanding of practical reasoning can be as rigorous as a purely logical understanding without sacrificing the context sensitivity of ethical analysis.⁸⁸

From an *ethical* perspective, in terms of prioritizing matters when interlocutors are caught in moral dilemmas and difficult impasses, rhetoric is the art of finding *adequate* (appropriate) arguments for persuasion. It is not a practice of persuading at all costs! The

⁸⁷ Perelman defends, in his *Treatise of Argumentation* (1958), that logic and argumentation are both rather two modes of rhetoric, thus, none being either totally separate or superior to the other. 2007, p.177.

⁸⁸ GARVER, E. 2004: p. 10.

orator's job is to present compelling *appropriate* arguments, not just leading the audience to accept one's view by whatever means available. The concern about "ends justifying any means" is left behind. Its appropriateness not being restricted to logical formalism, it also amounts to saying that persuasion cannot be (at least not automatically) equated to manipulation: ethical criteria might be as important as logical ones.

According to Perelman and Olbrechts-Tyteca (*Ibid.*), there is a moral restriction of rhetoric to a *practice of reflective and responsible argumentation* that can be empowering instead of limiting. As an *ethical practice*, language can go where neither reason nor affectivity alone is able to reach. They thus address the old (yet far from being exhausted) ethical-rhetorical dilemma facing democracy with respect to the grey line between argumentation (legitimate persuasion) and manipulation (violence) through re-illuminating their paradoxical relation.⁸⁹ Philippe Breton (2007), an attentive reader of Perelman's and Olbrechts-Tyteca's work has coined the term "convincing" (*convaincre*), rather than "persuading", so as to underscore the ambiguity precisely that seems to be inherent in the latter term.⁹⁰

The example of how *authority* (or, yet, *leadership*) is created can be paradigmatic in such respect. *Legitimate* authority arises as a rational decision, i.e., by someone's allowing oneself to be led by someone else through accepting that the other's indications and arguments are indeed compelling. Similarly, as far as the legitimacy of persuasion

⁸⁹ Paradoxical inasmuch as the two may conflict about respecting the other's capacity for understanding a matter and freely accepting a point of view thereby. This was summarized by Breton as the 'paradox of argumentation' (see, e.g., BRETON, P. 2007: p. 33).

⁹⁰ Olivier Reboul also makes some very sensible remarks with respect to such an ambiguity (1991: Introduction). We should mention here at least a capital distinction pointed out by him in order to understand rhetorical persuasion in a legitimate sense of argumentation, namely: "*faire croire*" and "*faire faire*". For, as he emphasizes, rhetoric is the art of accomplishing both or at least the former. While, when we have just the latter without the former, we are no longer dealing with rhetorical persuasion, but rather with manipulation that, being coercive, cannot be legitimately distinguished from brutal force.

goes, we can say with Eugene Garver (2004) that “Rhetorical argument can only persuade an audience of something that this audience is already able and willing to hear” (p. 200) Otherwise, we would not be dealing with legitimate authority at all, but rather with impositions. If persuasion can be taken as superior to brutal force, it has to be possible to persuade and be persuaded while keeping *integrity*. Persuasion can be taken as both an epistemic and ethic (respectable, legitimate) activity given that it can also take place without necessarily corrupting our reasoning and conduct. The pedagogical essence of teaching and art is illustrative in that respect!

Unfortunately, affectivity but also rationality can both be used in abusive ways, and for both good and bad causes. Rational rhetoric can be superior (as opposed to sophistic rhetoric) inasmuch it is a balancing of *rationality and affectivity* without abusing either of them. In this sense, we can exercise diplomatic and creative abilities through dealing with each other as equal and free individuals who are capable of sharing reasoning and understanding. We hope for more collaborative work, and even consensus, to be reached more often. If not, at least we have tried through constructive exercises of listening and reasoning together, even along people who think and live differently from us.

By limiting rhetoric to responsible argumentative persuasion, one does not have to exclude all appeals to our affectivity. After all, emotions definitely play an important role in persuasion. However, the latter can, nevertheless, focus on the most *appropriate* emotions, as I have emphasized through the notion of *expressiveness*. While centralized on argumentative reasoning, *expressiveness* attempts to illuminate the role of human authenticity and creativity. There is nothing intrinsically wrong in appealing to emotions,

although the ways we do it, for what purposes, and how it may come to affect others, do definitely make much difference concerning the moral status of an appeal.

Accordingly, we wish to emphasize some important points, often neglected, especially nowadays, with the whole frenzy about the Internet:

- An *ethos* constructed upon deliberation and rational argument is a very important controlling factor for *legitimate* persuasion. (Breton 2007, 2008)
- Formal arguments per se do not produce *trust*, which is crucial for deciding ethical issues, precisely because they do not persuade by showing character (*ethos*). (Garver 2004)
- There is a difference between formal and *ethical arguments*, given that the latter show the interlocutor's own responsibility and will to compromise through his/her own commitments in a discussion, that is to say, through *responsible engagements* in a rhetorical mission. (Perelman & Olbrechts-Tyteca 1958, 1977)⁹¹

Without such commitments, eloquence becomes merely empty sophism (i.e., demagogy) and practical reason (ing) gets dangerously truncated as blunt instrumentalism (i.e., manipulative persuasion no matter what). (Breton, 2007, 2008, 2011)

Moreover, an *abdication* of the referred commitments is symptomatic of an intemperate (vicious) character that is not willing to take upon itself the responsibility to compromise on her/his own arguments (Perelman 1958, 1977).⁹² Such weakness is what leads people to fall, on the one hand, into radical absolutism such as fanaticism (i.e., a

⁹¹ That is: an exercise of continuous approximation between the ideal and the contextual that, thus, constitutes the very rhetorical challenge of adapting one's argumentation in order to bridge the gap between universal and particular audiences, such as indicated by Perelman (1958: § 7; 1977: chapters 2&3).

⁹² We shall be applying the term *responsibilization* to indicate Grize's 'prise-en-charge' (1982, 1996), that is, in a sense, though very close to what Ricoeur calls '*imputabilité*' (2001), that goes beyond mere accountability to others as it runs deeper to also include the one's very willingness to posit oneself as a committed (engaged) agent. In English, one may prefer to translate it as 'taking-charge', but we chose to keep the original term in French, which we consider explicit enough and more elegant.

forced compromise which blindly transfers responsibility to a cult or entity); or, on the other, into radical forms of skepticism (i.e., a *non-compromised* or *disengaged* form of relativism that gives up on civil responsibility). In sum, these are some extreme manifestations of a desperate or simply *irresponsible attitude*, without which neither absolutism nor skepticism would pose serious risks any longer (*Ibid*).

Neither hypocrisy nor rash irony makes one automatically right or wrong, but they can make one vulnerable to reasonable and justifiable criticism. As Chaïm Perelman and Lucie Olbrechts-Tyteca (1958, 1977) have reminded, fanaticism, on the one extreme, or anarchism on the other, may just be subtle ways of avoiding responsible commitments. In the former case, it is due to the transferring of such commitments to an absolute authority. In the latter, by just not committing to any authority at all. For, as responsibility involves commitment (Grize's "*prise-en-charge*"), it unavoidably takes courage, along with empathy and solidarity from us to live well in society. After all, let us not forget that passivity (i.e., no action) is just another form of participation, that is, a way of just letting things the way it is and, thus, supporting the *status quo*.

3.2.2. Argumentation: naturally logical?

*Argumentation is an essentially discursive activity. Lacking fixed axioms and postulates, it departs from principles which are not taken from settled preconditions, but rather from common sense. It does not prove anything, but it shows and brings up what it proposes. Closer to rhetoric than to demonstrative logic, strictly speaking, it is not subjected to a monotonous linearity, thus developing itself both from a retroactive procedure, and perhaps as much, from a proactive one.*⁹³ (Grize 1996: p. 27)

With these words by Jean-Blaise Grize in mind, and following Chaïm Perelman's and

⁹³ *N. of T.*: our free translation from the French version.

Lucie Olbrechts-Tyteca insights on argumentation,⁹⁴ we will introduce *Natural Logic* (Grize, 1982, 1996), for better reasoning behind argumentative communication praxis. There are five main postulates related to the communication process (Grize *apud* Campos, 2007): (1) *Dialogism*: communication as [IS] interaction (a two-way road); (2) *Situation of interlocution*: determines the psychosocial conditions and consequences of communication; (3) *Representation*: communication is not just a medium, but is also a symbolic activity that implies the (co) construction of psychological and social images of the world; (4) *Cultural pre-construction*: images are fed by cultural pre-constructs that are assimilated and accommodated by interlocutors, thus, shaping their behaviour as communicators. (5) *Object construction*: what is communicated—discourse—by the subjects-in-charge for sense-making results in the construction of referential objects. Such objects find “commonalities” in the meanings within particular languages, as they are built through the communicative process (schematization) for sharing understanding among interlocutors (Grize *apud* Campos, 2007).

Accordingly, Grize’s situated “schematizations” (1982, 1996), his communication model, constitute both a “genetic” (i.e., historically transmitted) process as well as a result of our “co-constructions” springing from our interactions as responsible communicators (subjects-in-charge). It is a *process* because communication fundamentally requires an organization of content for any discursive activity to be constructive, but also constitutes a cumulative *result* as content is related to (re) presentations built upon cultural pre-constructs within any given language. As such, the history of words used to express meanings cannot be ignored as it frames their possibilities, from construction and reconstruction communication processes. Grize relied

⁹⁴ For Grize as well, argumentation and logic are both rhetorical, the former naturally involving a double movement (dialogic structure) that may encompass the latter within its rich dynamics of sense-making.

on Piaget's (Campos, 2007) important contribution to communication with his "model of value exchanges" (see Figure 6 below) that considers values as both cognitive and affective. Morality, according to Piaget (Campos, 2007), constitutes the normative (social) dimension of affectivity.

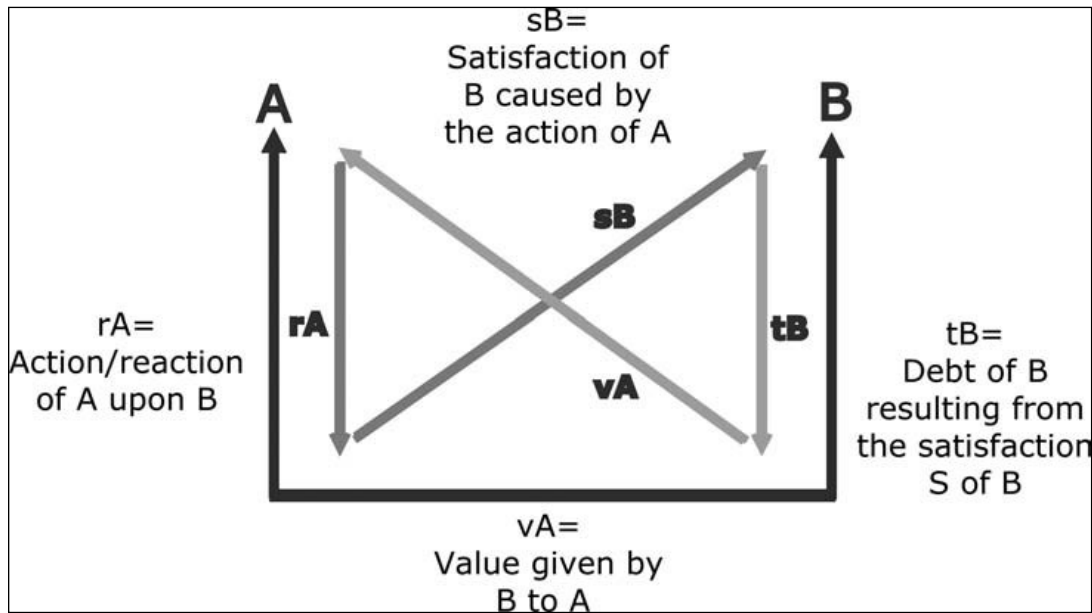


Figure 5: Piaget's model of value exchanges (*source:* Campos 2007, p. 389).

For Grize (1982, 1991, 1996, 1997), such a historical "genetic framing" (i.e., hermeneutical framework) is precisely what can provide each situated schematization with a developmental "uniqueness," similar to that of evolving ecosystems.⁹⁵ Schematizations represent "processes of interlocution" between individuals A and B, equally recognizable, based on images of the world (Im) that are constantly being created and recreated by their verbal and non-verbal interactions. Grize summarizes it as follows:

⁹⁵ Analogies to music partitions (Lima 2012a) or cooking recipes (Létourneau 2007) may also be illuminating in such a respect.

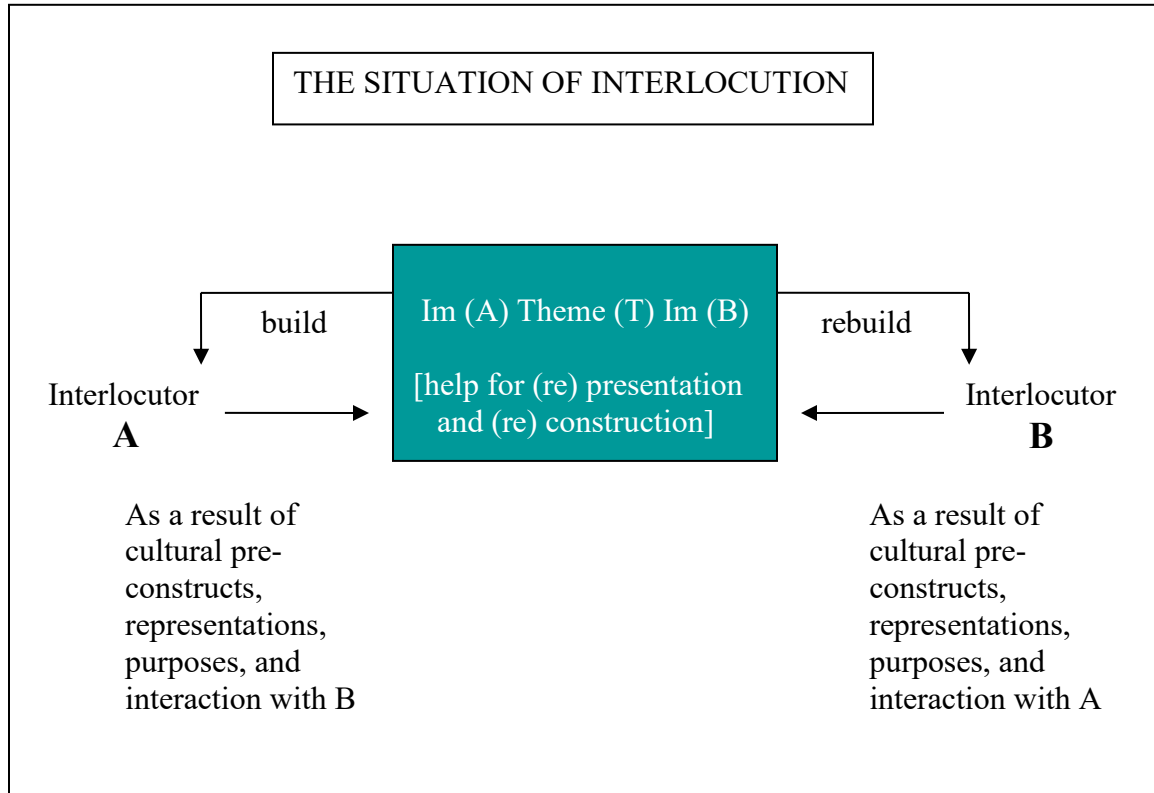


Figure 6: The dialogical schematization (adapted from Grize 1997, p. 29).

The above schema helps us understand the virtual relationships between interlocutors in genuine dialogical settings (consistent with Breton’s triangular model that we integrate in this thesis). It becomes relevant to legitimate (ethical, non-abusive) argumentation, which is mainly based on genuine dialogue, be it between any orator and his/her audience (e.g.: democratic representatives and their citizens) or between no matter which autonomous (free) individuals who engage in genuine (authentic, nonviolent) discussions.

The dialogical exchange between interlocutors A and B is a natural mechanism in which interlocutor A builds an image [Im (A)] and interlocutor B another image [Im (B)], about a theme (T) which was first proposed by the initiator of the exchange (say, Interlocutor A). Then, depending on who is next to take the turn in the communicative

process,⁹⁶ such images Im (A) and Im (B) are reconstructed (e.g., expressing other understandings) or further expanded as new elements may be added to the historically built common theme (T), as it now involves reinterpretations of the initial interpretations, and so on... Yet, those images built by the interlocutors [i.e.: Im (A) and Im (B)] as a result of their communicative process also inevitably depend on the intentions (will, objectives, character) of each interlocutor towards moulding (shaping, framing) their particular representations, as well as on the contexts in which their own cultural pre-constructs (beliefs, traits, habitudes, etc.) were developed, informing their own framing in image building.

In such an interactive process, Interlocutor A will in its turn, build a new image [i.e., Im (A')] of the theme (T), as a result of what Interlocutor B has provided in response to the initial Im (A), and that also in light of B's own interpretation [i.e., Im (B)]. Then, in return, B rebuilds a new image Im (B') of theme (T) as a result of what interlocutor A has provided in light of his own previous interpretation Im (A'). And so on up to the end of the exchange between interlocutors A and B. It is, therefore, by building and rebuilding meanings in such an interactive way that our schematizations come to constitute both a recursive and a progressive process of (re) construction by which interlocutors can conjointly help to interpret each other's words (Grize, 1996).

According to Grize (1996), for such a process to be constructive, it requires four basic competences (a-d) extending within a socio-psychological range: **(a) Linguistic:** syntactic, semantic, and "performative" abilities; **(b) Cultural:** discourse is culturally enacted; **(c) Rhetorical:** expression is bound to metaphorical and analogical thinking; **(d) Logical:** argumentation involves a process of reason (ing). To deal with such basic

⁹⁶ For Grize, as for Perelman, human communication is intrinsically argumentative.

competences within the rich domain of human communication, Grize (*Ibid.*) then propose to focus on what he called “natural logic.” It refers to logical-discursive operations that we enact in natural linguistic “situations of interaction”, constituting what he called “situated schematizations” as represented below:

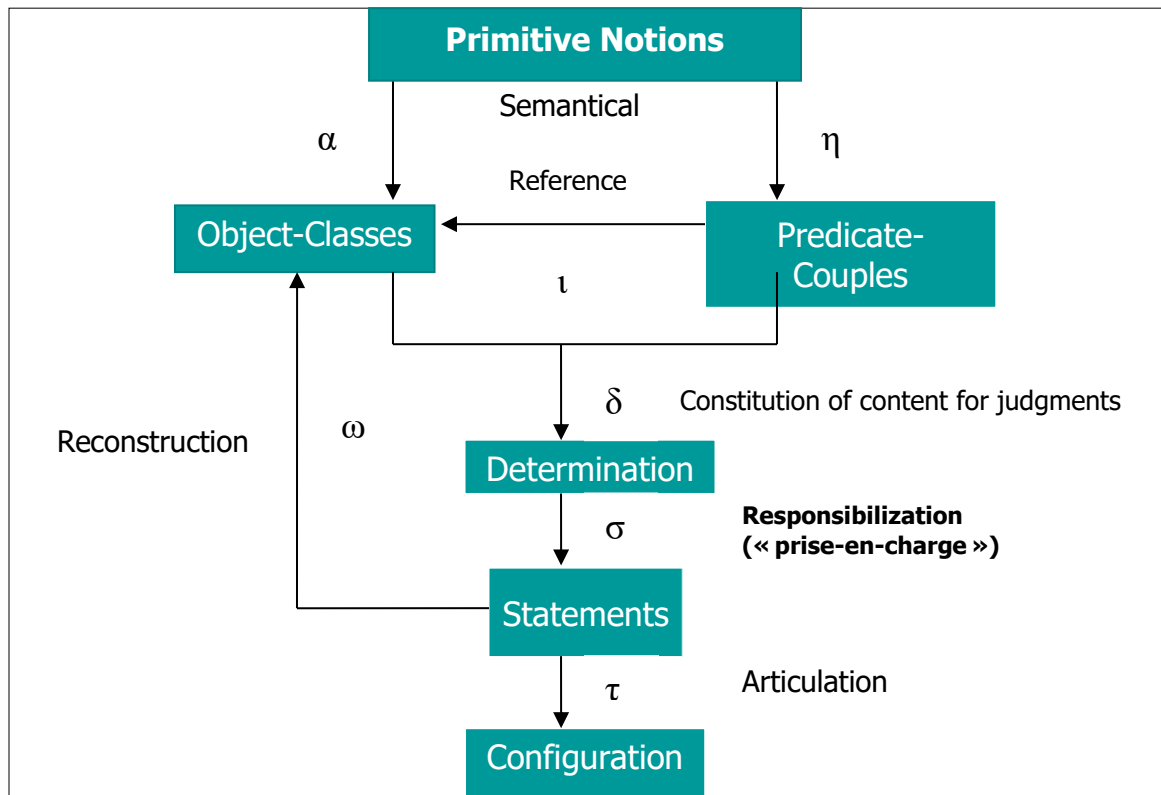


Figure 7: Operations of Natural Logic (adapted from Grize 1996, p. 104).

This structure represents the way *logico-discursive operations* are enacted in natural reasoning processes, in the rich dialogical dynamics of human communication. They are, of course, *logical*, because they reflect reason(ing) operations, but they are also, fundamentally, *discursive*, given that our thoughts manifest themselves through symbolic language within discourse. Whence we can say that stricter formalisms (schematizations) are limiting cases of such naturally dynamic situations of our interlocutions. What we find most instructive for our particular purposes here is the operation of *prise-en-charge*—which we follow Campos (2015) in translating as “*responsibilization*”. We take

this concept to represent the sense of “moral accountability among interacting autonomous selves” (that we also wish to emphasize later in this thesis—ch. 4), particularly with respect to the ethical challenges brought to the contemporary world by digital media.

However, Grize’s schematization seems to retain, if taken by itself, the old cognitivist problem concerning the relationship between two poles that remain to be reconciled, namely: the logic of objects (i.e., object-classes), on the one hand, and the logic of subjects (i.e., speakers and/or analysts who deal with such “objects” as references). If we look at this dichotomy through the lenses of Discourse Ethics (i.e., subject-subject oriented)⁹⁷, and integrate it to Breton’s triangular schema of ethical argumentation, by also complementing it with the Peirce-Mead’s semiotic perspective (see section 3.3 below) in order to preserve the sense of interactive autonomous selves as responsible discussants, then, this relationship may no longer present any substantial problem. For, according to our integrative model, when dealing with classes of “objects” (i.e., subject matters) the participating interlocutors (i.e., autonomous agents or subjects-in-charge) are called upon to share among them a *double “responsibilization”* in dealing with such subject matters, i.e., to share both *the care* and *the consequences* of their “interacting and dealing with each other” and with their environment, as they intend to partake subject matters into a legitimate discussion.⁹⁸

Moreover, also inspired by Grize’s vision, Campos (2007, 2015) came up with the following model to represent the configurations of meanings in which the affective, cognitive and moral-ethical dimensions of communication, mediated by different kinds of

⁹⁷ That is, a non-instrumentalist paradigm so as to be indeed ‘trans-actional’.

⁹⁸ The senses of ‘co-authorship’ or ‘co-responsibility’ are thus most illuminating in such a connection.

objects are built and rebuilt by interlocutors leading either to the moral pole of dialogue or that of violence:

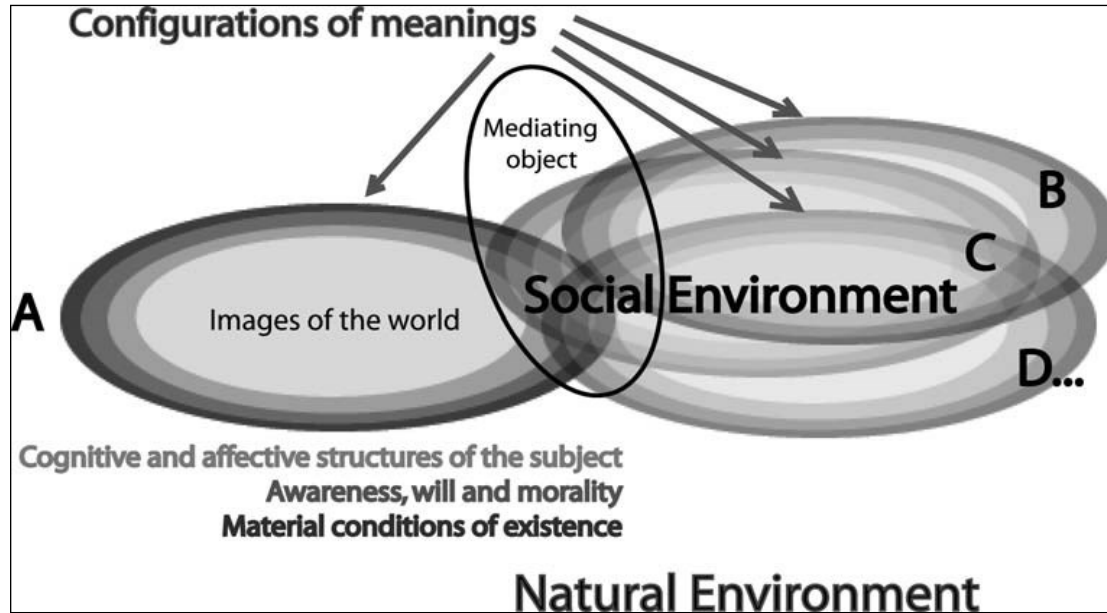


Figure 8: Schema of the Ecology of Meanings (Campos 2007, p. 398)

The “ecology of meanings” (Campos, 2015) is proposed here as a complement to our integrative theoretical framework to explain communicative interactions. Its critical constructivist approach integrates Piaget’s model of exchange values (1923, 1959) and Grize’s communication model of schematization (1996), while also exploring one of the promising research paths envisaged by Habermas’ theory of communicative action (1987). It understands communication as a transversal discipline crossing all others, from the psychosocial and biological to the exact disciplines, as a foundation of knowledge both universal (necessary) and contextual (contingent), in which argumentation moves to persuade interlocutors in terms of pretensions to validity depends both on nature and culture. Perelman and Olbrechts-Tyteca’s (1958, 1977) dynamic rhetorical power has connections with Campos’s ecology of meanings.

This account has the purpose of integrating the above-mentioned approaches, emphasizing the concept of *prise-en-charge* (“responsibilization” or, yet, “taking-charge”) for autonomous and free individuals participating as equals in a discussion. This is relevant to understand the emphasis concerning equality and integrity of interlocutors in Breton’s (2007) triangle of legitimate (ethical) argumentation. Each approach would, however, be incomplete in itself, if taken separately, as they lack the argumentative aspect of dialogue that Breton’s triangle well incorporates from Perelman’s and Olbrecht-Tyteca’s theory of argumentation theory (1958, 1977), which also leaves more explicit its limitations with respect to manipulation. Although Grize also relies on Perelman’s and Olbrechts-Tyteca main insights, he does not formally incorporate rhetoric into his account of Natural Logic.⁹⁹

The subsequent model I compile (i.e., the Peirce-Mead-Grize-Breton model), is supposed to incorporate it all, being also compatible both with Campos’ (2007) holistic “ecological” framework (i.e., one that considers our natural environment alongside the variety of world images that we, as interlocutors, create all around us); yet, also to the “pragmatic-transcendental” double paradigm proposed by Discourse Ethics. This all-encompassing framework helps us to highlight the aspect of “prise-en-charge” and the natural relations (dialogic in its nature) to be respected by legitimate argumentation. Accordingly, it would rather be in simplified *limiting cases* that subjects may, thereby, become themselves “objectified” (i.e. treated as just “tools,” when not completely

⁹⁹ See, e.g. : GRIZE, J-B, *De la logique à l’argumentation*. 1982.

ignored) by the imposing *subjects-in-charge*, instead of being respected as *equally responsible and free (autonomous) participants in their interactions*.¹⁰⁰

In such limiting (objectifying) cases, subjects are thus brought to fall into the class of “objects” (instrumentalities or objects of study) by allowing those *in-charge* to deal with them in a manipulative way. At this point, a complex question arises about how much those who *take charge* are also capable of exerting *sufficient self-control* (so as not to abuse their opportunity to manipulate others). That is to say, the question concerning the very fine line between *power* and *violence* to which I shall turn next when tackling manipulation and its challenges for ethical (legitimate) argumentation within democratic environments.

3.2.3. Philippe Breton’s triangular model of ethics for communication

Argumentation, an ethical matter.
(Breton 2007, p. 23)

Philippe Breton, in line with Perelman’s and Olbrecht-Tyteca theories on argumentation (1958 & 1977), challenges us to adopt a broader approach to communication, summarizing the representation of the balancing exercise that encompasses the three main interactive communication axes for sharing information:¹⁰¹

¹⁰⁰ That is to say: when such interacting subjects are not allowed or rather choose not to ‘responsibilize’ (*prendre-charge*) for their ‘trans-actions’ within their interactions (be it by not engaging at all or by just changing the subject-matter to another irrelevant one within discussions).

¹⁰¹*N.of.A.*: this schema as well as others below reflect a free adaptation from Breton’s original in French.

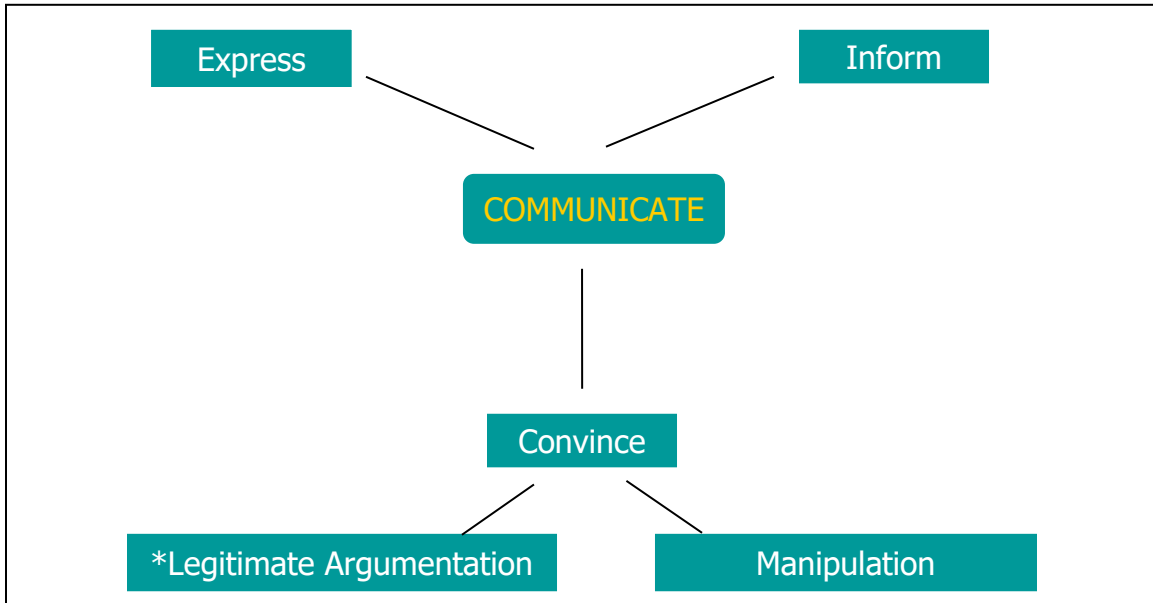


Figure 9: The three main aspects (modes) of communication (Breton 2007: p. 5)

Breton thus observes that these three main registries (i.e.: to express, to inform and to convince), though separated in theory, present themselves in practice as integrated. In order to consider public communication in the broader sense of *legitimate shared understanding*, we have to rely on the human ability to conciliate those three registries responsibly well (2007). In what regards persuasion, more particularly, it means to confront more explicitly the dilemma between *legitimate argumentation* and *manipulation*, in order to conciliate among:

- Exposing (rather than imposing) a *position*;
- Proposing appropriate arguments (*reasons*) in its favour;
- Being open to consider, in the name of an ethical (i.e., *responsible*) standing, the *relevant points* against one's own position, maintaining thus both a reflective and critical attitude instead of just seeking adherence no matter what.

On the other side of the spectrum, *manipulation* rather consists of depriving someone from the freedom of self-reflection and reasoning, preventing him/her from exercising free judgment. It means essentially imposition based on *lack of respect* towards the other instead of treating the other as an equally rational human fellow. This is bluntly opposed to democratic principles, as it blocks the other from informed and rational participation as an equal. Manipulation consists of fabricating information conceived purposively to *paralyze* or *mislead* one's interlocutor, without otherwise providing good reasons to justify one's legitimate acceptance of the message. Breton (2007) aims, therefore, to highlight this inherent illegitimacy of manipulation in contrast to more authentic practices of sharing understanding through open and participatory discussion (i.e., a cooperative endeavour made possible by legitimate argumentation essentially required within democratic contexts).

Manipulation is thus negatively presented as the limiting point of how far argumentation can go before it becomes illegitimate, that is, to show more explicitly where one starts and the other ends.¹⁰² Thus, even considerably positive forms of, say, "propaganda" against tobacco consumption, for example, can be targeted rather negatively to also constitute manipulation, if it does not present sufficient "good" reasons for people coming to consciously accept or reject such a message. That is to say, it is regarded in a way not to be encouraged, given that its illegitimacy can easily open the door (i.e., creates a precedent) for further gradual abuses by publicity and marketing,

¹⁰² By this, we do not wish to (nor actually) deny that manipulation may sometimes be needed in real situations (e.g., for inducing a child into taking some unpleasant medication) for the lack of better options. But that does not change the fact that it is manipulation nonetheless! And, thus, it presents a problem of ethical judgment and moral decision by its being precisely so. In an ideal world, it would be avoided as much as possible, though we acknowledge, of course, that the real world has its limitations: this is precisely why we offer this triangular model for presenting more explicitly such limitations concerning ethical argumentation.

which may turn out to be much harder to control once started (the good old “slippery slope” argument).

A good example of an ethical “publicity campaign,” has been given by the Montreal Transportation System (STM—*Société de transport de Montréal*) for advocating public vs. private transportation in town: “Jealous of the preferential line? Take the bus instead: besides being cheaper and faster on peak hours, it is also more ecological!” (STM public campaign 2014).¹⁰³ Such an advertisement, besides being clear, also provides good reasons for people to change to public transportation, while also acknowledging the common temptation for some drivers to invade the lanes reserved for buses during the busiest hours.¹⁰⁴ This sounds to us a “good” transparent public education, instead of mere manipulative propaganda. Breton (2008) attempts to summarize as clearly as possible the subtle difficulty involved here, by stating what he termed the “paradox of argumentation” thus: “Here lies the very mystery of legitimate argumentation: one should devote all his efforts, energy and creativity to persuade someone else, yet, telling the other that (s) he is free to be persuaded or not, as one leaves open the possibility that the other’s point of view may be as legitimate as one’s own.”¹⁰⁵

¹⁰³ See, e.g.: STM, “Sustainable Development Report 2014” in the *STM Annual Report 2014 - Combining Performance and Customer Satisfaction* [Online], http://www.stm.info/sites/default/files/pdf/en/15001_06_bilan_dd_2015_ang_int.pdf

¹⁰⁴ Let us note that this is considered argumentation in the broader (encompassing) sense proposed by Perelman and also by Breton, which we endorse here, as it opens up a window for ‘appropriation’ and ‘prise-en-charge’ by the receivers in their turn, as they see the campaign, accept it or not for themselves, as well as discuss it further with others: this is a campaign that does provide indeed explicit good reasons in favor of public transportation, despite whatever financial motives people may have for choosing otherwise at some places, like Canada, for example. We thus offer it as an example of educational advertisement (as opposed to manipulative marketing commercials just to sell products), that is: if people are free to choose, they will still have to make their own judgments and choices according to the message received, but at least the government did its pedagogical part for defending it as a good choice. Perhaps, an additional ‘more coercive’ but necessary step should be to decrease financial incentives (in parallel to such a campaign) at some places, e.g., by charging extra taxes for those who own cars (say, a carbon emission tax): this is another point to think about, not only in Canada, we suspect.

¹⁰⁵ BRETON, P. 2007: p. 144.

Accordingly, the author proposes a “triangle of argumentation” (2008), through which the flexibility and the limitations for legitimate (ethical) argumentation are presented (Figure 10, shown below). This schema works for multiple applications, yet, it can avoid arbitrary points of departure (“opinions”) as their premises are not to be considered as all equally relevant, but rather as dependent *both* on their appropriateness to the discussion (including its context of reception) *and* on the audience’s indications of acceptance towards appropriating itself of the argument being shared, through a *reflective exchange of views* (i.e., responsible interaction or engagement), with the speaker: ¹⁰⁶

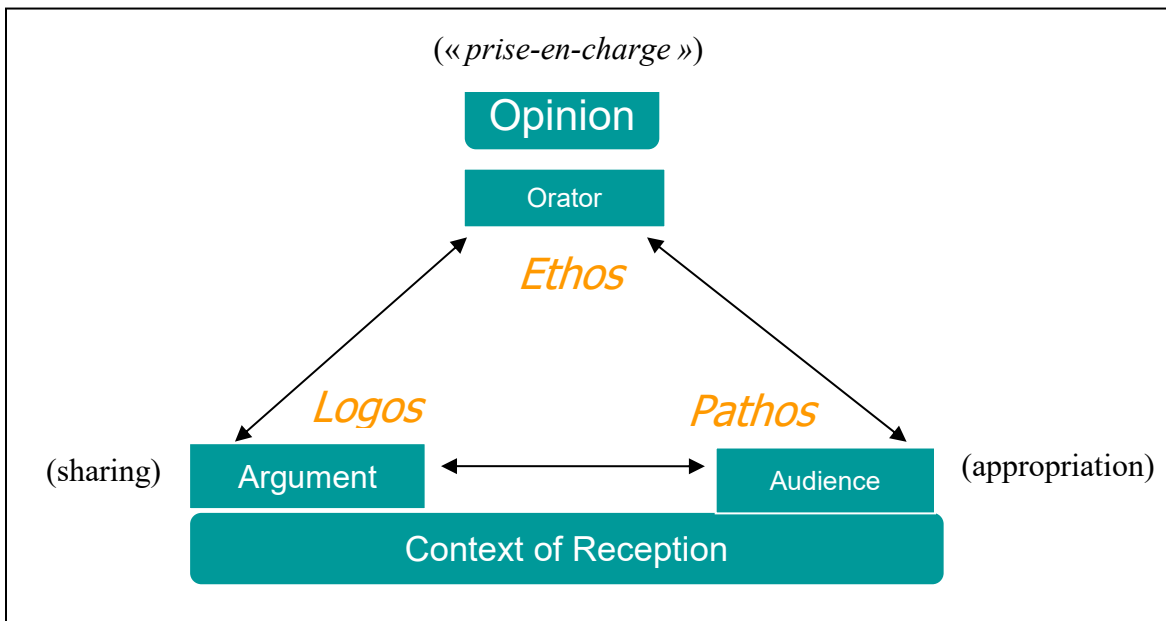


Figure 10: Breton’s triangle of argumentation with Grize’s notion of “prise-en-charge.”¹⁰⁷

¹⁰⁶ The reason for this double preoccupation concerning ‘relevance’ is made clear enough by Perelman and Olbrechts-Tyteca, i.e.: by relying solely on the audience’s adherence, as the only measure for argumentation strength, one will end up corrupting the audience by giving it too much power, without limiting its will in its turn, with respect to the appropriateness to the discussion in progress. [See e.g.: Perelman & Olbrecht-Tyteca, 1958 (Ch. V) and 1977 (Ch. XII); Lima 2012a (note 11).]

¹⁰⁷ Adapted from Breton 2007, p. 20: we’ve added the terms in parentheses for further clarification! It is also worth noting that although Breton keeps Perelman’s terminology of ‘orator’ and ‘audience’, his proposed balanced triangle for representing ethical (legitimate) argumentation within democratic contexts, by having a symmetrical (triangular) shape, does not need to presuppose any hierarchy among interlocutors, i.e.: one’s status whether as speaker or audience in a legitimate democratic discussion thus initially puts precedence on the former just as a matter of whom initiates and conduct the discussion (i.e., ‘takes-charge’) at each turn of the exchange. (Piaget’s value exchange and Grize’s interlocution schemas can both be helpful in complementing Breton on this point, as these highlight further the very interactive dynamics for such an exchange of views –for more details, see Campos 2007.)

According to the figure above, the “orator” (i.e., speaker-in-charge) needs to make a choice for finding the appropriate angle as a starting point to the discussion, according to which the argument is to be initially presented. A legitimate argumentative act thus happens in a “context of reception” that already includes cultural preconceptions, values, judgments, and representations by both the speaker and the audience to whom the argument is to be more or less adapted accordingly. Breton (2007) sums up three main communicative (interactive) acts that are considered essential for building an ethical (responsible) argumentation (pp. 20 – 23):

- (i) attentive listening (which requires openness to dialogical exchange);**
- (ii) due consideration for the other’s point of view; and**
- (iii) willingness to take responsibility for (eventually justifying) one’s position.**

Breton (2007) also offers examples that are not necessarily limited to one-to-one interactions. The triangle can also be well applied to larger organizational contexts, e.g., a public consisted of teachers or of police officers addressed by public speeches concerning drug addiction (“*toxicomanie*”) (2007, p. 22). One can adequately and legitimately present the same issue to different publics, with specific concerns, by taking into consideration as many different points of view and responses as possible regarding a particular issue (thus accomplishing what Perelman and Olbrechts-Tyteca [1958] indicated as a balanced approximation between particular and universal audiences).¹⁰⁸

It should also be noted that being part of a public (audience) necessarily includes the possibility that one does not actually have to speak out in order to make up her/his mind about any particular issue. Even though, ideally, there should always be some room

¹⁰⁸ See e.g.: PERELMAN & TYTECA, *Treatise*, 1958 (§13- 14), concerning more particularly such a pedagogical challenge in the case of teaching that can of course also benefit enormously if more interactive.

left for further discussion, questions, and general feedback from the audience during and/or at the end of public speeches, no matter whether the context is one of teaching, negotiation, or press conferences. Thus, some basic exchange is always to be expected between speaker and public within democratic environments.

Fortunately, and partly thanks to the Internet, there is now a variety of ways to collect public opinion in democratic environments, as we can increasingly count on new technological tools for better interacting and collecting data and for quicker feedback both from particular and more general publics (e.g. interactive electronic surveys, petition sites, ballots and referendums, etc.).¹⁰⁹ In such situations, we may surmount typical dialogical settings. In some cases, the same may apply to customers offering and acquiring Big Data to/from algorithms and applications for metadata analysis. How could our dialogical framework be still useful for dealing with those kinds of situations as well?

These may appear to be separate subjects: one dealing with tools that favour democratic (and pedagogical) interactions, which interest us the most here; the other, having to do with the goal of coming up with increasingly intelligent and powerful machines and algorithms to work *for us* (i.e., to replace us in performing complex or boring tasks). No matter which case, however, at the end of the line, the final results and decisions will keep affecting, being received, as well as analyzed by one or a group of human stakeholders, be it with respect to politics or commercial businesses.

Notwithstanding, such collaborative dynamics still might face, unfortunately, numerous risks, that Breton (2007) attempts to summarize as follows:

¹⁰⁹ One of these applications, e.g., allowing for better and quicker feedback from students in schools and universities is called Blue Learning Experience Management (www.explorance.com): a tool that's been well accepted by teachers and institutions all through Canada, US, UK, and Australia.

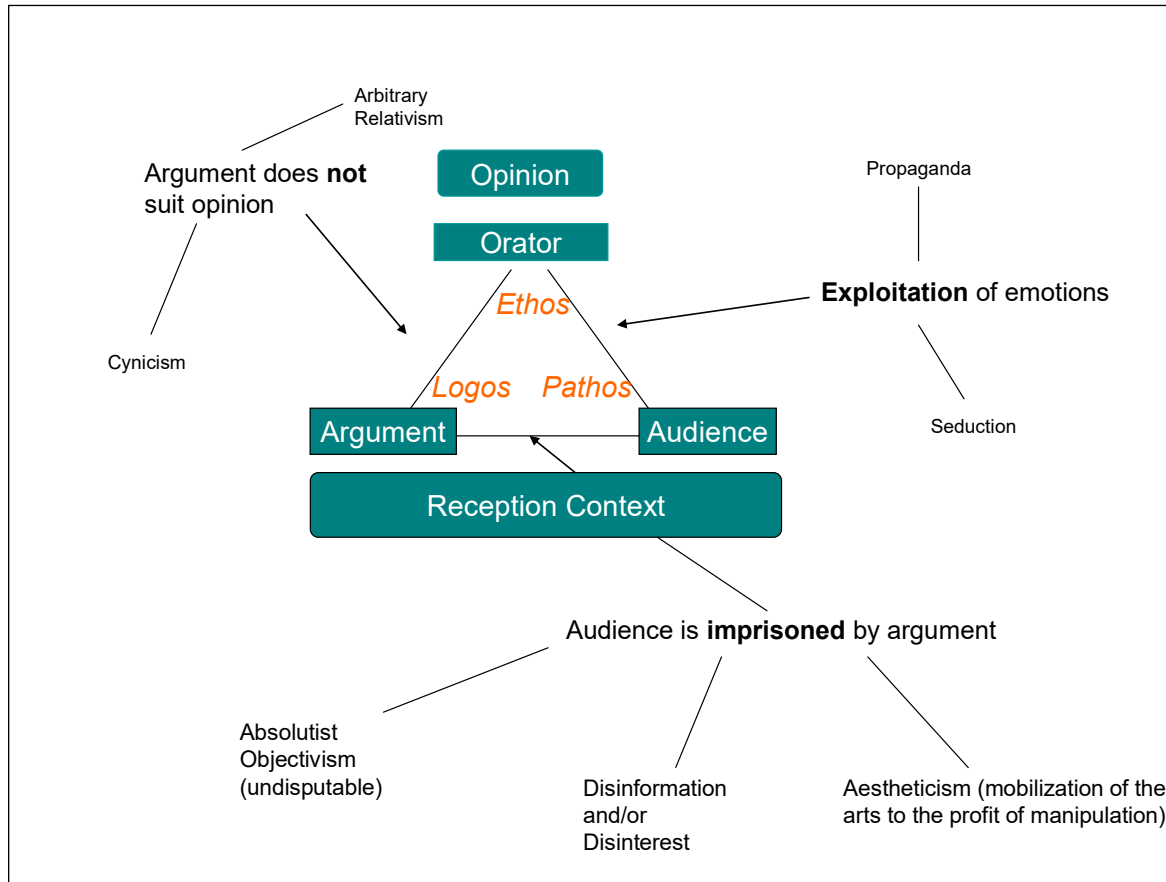


Figure 11: Triangle of ethical argumentation with its limits (adapted from Breton 2007: p. 35).

The above schema allows the observation of common manipulative tricks such as cynicism as well as radical relativism, both constituting irresponsible approaches that can undermine legitimate argumentation. This model works very well to describe situations like publicity stunts, or even propagandist abuses, by describing how they fail to meet dialogical criteria. They focus both on the production and transmission of messages.

Such criteria enable the diagnosis of arrogant or indifferent standing towards others. Once the motivations and strategies for promoting open discussion and debate among people (however different those may be) are blocked, dangerous routes might be taken towards accepting anything (without due reflection and justification) as being legitimate and acceptable. The same point holds for other forms of manipulation as depicted by Breton's schema above, which may damage, in one way or another, the

balanced dynamics of his supposedly interactive triangle.¹¹⁰

Instead, ethical (legitimate) argumentation is expected to promote critical reciprocal examination by sharing understanding through discussions and exchanges with others, as it leads to providing reasonable justification for mutual “pretensions to validity,” such as Discourse Ethics also attempts to point out. The notion of ethical argumentation as a *co-responsible endeavour* (or “responsible engagement” as Perelman and Olbrecht-Tyteca prefer to call it),¹¹¹ is presented by Breton (2007) as an essential dimension of human communication, crucial for maintaining legitimate democracies.

After all, as Garver (2004) has adequately pointed out as well, “Only by limiting myself to responsible argument can I have ethical relations with my audience, since the only rational form of *ethos* is one created through such argument.” (p. 54). We do not depart here from a model of an orator speaking to an audience, even though we can, of course, surmise positions are reversible, in accordance with the model. Any communicative interaction (dialogical or argumentative in nature) supposes a speaker and a receiver (who, ideally, take turns as they interact) such as illustrated by Piaget (1923, 1959) and Grize’s (1982, 1996) models already depicted above (section 3.2.2).

Nevertheless, Edda Weigand (2011) point out that

Power represents a very important force which operates everywhere in dialogic interaction. Even if we do not want to set moral benchmarks, one benchmark remains: the benchmark of human action. We can expect civilized behaviour when influence or power is used on our fellow beings. In this sense, even a descriptive model includes norms. As human beings we should reflect on what norms, we would like to acknowledge in limiting the use of power in dialogic interaction. For the basis of civilized behaviour and values of humanity should not be dismissed.¹¹²

¹¹⁰ See e.g., the end of section 14 of Perelman & Tyteca’s *Treatise*, where he also refers to irresponsible antagonistic attitudes such as fanaticism and scepticism (1958 : pp. 81-83).

¹¹¹ See e.g.: PERLEMAN & TYTECA, *Treatise*, 1958 (sections 12-14).

¹¹² WEIGAND, E. 2011: p. 241.

Contemporary societies are complex and are increasingly far from ideal smaller communities, which would share common values and interests. They present themselves as contradictory social structures enacted by conflicts and negotiations among diverse and, unfortunately, often opposing social actors amid conflicts. Temporary agreements and unstable contracts, which tend to be transformed into institutionalized forms, might or might not reflect explicit situations of domination, and may provisionally stop. However, domination can also emerge from some degree of institutional representation, characterized by social actors managing to achieve advantageous power positions therein.

We do not wish to deny the usefulness of contracts, of course, as democratic governments are bound to them. However, this does not imply, nonetheless, the denial that such contracts do involve strong (and many times imbalanced) power relationships. For example, are contracts between communication service providers (e.g., offered by Bell *vs.* Videotron in QC—Canada) and ordinary customers, equal and done on a free basis? We doubt it, as one is pretty much compelled to switch from one provider to another, every 6 months or so, even without wishing to do it, as they keep increasing charges as the contracts mature. It is actually an ethic of “get it or lose it” (i.e. of everything or nothing) as one’s only option would be not to have the services by not abiding to the “suggested” contract clauses.

So, it seems to bring us back to Hobbes (1651) and also to Locke (1689), as mentioned previously (chapter 2). We gradually come to choose a somewhat “common” supreme power capable of arbitrating between our competing human desires and opinions. This power has been formed according to the framework of a civil society that allows individuals to make a “voluntary” social contract with a sovereign authority, transferring their natural rights to that authority in return for the protection of their lives,

liberties, and private properties. Now, whenever the ruler becomes a tyrant, for example, that constitutes a violation of the social contract that bestows life, liberty, and privacy as a natural right for everyone. Locke (1689) concluded that the people have a right to overthrow a tyrannical or illegitimate ruler under such circumstances. By placing life, liberty and private property as the supreme values of law and authority, we obtain the main formulation for the basis of liberalism upon social contract theory. Hence the importance of robust constitutions as reminding references of citizens' rights and obligations that should be respected within liberal societies. Each citizen's rights end where those of fellow citizens begin.

So, the institutions of the State, as well as the organizations and discourses that frame and regulate social life, are never, truly, the living expression of a "society," but reflect "crystallized power relationships," that is, "generalized means" that enable actors to exercise power *over* other "social actors" in order to have the power *to* accomplish their goals (Parsons 1992).¹¹³ Actors produce the institutions of society under the conditions of the "structural positions" that they hold, although with the capacity (ultimately) to engage in self-generated purposive (meaningful) social action. This is how a semiotic approach can see "structure" and "agency" being integrated in the understanding of social dynamics. We do not have to accept the twin reductionism of structuralism or subjectivism.

So, coming back to the example of contracts offered to the general public by corporations providing communication services. According to our ethical triangular model, in order to establish a more balanced relationship between providers and ordinary

¹¹³ PARSONS, *Social Change and Modernity* (ed. Hans Haferkamp and Neil J. Smelser). Berkeley · Los Angeles · Oxford: University of California Press. 1992.

individuals who may be interested in acquiring services (almost unavoidable), we would need, first of all, governments to establish consensual regulatory frameworks to guarantee (essential) services no matter from which provider, though offering reasonable options of choice and negotiation (e.g. prices, time frames for upgrades, etc.). The provision of enough information for people to make better (informed) choices among extra services that could be offered by each provider is required, in addition to basic services. More options, to avoid forcing people to say “no” to the whole contract and to change from one provider to another searching for better deals in the “free market” jungle. Loyalty is thus being discouraged, unless for people who can afford higher prices and feel just lazy to make any changes at all to their providers. At the end, this is not what we consider an ethical (legitimate) negotiation, as it rather sounds like neglect or abuse of power.

3.3. Peirce-Mead-Grize-Breton compounded model for autonomous selves

As we have highlighted above (chapter 2), there is a radical singularity (i.e., uniqueness) in the human capacity to communicate, but that can be lost by the rigidities of convention and its hegemonic framing. Semiotics with its wide range of possibilities can definitely help us better comprehend the logic implicated in the process of language constitution and, consequently, of our very process of thought and explanatory power. It can thus offer a prodigious conceptual map for understanding the dynamics embedded in human language and communicative interactions.

Not less importantly, journalism and media tools are required to act as mediators of the complex relationships among politics, science, cultures, and societies in as responsible and legitimate way, particularly in democratic settings. Hence the fundamental importance of “freedom of expression” and “autonomy” for both individual

citizens and the press for researching, learning, and communicating (sharing information and understanding) among themselves.

We have therefore compiled the following model for ethical (legitimate) argumentation, which attempts to accommodate, in an intelligible and explicit way, the peculiar semiotic “triadicity” of individual human selves as “autonomous” and “reflexive” beings, all equally capable and deserving of expressing their views and particular perspectives. It serves to illustrate the dynamic richness of human communicative interactions if allowed to emerge in cooperative contexts that could nourish and develop humans’ creative potentials.

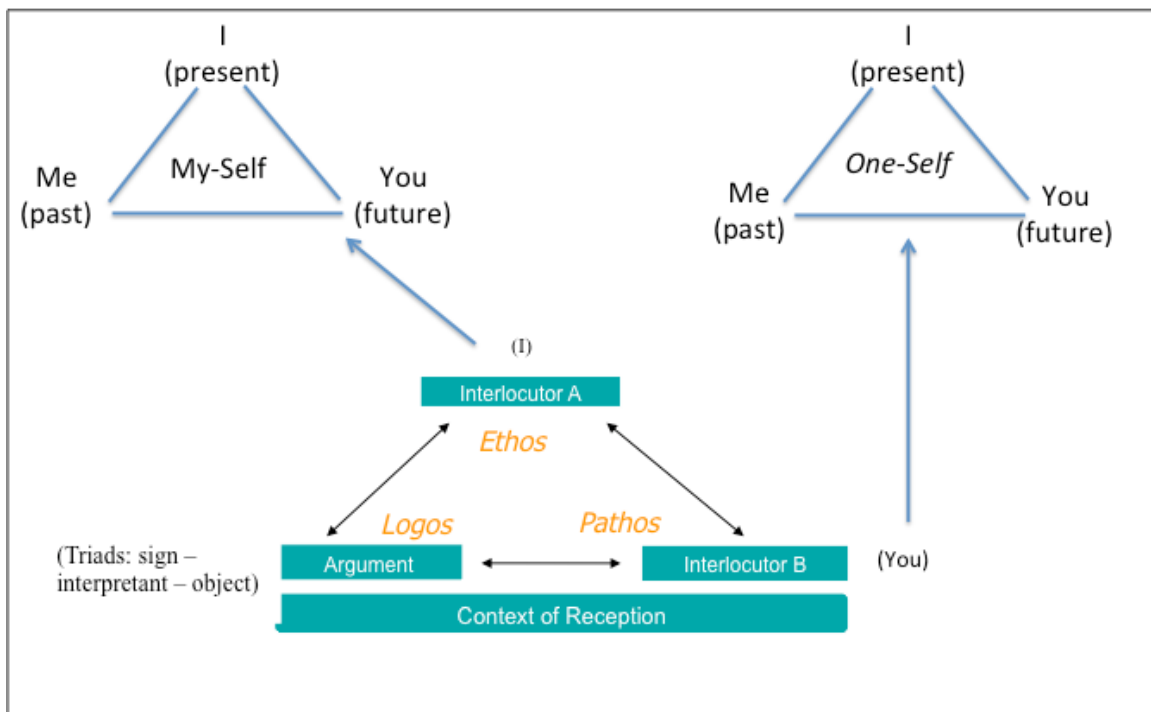


Figure 13: Ethical (legitimate) argumentation “semiotically” represented as intersubjective dialogical interaction (as triads of “triadic autonomous selves”) incorporated to Breton’s triangle of argumentation.

The box on the left representing the *argument* (signs/meanings) also has itself a triadic structure composed by the triad “sign (strict sense)—interpretant—object,” which

semiotically work together towards meaning creation and sharing of understanding.¹¹⁴

Accordingly, in such symmetrically interactive communications, both “communicator” and “communicatee” take turns in acting as subject and object through inter and intra-personal processes of meaning creation, exchange, and interpretation.

These two levels of reflexivity and interpretation (i.e., intra/inter), as we’ve seen above (section 2.3), dynamically interconnect, illuminate, and nourish each other. The latter is more public (indirect or mediated) while the former is more private (direct or immediate), collapsing (i.e. internalized reflexively) by mirroring the interpersonal processes of communicating with others. Neither one is completely private nor completely public, but are variations in degree between these two poles. A *continuum*, as pragmatists and critical constructivists alike may prefer to call it, between different aspects of meanings, concepts, and perspectives (whose balance determines the successes or failures of democratic systems). This way, the dynamics of human language can flourish as events and other people “present them to us,” within the diversity of both societies and nature.

Moreover, this triangular model incorporates the approach that we wish to emphasize for preserving the sense of “autonomous” (Peirce-Mead’s semiotic perspective), “interactive” (Grize-Breton’s dialogical perspective), and “co-responsible” agents (Apel-Habermas’s ethical perspective) for legitimate democratic (argumentative) systems. Our compounded Peirce-Mead-Grize-Breton triangular model, by incorporating autonomous and co-responsible selves, is therefore adopted as being both encompassing and flexible enough to avoid our slipping into self-deceptive, counterproductive, or reductive “dyadic models” (whether neo-Cartesianisms or any variety of

¹¹⁴ For further details about such triads that compose the communicative hexads, see above (ch. 2) and WILEY, Norbert 1994.

downward/upward Reductionism attempting to counter them), which facilitate elitism/racism and keep leading us to endless and ever more destructive wars, instead of providing human liberation.

One still more interesting aspect of the new possibilities brought by Digital Media is that public discussion now allows for the materialization of a plurality and indefinite production of meaning creation and sharing, such as it was envisioned by the Peircean semiotic perspective in more abstract terms. It can be said to represent the “materiality” of semiotic dynamics now brought to daylight and in plain action, namely: the flow of ideas being shared and further producing others (potentially *ad infinitum*) with almost no barriers of time or geography, other than some minimal technical constraints, though still facing tension zones among the predominant “niches” of meaning in the (sometimes very) different conversation groups that come to interact. One of the biggest journalistic challenges now is the ability, for reporters and other media professionals, to recognize and establish the credibility of legitimate events (including cyber-events), despite their multifaceted complexity and instantaneous spreading allowed by a huge variety of social media tools.

While the monopolization of the mediated processes of semiotic representation (i.e., sign generation activity) may, on the one hand, be challenged by the huge array of possibilities brought by digital media (e.g., the plurality of new ways to interact and share information curtailing previous geographical barriers); on the other, the power that comes with them brings threats to basic democratic rights, e.g., by abusive mass surveillance. The limitations for legitimate communication shown through the triangular (balanced) model presented above, help us analyze concrete problematic cases concerning the use of digital media and the regulatory challenges that contemporary democratic societies face.

Part B

4. Digital Media Ethics

*The twentieth century was the bankruptcy of the social utopia;
the twenty-first may become that of the technological one.*
(Philosophical and Practical Aphorisms 2010)

We've been watching in this century a dangerous re-emergence of sophisms, with a wave of conservative governments coming to power at important countries around the world. Thus, we need to be very careful at facing sophistic and fallacious tricks being used to manipulate public opinion into accepting and electing leaders that encourage the spreading of fake news, leading many people to call it the "post-truth" period.¹¹⁵

Keeping in mind what has been presented above (Part A of this work), let us recall that "pseudo-discourse" is not supposed to override dialogue; nor any individual (particular) interests should be put above "collective" ones, if consensus is indeed to flow democratically in a democracy, through dialogue and legitimate argumentation, such as defended in this text. In such lines, as highlighted above, Apel and Habermas have both been important voices, departing from a universal point of view, where observation and judgment can be arbitrated impartially and towards more collective consensus and/or critique. That is, not from a solitary (intimate) or solipsistic point of view (e.g., in the lines of a neo-Kantian ethics of obligation), but rather via more participative and deliberative democracies towards constructing a discursive ethic made by and for "us" (i.e., collective voices).

As societies keep developing around new technologies that promote multiple and faster ways to enable communication in a more global scale, one can observe, however,

¹¹⁵ To a point of even being this term chosen as 'the word of the year' in 2016: THE OXFORD DICTIONARY [Online], published in December 2016, <https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016> .

that their regulations still follow a rather immature stage at the present time. We thus wish to address in this part of the work some of the many challenges that this situation poses to some of our hard-conquered democratic rights, such as freedom of expression and privacy, in the context of digital media communication. One of the main goals is to throw light on some important consequences that such new media have brought to our basic role as “essential communicators” (i.e., people who are able to share understanding and knowledge in a legitimate way). And this because complex problems have emerged involving delicate grey zones, for example: between what may be considered *private* or *public* information, and how much *transparency* should governments and regulators be required to demonstrate to their constituents and clients as opposed to what information they are supposed to know and handle about regular citizens in general.

Recalling Schindler’s insights about freedom and social order (from his philosophical papers), we are led to suppose that meaning can only be understood in the very context of the social relationships in which information is shared and communication is processed. In his own words: “we can say that philosophical writing means to communicate ideas and uses logical argumentation as its primary instrument in doing so. And we can nevertheless add that the *form* of that communication makes a profound difference to the meaning it expresses.”¹¹⁶ Thus, the dramatic integration of poetry and philosophy in Schiller’s writing turns out not to be a mere issue of style, but actually has profound implications for the substance of what he says so as to show their unity, that is, their wholeness both preceding and following his analysis of freedom and communication. He thus links human freedom to its expressive form (far beyond mere “subjectivist” reductions) as a notion of deliberate and discreet acts of an individual will,

¹¹⁶ SCHINDLER, D.C. *The Perfection of Freedom*. Cascade Publisher, Oregon. 2012, pp. 46, 47.

which makes of his philosophy not just a “philosophy of freedom” but a model of “free philosophy” as well.

In such a spirit, and as advocated in Part A above, we approach communication basically as the sharing of meaning and understanding through ethical (legitimate) discussion (i.e., the genuine exchange of information that includes, of course, the structural forms of data circulation).¹¹⁷ It is, thus, also important to recognize that this process has increasingly become dependent on the technological tools being used (besides particular characteristics of senders and receivers themselves), with cultural codes of reference and protocols of communication already embedded in them since the conception, as well as the scope of the exchange processes.

Regarding the scope of the processes of communication more particularly, one can easily observe that, typically, we used to be able to distinguish *interpersonal communication* from broader *mass (societal) communication* in a much more explicit way, before the popularization of the Internet, where: “the former were more interactive (with feedback loops) and private, involving sender(s) and receiver(s) as its individualized subjects; while the latter being traditionally one directional (from one to many) and more public, having the potential to be broadly diffused to groups and society at large.”¹¹⁸

The Internet was originally designed to serve as a decentralized military communication system that would continue working even if parts of it suffered a military

¹¹⁷ As seen in Part A (section 3.1), our main recommendations on this respect, based on the proposal by Discourse Ethics, can be summarized thus: **(i) attentive listening** (which requires openness to dialogical exchange), **(ii) due consideration for the other’s point of view** (i.e., for the equality among interlocutors), and **(iii) willingness to take responsibility for (eventually justifying) one’s position** (i.e., co-responsibility among free and equal autonomous interlocutors).

¹¹⁸ SCHILLER, J. 2007: p.18.

attack, as commissioned in 1969 by the US Department of Defence as the Advanced Research Projects Agency Network (ARPANET). Technically, therefore, the Internet is a decentralized worldwide system of computer networks that allows for the exchange of data among networked computers through a technology called packet switching and through standardized protocols that enable this exchange. Through packet switching, messages (in the form of e-mails, audio, video, or other file formats) are broken down into small packets of digital information, each with address and reassembly instructions, to be sent via the most efficient routes to their destination, where they are reassembled (Castells 2009).¹¹⁹

In other words, by breaking messages down into smaller packets that can travel independently, the so-called packet switching technology takes optimal advantage of bandwidth and enables data exchange among millions of networked computers with unprecedented speed, reach, and interactivity. Because of these qualities, the Internet has become in many countries and communities the primary means by which individuals, communities, governments, civil society organizations, businesses, and other entities communicate and interact. Between the early 1990s, when the Internet first became available for public and commercial use, and 2006, it has thus grown to encompass almost 1 billion users. These users take advantage of a multitude of communication technologies that constitute the Internet, such as the World Wide Web, electronic mail, Instant Messaging, and Usenet groups, to engage in a wide range of activities.¹²⁰ All these online activities involve interactions among individuals, corporations, civil society organizations, businesses, and other entities, through which personal data about

¹¹⁹ CASTELLS, M. *Communication Power*. New York: Oxford University Press. 2009.

¹²⁰ Data source: STAPLES, W.G. (ed.) *The Encyclopedia of Privacy*. 2007, p. 298. More up-to-date stats (you can see below in section 4.1, note #4) also show that almost half of the world population already had some sort of Internet connectivity since back in 2014, having reached its 3rd billion of people worldwide.

individuals can be tracked, collected, archived, shared, copied, manipulated, transferred, and/or exposed—with or without the individual’s knowledge.

For example, different technologies can track website users’ visit history (including visits to previous and subsequent websites), what they may be accessing and for how long (i.e. how much time they spend on a given article), what they buy (and where and when they buy it), what ads they view and for how long, what personal data (including financial data) they enter into web forms, what software they are using, and what e-mails they receive and send (including when and where they access them), and to whom they forward them. Online newspapers, e.g., can now quite easily obtain records of the political or other interests of their readers, and online bookstores may get records of what books their customers have viewed or purchased (on any topic, including health, finance, etc.).

The Internet landscape about privacy, thus, is becoming so increasingly sophisticated that some have concluded that it is now hardly possible to continue expecting any form of data privacy at all. Others agree that the Internet could indeed become the ultimate data surveillance technology, though with the provision that technology *per se* does not necessarily imply such exploitation of personal data. Rather, a medium such as the Internet and its tools (as well as the public policies that regulate their design and use), reflect the interests of different stakeholders in its access to personal information or regarding its protection. But the ways in which such interests are negotiated in the current digital context may bring significant implications for a person’s right to self-determination, personal safety (especially for victims of crimes, e.g., of domestic violence), medical and financial privacy, risk of identity fraud, opportunities for free political deliberation, dissent, and activism, and access to employment opportunities

too.

In a nutshell, the Internet and the worldwide diffusion of digital media (with all its new tools and powerful protocols, provided by a variety of Information and Communication Technologies—ICTs), have definitely altered our communication dynamics to a huge extent. This is also due to the emergency of a new revolutionary form of interactive communication, which Manuel Castells sensibly names “mass self-communication,” which is, according to him: “a new form of communication characterized by the capacity of sending messages from many to many, in real time or any chosen time, and with the possibility of using point-to-point communication, narrowcasting or broadcasting, depending on the purpose and characteristics of the intended communication practice” (Castells 2009: p. 55).

It certainly has also given users a lot of flexibility and liberty, perhaps even too much in some respects, especially if one is not prepared to use it with enough prudence or to cope with its unintended reaches and consequences. Such wider scope of communication through the use of digital media has, on the one hand, amplified the potential scope of our communicative practices. And this is making more pressing an ethic of “cross-cultural” communication in our now globalized interactive stage, as new collaboration opportunities have been created among otherwise isolated individuals and societies by the possibility of overcoming geographical and other physical barriers. On the other hand, as Baron (2008) points out, digital communication also offers much more “volume control” towards limiting our social environment by managing and scrutinizing our encounters.

A good amount of Information and Communication Sciences, thus, have become an interdisciplinary field also devoted to find solutions for effective communication of

information (including the safe management of its registries) via the web. This happens, nonetheless, in social contexts (i.e., involving interacting individuals at some point or another), whether such communications are institutional or personal in scope, and according to their specific ranges and needs. The expansion in this field is inexorably linked, of course, to the developments and transformations in the area of ICTs (Information and Communication Technologies), given that the fast changes and capabilities of its tools have culminated in our becoming what is now called a “global information society.”

Such contexts now encompass interacting agents worldwide (including people from very different backgrounds, values, and interests), the effects and consequences of such tools end up reverberating throughout a variety of social dimensions reaching thus far beyond the mere frontiers and requirements of technological specifications for those tools. These issues reach the intersection of State action, the private sector, and our democratic rights such as freedom of expression and privacy in the digital age. This is due to the fact that online expression is increasingly mediated through private networks and platforms created, maintained, and operated by a diverse range of ICT companies.

Thus, while the rapid growth of the ICT sector has led to unprecedented opportunities for access to information and communication, it has also triggered new forms of State regulations as well as additional potential for abuses that threaten the very existence of a free and open Internet itself. The activities of the private sector now have an outsized impact on the freedom of expression and privacy of millions of users, given their role as gatekeepers of the global exchange of information and ideas.

4.1. The new “world ecology”: digital media, politics, and social networks

*Like it or not, we are all increasingly cosmopolitans, citizens of the world,
not simply citizens of a given nation.*
(Charles Ess 2009)

The spreading out of digital media raises indeed a variety of new issues as we try to understand them, their place in our lives, their consequences to ourselves and to our relationships with others in society. While these technologies can counter silence and powerlessness by allowing individuals to engage in new spaces in which they can express themselves both as professionals and as citizens; at the same time, they also require that we further reflect upon the extent to which they may be transforming the very nature of our interactions, and of our perception of the world. For example, one may reasonably ask the question of whether human communication, while definitely broadening in its structural scope, is also not making interactions shallower and more suspicious, thereby threatening the authenticity and ethical purpose of human relations.

Moreover, one of the best promises of digital media is their democratic potential not only to enable more information gathering, but also to allow for more direct (personal) communication through engaging people via the Internet who may also be physically distant. The ways for addressing, inter-personally, individuals within groups that before used to be much more selective or elitist (including in politics) have, thus, become more blurred, hopefully, favouring more transparency as well. However, with the increased number of opportunities for people to “communicate” via these new tools and to create mediated content on a larger scale, we also have much confusion about the availability, range of messages and posts that may lead to undesired broadcasts.

After all, mediated conversations can now also be documented for future reference, besides being made much more largely available both in space and time. This

has blurred the boundaries between mass and interpersonal communication even further, which is turning out to be disruptive to both of them (Baym 2010). Such new technological possibilities also open many doors for abuses, not only from employers with regards to their employees, but also from governments with regards to its own citizens, not to mention, to foreigners, in terms of mass surveillance. Such potential abuses raise further issues of confrontation versus collaboration, both within and among different cultures, as the boundaries between public and private greatly changes as well (Katz & Rice 2002).

This has called for a more holistic concept that corresponds to such a wider “world ecology,” as it’s suggested by the term “*infosphere*,” proposed by Luciano Floridi (2010, 2011). It basically consists of acknowledging that what happens online, though being somewhat new and exciting, is no less real than previous types of communication. That is, Floridi wishes to reframe the traditional, now much outdated, distinction between “virtual” and “real,” as the former has increasingly become part of daily interactions (both personal and professional) among people and institutions in the techno-digital era.¹²¹

We should also underline that digitized products and wireless communication, including games, music, images and news shared online, as well as instant messaging, now cover a large range of human (inter) activity, from personal support networks to professional tasks and political mobilizations (Katz et al. 2003, Kaufmann 2004). Thus, one may be entitled to say that the grid of electronic communication and digitized information now encompasses a good amount of what people do, wherever and whenever

¹²¹ Recent advances on the so-called Internet of Things (IoT) and artificial reality (including the new game fever of ‘PokemonGo’) have been contributing to make such a line even finer.

they do it, in their daily lives.¹²² The key feature of wireless communication is not just mobility, but also the possibility of “perpetual connectivity” (by being always online), which raises yet a whole new set of ethical questions and challenges, given its proneness to abuses (Castells 2009, Baker and Maier 2014).

The accessing, handling, and exchanging information with the Internet has thus become crucial for allowing many to interact with one another, be it professionally or socially (processes that include, of course, communicating, discussing, and arguing as well). In such a context, researchers in the field of communication and ethics have been very concerned about the fast-spreading use and power of Information and Communication Technologies (ICTs) worldwide. For example, Luciano Floridi (2010) and Charles Ess (2009) have been trying to raise more awareness about many ethical challenges confronting us in this field.

They both indicate some important implications resulting from the crucial role of communication as such a multi-informational medium being now fast re-engineered, apparently in a random way. For example, Ess alerts us, among other things, that if such a route is not soon diverted to a much more responsible and regulated pathway, we will just continue to perpetuate the exclusion at an incredible rate (Ess 2009). So, unless we can manage to distribute communication tools and resources in a more inclusive way, so as to allow people everywhere to have access to the Internet or mobile devices, for example, we may just be preparing further ground for future “digital slums.” Thus, unless much more inclusion happens, we cannot actually enter into a broader, “globalized” discussion about what now became just “usual stuff of life” to so many. Even less we would be able

¹²² According to available stats, about 40% of the world population now has some access to the Internet (that number keeps growing fast each day), with the **first billion** having been reached in 2005, the **second billion** in 2010, and the **third billion** in 2014. See, e.g.: INTERNET LIVE STATS., *Internet Users* [Online], Published on July 2016 (accessed on December 2016), <http://www.internetlivestats.com/internet-users/>. Not to mention, of course, some sort of telephone connectivity and other electronic transactions.

to bring them into a discussion about both their obligations and their rights, for that matter. In the meantime, while such an optimal stage is still far from being accomplished any time soon (if ever), both governments and companies need to work hard together for putting in place as many general provisions and safeguards as possible for protecting citizens' basic rights as users of such tools.

Floridi's account also offers us an interesting (and informative) overall view of the many senses that information can assume nowadays, ranging from raw "technical" data (be it mathematical, physical, economic, statistical, biological, etc.), to more elaborate and complex systems for management, interpretation, and analysis of information, as additional semantic layers of meanings are added. He also wishes to emphasize our unprecedented human condition as "*inforgs*" (i.e., informational organisms whose identity and integrity are also shaped by the information available and handled by/about them in such new ecology [in Floridi's term, "*infosphere*"—see p. 6 above] that includes, as well, interacting smart machines working by ever more complex and powerful algorithms).¹²³

One of our main goals in this part B is to address important issues regarding the many challenges that Digital Media has raised. Hopefully, it may also bring us closer to a broader consensus on a global ethics that can strengthen our sense of collectivity, instead of just supporting activities towards wider commercial visibility, propaganda, censorship and further forms of abuses or divides (now, also to include "digital" ones), which may rather promote the continuation of exploitation and business as usual.

Castells (2004c) and other intellectuals have also well emphasized that the

¹²³ Floridi coins interesting terms such as 'infosphere' and 'inforgs' inspired from Alain Turing's groundbreaking work on the revolutionary idea of computation. See e.g. his short volume on Information (2010) and for more of his current preoccupations: FLORIDI, L. "Ethics in the Age of Information" in *The Alan Turing Institute* [Online], Published on April 1st 2016, <https://youtu.be/1LH70qkROWQ>.

cultural dimension of the process of such “multilayered transformation of communication” now finds itself at the intersection between sometimes contradictory (though not necessarily incompatible) main trends, namely: the parallel development of a “global culture” (or multiple identity cultures); and the simultaneous rise of “individualism” and “communalism” as two opposing, yet equally powerful, cultural patterns that characterize our “new world” (Norris 2000, Baker 2005).

At the core is the formation of global Media businesses whose network has been made possible by public policies and institutional changes characterized by liberalization, privatization, and regulated “deregulation”, both nationally and internationally, and supported by generally “pro-market” government policies which have become prevalent worldwide since the 1980s.¹²⁴ Accordingly, senders and receivers have become the media and their so-called “audience” (i.e., people who are identified as “consumers of media”) when we refer to mass communication nowadays. In such a context, Castells (2009) compiles the main transformations that have been taking place in the last decades, without wishing to imply any order of causality on such a presentation (p. 56):

- widespread commercialization of the media in most of the world;
- globalization and concentration of media business through conglomeration and networking;
- the segmentation, customization, and diversification of media markets, with an emphasis on the cultural identification of the audience;

¹²⁴ Recall, e.g., interesting aspects highlighted by the volume “Du papyrus à l’hypertexte” (La Découverte, 1999) concerning narrow-streaming and the concentration of people into micro-communities. In talking about micro-communities, another point worth mentioning is the current plan by Google think tank (former Google Ideas, now Jigsaw) to offer a counter movement for stopping aspiring ISIS recruits. See, e.g.: GREEN, Y. *Wired*. “Google’s Clever Plan to Stop Aspiring ISIS Recruits” [Online], July 9 2016, <https://www.wired.com/2016/09/googles-clever-plan-stop-aspiring-isis-recruits/>.

- the formation of multimedia business groups that reach out to all forms of communication, including, of course, the Internet;
- and increasing business convergence between telecommunication companies, computer companies, Internet companies, and media companies.

Such transformations happened in each one of the dimensions of the communication process so that they converged to constitute a system where one transformation now cannot be understood without the others. They form together what has been labeled a “communication revolution” (Mansell 2002, McChesney 2007) characterized as the “inflection point” (Cowhey & Aronson 2009) identified by the emergence of new media through the increasingly broader interaction of technological change and communication (Rice et al. 1984) based on the digitization of information, computer networking, advanced software, diffusion of enhanced broadband transmission capacity (local/global via wireless) and increasing Internet access.¹²⁵

The Internet is actually an already old technology, first developed back in 1969, but diffused in a large scale only 20 years later, especially after the World Wide Web server and browser were made available to the general public in the 1990s. This prompted a rapidly and growing social demand for the “networking of everything,” both from the needs of the business world and the public’s desire to build its own “communication networks” (Castells 2001, Benkler 2006). The Internet, the World Wide Web, and wireless communication thus altogether no more constitute media in the traditional sense, as they are now also means of interactive communication and given that the boundaries

¹²⁵ According to Castells (2015), 97% of the available information nowadays is already digitized, which moves an e-market of about US\$1,5 trillion in developed countries alone (original source: *E-marketer* 2014).

between mass media communication and more individualized forms of communication have become increasingly blurred (Cardoso 2006, Rice 2008, Létourneau 2014).

Such new technologies and business models, supported by the policies of regulatory agencies, therefore, have allowed for both an organizational and a technological convergence also between the two systems, which began to take place more pointedly in the first decade of the 21st century, leading to the gradual formation of the new multimedia system now in vogue (Jenkins 2006). But, let us not forget, this new field of communication in our time is emerging through a process of “multidimensional change” that is shaped by conflicts already rooted in the contradictory structure of interests and values that are increasingly constitutive of our large and plural societies in the digital age.

The various dimensions of such transformations have converged into a system where no single transformation can now be understood without the others. For, each component of such transformations, underlying the development (evolution) of this “multimodal communication system,” can rather be said to represent an interactive net of social relationships that ultimately are expressions of “power relations,” most apparent in the persistence of the digital divide between and within countries, depending on their consumer power and their level of communication infrastructure. And even with growing access to the Internet and to wireless communication, abysmal inequalities in broadband access and speed, as well as, most importantly, educational gaps in the ability to operate a digital culture, all tend to reproduce and amplify class, ethnic, race, age, and gender structures of social domination between and within already unequal countries (Katz 2008, Rice 2008).

The ability (or its lack) by people to generate, not only effective, but also robust

protocols of communication between contradictory “cultural frames” will define the possibility of communication and/or miscommunication among subjects involved in increasingly diverse communication processes. As also mentioned above, media ranging from culturally diverse television networks to the World Wide Web, now constitute the packages of communication protocols that together can work towards bridging cultural and inequality gaps and/or refraining from it, by nourishing further fragmentation of people and groups into autonomous “cultural islands” of rich (with access) on one side, and poor (without access) on the other. This brings undesirable trenches of resistance to the web democratization that has been envisioned by its creator, Sir Tim Berners-Lee.¹²⁶ In other words: “technology is only as good as the people who drive it” (SAS Analytics—campaign 2015). So, to be aligned with democratic principles, public policies concerning digital media would have to become more uniform, as they need (ideally) be applied to everyone and everywhere, no matter what country, class, race, religion or/and gender one currently is or comes from.¹²⁷

At the same time, access to such media can certainly empower social actors and

¹²⁶ Sir Berners-Lee, the World Wide Web creator, became one of the main advocates of a universal *Magna Carta* to be globally adopted for the Web he helped to create (you may refer e.g. to his article at The Guardian: <https://www.theguardian.com/technology/2014/mar/12/online-magna-carta-berners-lee-web>). He has been recently awarded the 2016 ACM A.M. Turing Award for his accomplishments with computer machines: “Berners-Lee was cited for inventing the World Wide Web, the first web browser, and the fundamental protocols and algorithms allowing the Web to scale. Considered one of the most influential computing innovations in history, the World Wide Web is the primary tool used by billions of people every day to communicate, access information, engage in commerce, and perform many other important activities.” Extracted from: ACM (ASSOCIATION FOR COMPUTING MACHINERY), “Inventor of World Wide Web Receives ACM A.M. Turing Award 2016” [Online], published on April 4th 2017, <https://www.acm.org/media-center/2017/april/turing-award-2016> .

¹²⁷ Let us take note, e.g., that in many countries we buy connection packages from communication service providers that already include Internet access, not just phone line or cable TV, as before. Thus one is no longer paying for just one of those services separately, but rather subscribes to the packages as a whole. In Canada, for the time being, such packages do not limit content access either, but that may not last much longer, if net neutrality does not become guaranteed by law, as it became in Brazil after the implementation of their Bill of Rights for the Internet since 2014 (*Marco Civil da Internet*, refer to section 4.5 for more details about it).

individual citizens who have interest and enough technical know-how, in order to further advance their projects, defend their interests, and assert their values, while they become increasingly aware of the crucial role that such new multimedia systems can play in the culture, education, and politics within contemporary societies. Thus, we have inevitably also witnessed in both developed and developing areas of the world, an increase in the number of social and political mobilizations (e.g., large public demonstrations in Brazil in the last three or four years, as well as the so-called Arab Spring), with people trying to express their concerns about acquiring and protecting civil liberties and rights, including about the access and control over their personal information (especially in Europe, United States, Australia and Canada) after Edward Snowden's first revelations. The way governments and companies handle peoples' communications (both personal and business-related) over the Internet has become increasingly relevant in order to protect democratic rights such as freedom of expression and choice, in this broader, so-called global ecology or "*infosphere*" (Floridi 2010).¹²⁸

Also, from a more technical perspective, as Jenkins has pointed out (citing Sola Pool's pioneering work: 1983), the so-called "convergence of modes" is blurring the lines even further between regular connection (such as point-to-point telephone lines) and

¹²⁸ For some organizations concerned with such issues, see e.g.:

*CIRA [Online], <http://performance.cira.ca> (accessed on October 2016);

*OPEN MEDIA [Online], <https://openmedia.org/en/ca> (accessed on November 2016);

*ELETRONIC FOUNDER FOUNDATION [Online], <https://www.eff.org> (accessed on December 2016),

*ONLINE COMPLIANCE PANEL [Online], <http://www.onlinecompliancepanel.com> (accessed on January 2017);

*CJFE [Online], <https://cjfe.org> (accessed on January 2017).

*INSTITUTE OF TECHNOLOGY AND SOCIETY (ITS-RIO), [Online], <http://itsrio.org/en/> (accessed on March 2017), this organization is formed and under the direction by the main formulators of Brazil's Internet Civil Code ('Marco Civil da Internet'), who elaborated the main text for the legislation as a result of the engagement among general citizens, legal and IT experts, and politicians, under the supervision of the Brazilian Ministry of Communications (the text of this bill can be consulted online at: <http://www.ebc.com.br/tecnologia/2014/03/veja-o-texto-aprovado-na-camara-sobre-marco-civil-da-internet> and <http://jornalggn.com.br/noticia/brasil-tem-6o-orcamento-mais-transparente-do-mundo-diz-organizacao>).

“mass” communication (one-to-all connectivity), thus redesigning the whole communication landscape, given that: “a single physical means—be it wires, cables or airways—may carry services that in the past were provided in separate ways.” (Jenkins 2006: p. 10.) Conversely, a service before being provided by any one particular medium—be it broadcasting, the press, or telephony—can now be provided in several different physical ways. So the one-to-one relationship that used to exist between the medium and its users is increasingly eroding. These are structural transformations that may bring a pretty wide range of consequences to the way people actually handle information at both the present and the future. Thus, telecommunication, broadcasting, and computer networks have converged on the basis of digital networking, with its new data transmission and storage technologies, developing at a frantic speed, particularly optic fibre and satellite communication (Cowhey and Aronson 2009).¹²⁹

As people (so-called “users”) appropriate new forms of communication, they are now able to build their own systems of “mass communication” (giving emergence to what Castells calls “mass self-communication”) via SMS, blogs, podcasts, wikis, etc., through which file-sharing and p2p (i.e., peer-to-peer) networks make the circulation, missing, and reformatting of any digitized content possible. If we consider just the “blogosphere,” with about 60 million blogs updated per day (as counted by Baker 2008—this number might be higher now), it already can be said to constitute a multilingual and international communication space that has no historical precedents. However, all around the world, most blogs are seen to be personal in nature, with about 52% of bloggers declaring that they blog “mostly for themselves” and with only 11% being about politics (Lenhart & Fox 2006: Pew Internet Project survey).

¹²⁹ COWHEY, P. and ARONSON, J. *Transforming Global Information and Communication Markets - The Political Economy of Innovation*. Cambridge: MIT Press. 2009.

Moreover, Castells also observes that, to some extent, a significant amount of this form of “mass self-communication” may be getting closer to “electronic autism” than indeed to “actual communication” properly. Yet, on the other hand, any post on the Internet, despite the initial intention of its author, becomes a message susceptible of being received and reprocessed in unexpected ways within a more globalized communication community.¹³⁰ That also because video streaming and sharing has become an increasingly popular form of media consumption and production, through social-networking sites such as MySpace, WhatsApp and Facebook, as well as YouTube and other user-generated content web sites, thus, now also constituting means of “mass communication,” though different from the way traditional media typically aimed at mass consumption in the past.

The growing interest of corporate media in Internet-based forms of communication, therefore, is just symptomatic of recognizing the significance of the rise of this new form of “societal communication” (in Castells’s terms: “mass self-communication”). This is not only a new communication realm, but also, ultimately: “a new communication medium whose backbone is made of computer networks, whose language is digital, and whose senders are more globally distributed and interactive” (Castells 2009, p. 70). A medium that has at least the potential capabilities to allow for unlimited diversity, autonomous production, and greater collaboration, resulting in a more dynamic and direct communication flow towards enlarged meaning construction in the public minds. This new setting, seen from such a perspective, would be ideal for democratic institutions and education to flourish, in more distributive and participative ways, such as envisioned for example by John Dewey’s views on democracy (recall

¹³⁰ Recall, for example, the case of the video anti-Islam accessible at: YOUTUBE [Online], Published on April 2008, <https://m.youtube.com/watch?v=7TLtWBsWSIY>. It spread very quickly all over the world through YouTube, as well as the charges published by the review *Charles Hebdo*, which arose rather violent retaliations in consequence throughout the world.

section 2.2 above).

Such a communication revolution, with its highly promising “autonomous character” and technological innovations, could only take place as much as it is processed and shaped by governments and companies that are now, however, “largely influenced by business strategies for profit-making and market expansion” (Castells 2009, p. 71). This amounts, of course, to a whole range of ethical concerns about the legitimacy of communication and, consequently, of appropriate contexts for genuine (ethical, free, open) discussion, given the potential for corruption and for the manipulation of power and access to information just to favour a few “beneficiaries,” instead of allowing for a broader and democratic access to most or, ideally, all citizens within democratic environments.

Thus, the growing influence of corporations in the media, information, and communication industries over the public regulatory institutions (that supposedly are the guarantors of the public interest) has rather been shaping this communication revolution mainly in the service of business interests. Also, the influence of the advertising industry over media business via the transformation of people into a measurable “audience of consumers” tends to further subordinate cultural innovation and entertainment pleasure just to commercial consumerism. I include here the whole range of possibilities for communication expansion, innovation, and knowledge exchange that the Internet may bring but that may be hindered in the name of profit interests and industry monopolies. As Claude Cossette has sensibly pointed out, in his book entitled *Éthique & Publicité* (2009, pp.: 105–115), we must raise (and reflect on) an important question concerning the control and handling of information, namely, “To whom the responsibility?” (« *À qui la responsabilité?* »):

On se forme sa propre éthique quand on prend ses distances par rapport au groupe dans lequel on évolue, que l'on identifie clairement le but de ses actions, que l'on établit ses propres valeurs, que l'on estime les effets positifs et négatifs de ses actions, que l'on examine ses comportements sous les aspects de justice et de compassion, que l'on consent aux autres la même dignité que l'on se reconnaît à soi-même, bref, que l'on agit en humain intégral. Pour un publicitaire, cela consiste notamment à considérer le consommateur davantage comme un partenaire que comme une cible.¹³¹

Also, Cossette reminds us that an organization or company *does not act*, strictly speaking, given that it is rather the people who compose and represent it who are the real agents and, therefore, who should assume the risks and responsibilities for their actions from a moral point of view. It makes sense, as the culture of any institution, whether public or private, reflects the mentality and attitude of the people who work for and compose such an institution (and vice-versa). Through stressing the first point, one leaves open the prospective range of contributions by each of its members, pretty much in alignment with the democratic principle of building a system that is made “by the people and to the people”. Moreover, borrowing from Comte-Sponville (2004: p.122):

C'est précisément parce qu'il n'y a pas de morale de l'entreprise, qu'il doit y avoir de la morale dans l'entreprise — par la médiation des seuls qui puissent être moraux, par la médiation des individus qui y travaillent, et spécialement (davantage de pouvoir, davantage de responsabilité) qui la dirigent. Et de même pour l'éthique : c'est parce que l'entreprise n'en a pas que les individus qui y travaillent ou la dirigent se doivent d'en avoir une.¹³²

Conversely, it is also true that some degree of organizational culture exists and influences

¹³¹ *N. of T.* - free translation into English from the original passage in French (2009, pp.: 106-107): “One develops one’s own ethics when (s)he is able to take some critical distance from the group in which one is immersed, when one can clearly identify the goals of her/his actions, when one can establish her/his own values, when one can evaluate the effects, both positive and negative, of one’s actions, when one can examine her/his behaviours under justice and compassion, when one concedes to others the same dignity that (s)he recognizes into oneself; in short, when one acts as an integral human being. For a professional advertiser, this consists especially of considering her/his public as a partner, rather than just as a target consumer.”

¹³² *N. of T.*: free translation into English from the original passage in French (Comte-Sponville 2009, pp.: 107): “Precisely because there is no morals *to* a company, there should be one *in* a company – by the mediation of those who alone can be moral agents, that is, the mediation by those individuals who work for the company and, especially, (primarily involving the power and responsibility) of those who lead and manage the company. Same thing goes to its ethics: because a company does not have one, then the individuals who work and lead it must have one for themselves.”

its members in its turn and, as a group sharing some common objectives and values, the entity is thus to be held accountable for its opinions and decisions as well. Analogously, there are institutional or organizational ethical codes that help regulate and set a pace for the general conduct of its members, especially for the prospective and new arrivals.

Moreover, other additional important points press themselves upon us, once we reflect more carefully about communication and information nowadays, namely:

(i) The mere fact that an increasing (or yet, overwhelming) amount of data is being made available to people does not, by itself, guarantee good choices from their part in terms of gathering, using, and sharing indeed relevant and adequate information among themselves; that is to say, mere accessibility unfortunately does not necessarily mean reliability!

(ii) Hence, there is a pressing need also for educating users towards not only selecting, interpreting, and handling well those data themselves, but also requesting from companies and governments an appropriate handling of the information that becomes available to and about users, if we keep any pretensions for managing our “*global ecology*” more responsibly indeed (recall previous section).

Therefore, in order for digital resources to be increasingly constructive and empowering in contemporary democratic societies, they need to be accompanied, in parallel, by the education of users towards disposing of such resources (co) responsibly; and so as to promote more enriching interactions among such users by favouring the development and sharing of intellectual and deliberative powers as well.

In this sense, we emphasize that an ethics for more deliberative democracies, through its argumentative (discursive, deliberative) processes allowing for open discussion, is also educational (pedagogical) in nature. For it can help us not only to

reflect on our own values and beliefs, but also exercise our genuine dialogical skills as communicative beings (Lima 2012). Furthermore, by becoming more conscious and informed about issues related to defending and maintaining some of our basic (hard-conquered) democratic rights, for example, people can better resist against abuses of power from large companies and their own governments, including by demanding from them better services and protections accordingly. In other words, conscious and alert consumers and citizens are paramount for the success of free markets and representative democracies respectively.

4.2. The Challenge of Pluralism

It has thus become urgent for us to conciliate some crucial philosophical issues, if we are indeed to move to a global ethical pluralism that can allow diversity to contribute in a healthy way to our societies as opposed to segregation. That is, we need to conciliate: on the one hand, a committed (i.e., responsibly engaged) form of individualism that can still take into account particularly relevant contextual conditions; and, on the other hand, a reflective (i.e., both normative and critical) form of universalism that can also take into account basic general principles to be globally shared. That is, some middle ground is hopefully to be reached by legislation and diplomacy working together.

This is important so as to keep anchoring us all as socially interactive human beings also in the context of this digital era and so that we may still be able to legitimately talk about international laws and recommendations based on universal human rights to be respected no matter where.¹³³ However, as anybody who has attempted to get integrated into another culture, for an extended period of time, knows

¹³³ See also observations in section 2.1 above, as well as the UN Special Rapporteur's recommendations cited farther below in this chapter.

well (especially when one tries to fit in as an immigrant), a lot depends upon fine-grained details of local/specific contexts. Such details begin with broad generalizations or stereotypes about cultures, religions, etc., but quickly become rather complex, even contradictory, as we move into the everyday level of a given group of people, living in a given community, in a given city, in a given part of a country. To make things even more complicated, cultures that influence and shape behaviours and beliefs (including our most basic values and communicative preferences) also include additional layers to the picture, for example, depending on our age, gender, marital status, or religious preferences.

Another related question arises: *How are we to succeed in communicating more effectively across such deep cultural differences? Or, more precisely: What ethical guidelines could we follow for better cross-cultural communication and conviviality, with respect to the frontier breaking possibilities offered by the Internet?*

The idea of adopting a global *Magna Carta for the Web*, such as it's been advocated by the Web creator (Sir Tim Berners-Lee), which could guide particular democracies and companies, may be a good starting point of reference. Nations and governments could work together, each in its turn, towards implementing the main accepted principles through particular regulations (e.g., the EU directives and recommendations for the Internet that served as reference for the developers of the Brazilian "Marco Civil da Internet," and vice-versa, as we will see in more details below, in chapter 4).

If one keeps in mind the main purpose of reaching considerable consensus about general (global) regulations for digital media (i.e., global guidelines such as the bill of universal human rights), as drawing regulations and adapting them in particular contexts in each nation emerge as practical and necessary challenges for democratic governments,

be they market-related or more political issues. We thus believe that an important component for a global ethics of digital media, allowing for cross-cultural communication, is the possibility to get acquainted and become more familiar with different world cultures.

This seems important even in cases of strictly self-interested or shortsighted reasons. For example, any group of people who have sought at least to hold “trade relations” peacefully (i.e., without appealing to force) with other groups (which may sometimes have radically different sets of beliefs, values, and practices, has learned that some minimal understanding and respect of the “other” is needed in order to avoid misunderstandings and diplomatic frictions.

Even mere commercial interests may constitute limited initial motivations for learning more deeply about the “other.” They may lead primarily to what we already shared (e.g., common business interests and a technical “lingua franca”) so that we can have a “minimum contact,” just enough to make contracts accomplishable and more profitable. However, as long as we keep focusing only on superficial “commonalities” (i.e., seeing the other as a mere “target” to be exploited for personal advantage), we may not accomplish the move to the next stage of genuine communication understood as shared understanding and respect among different people, that is, towards an appreciation of the other as indeed “another.”

Among these lines, as the Dalai Lama has incessantly pointed out at press conferences and encounters with scientists and diplomats all around the world (which very often develop in his lasting friendship with such distinguished people and leaders),

the following are the guiding motivations for a “secular ethics”:¹³⁴

- to break destructive social forces as corruption, collusion, and bias;
- to heal the planet by refocusing our concerns towards our own impact on the systems that support all life;
- to reverse the tendency towards systemic inequity through transparency and accountability;
- to replace violence with dialogue;
- to counter “us-and-them” thinking by recognizing human oneness;
- to create new economic systems that work for everyone, not just the powerful and rich;
- to design schooling that teaches empathy, self-mastery, and ethical principles and responsibility.

Anyone who has developed a long-lasting friendship with someone from a different culture knows well that the understanding and acceptance of the “other” as irreducibly different from “oneself” carries with it two important ethical elements: (a) respect for differences; and (b) the perspective of looking back more critically onto our own culturally embedded norms, values, and practices. Such elements are essential if we want to move from ethnocentrism, and a passive acceptance of the status quo, to more autonomous, informed and responsible choices regarding what we ourselves may regard to be good, true, rightful, just, beautiful, etc. As we expand our perspectives, we come to a new understanding not only of others but of ourselves as well, being able to reconstruct our own selves out of the new choices made possible by such (more genuine) encounters

¹³⁴ Taken from: GOLEMAN, D. *A Force for Good - The Dalai Lama's Vision for Our World*, 2015. The psychologist Daniel Goleman was also the author of “Emotional Intelligence” and has been giving presentations at conferences on education and financial institutions all over the world to spread the teachings of the Dalai Lama.

(Rawlins 1992).¹³⁵

From the standpoint of a more comprehensive experience and perspective, we can also foresee another problem that follows from mainly focusing on superficial commonalities, as we treat the “other” merely as a target and resource for commercial trade, namely: It prevents us from what Ess has called a “cultural” or “ontological” shock, that is, the bare recognition that our way is not the same as everyone else’s way. Such shocks can contribute to making us much more inclined to demonstrate some “epistemological” humility and tolerance towards other people, and they may also avoid misunderstandings and problems caused by arrogance and disrespect.¹³⁶

When others recognize this sort of humility, instead of arrogance or ethnocentrism, people tend to become more tolerant and patient in return, thus creating a circle of spontaneous and sheer reciprocity. This reciprocal posture of tolerance and respect turns out to be also useful whenever we eventually make inevitable cross-cultural mistakes. Therefore, we take Charles Ess to be correct in emphasizing that “reciprocities” (which now became even more relevant due to the increase of cross-cultural digital communication) can, thus, serve as essential “bridge-values” among diverse cultures and traditions worldwide.

However, while online venues have dramatically expanded opportunities for cross-cultural communication, paradoxically, they also present two considerable obstacles: (i) by making disembodied encounters possible, they favour an avoidance of so-called cultural or ontological shocks resulting from physical encounters, thereby

¹³⁵ RAWLINS, W. *Friendship Matters: Communication, Dialectics, and the Life Course*. London: Aldine Transaction Publishers. 1992.

¹³⁶ ESS, C. 2009: pp.111,112.

making it easier for us to avoid or simply ignore our differences;¹³⁷ and (ii) some research has confirmed that the technologies of digital communication contain and foster cultural values and communicative preferences favoured by their designers, thus imposing to a certain extent their beliefs and practices upon their “target cultures” upon which those technologies are to be applied; and this can lead to a new kind of (i.e. computer-mediated) cultural imperialism (Ess 2009: p. 113). Hence the importance of some regulations to be also applied to the process of designing and developing algorithms from the very beginning (e.g., “privacy-by-design” strategies and systems), accompanied by an educational program on Ethics for ICTs (Information and Communication Technologies).

Now, one may be inclined to argue that the absence of “physical presence” (embodied encounters) in digital contexts, which may lack multiple social cues (sometimes being signs of radical differences among people) actually avoid, on the one hand, potential (cultural) conflicts; but, on the other hand, it decreases empathy and trust among people for a lack of stronger connection and touch bases, as our relations thus become not only too shallow but also no longer challenge us to improve skills for dealing with others in more significant and lasting ways.

Hence, the ever more increased importance of visiting other cultures with more depth (e.g., by travelling more often so as to get to know “in person” other cultures and really be face-to-face with their values). Also, by being alert to the fact that certain electronic tools (social media applications, most particularly) already bring embedded in their algorithms (since its conception and design stages) the culture and values of their

¹³⁷ Let us also note that we're talking here about a minimum of ‘body contact’ or ‘physical exchange’ that could constitute a sense of ‘physical presence’, say, for example: eye contact, facial expressions such as smiles or sad faces (the main reason to be of the ‘emoticons’ more and more popular in Internet apps), the use of video cameras, etc.

developers, as well as the local cultures of their companies. Hence, the attractiveness of the idea that some basic requirements, for both design and implementation, be adopted in a more global (universal) fashion regarding the protection of personal information and respect for the privacy of users (to which we should come back later on in this work).

Nonetheless, because digital media also allow one to become cosmopolitan in a certain (restricted) way, we are now faced with a bigger responsibility to look for alternatives towards acquiring and practising skills (such as empathy and trust) that keep us bound as humans. These are essential conditions for genuine (including cross-cultural) communication and fostering lasting collaboration and friendship. As Charles Ess (2009) also points out, such skills allow us to get to know one another not just as “more of the same” but, indeed, as “another” who is irreducibly (sometimes even radically) different from ourselves, and we do need to learn how to cope with such differences through our interactions both within and among societies. All the points above need to be kept in mind as we aim at the accomplishment of a legitimate global digital media ethics, that is: one that can be endorsed and used as guidelines by most (hopefully all) democratic societies. For, as Weigand (2011) also cautions us:

Power represents a very important force which operates everywhere in dialogic interaction. Even if we do not want to set moral benchmarks, one benchmark remains: the benchmark of human action. We can expect civilized behaviour when influence or power is used on our fellow beings. In this sense, even a descriptive model includes norms. As human beings we should reflect on what norms, we would like to acknowledge in limiting the use of power in dialogic interaction. For the basis of civilized behaviour and values of humanity should not be dismissed.¹³⁸

Considering such a context of “power struggling”, we should also recall that freedom of expression and communication via the Internet (i.e., involving simultaneously global and local multimedia systems) may become dangerously curtailed because spied by

¹³⁸ WEIGAND, E. 2011: p.241.

government agencies and their bureaucracies. Though the usual argument still holds in favour of national security, for example against terrorism and other perceived threats, such controlling power is, unfortunately, usually subjected to the interests of political and economic elites (and/or ideological/religious groups), with all their accompanying apparatus and manipulation tricks. Consequently, rights to “privacy” and “freedom of expression” are sometimes considerably forgone in just a flurry of “cookies” and “personal data” retrieving strategies, except for those users with a high level of technical sophistication and capabilities in order to protect themselves (Solove 2004, Lever 2012, Castells 2015).

Now, if we have any reasonable pretensions for constructing a responsible “global electronic metropolis” (as it has been suggested by the powerful propaganda around the fast ongoing developments and fast spreading of the ICTs’s industry), some philosophical issues must be reconciled, such as privacy vs. transparency concerns, to enable a more open discussion about such issues, for example, the need for a global “digital media ethics,” that could be situated somewhere in between absolutism and relativism, but still be sufficiently normative while respectful of different cultures (Ess 2009, pp. 207–213; Apel 2007, p. 54—*ff.*; Lima 2012, pp. 237–255).

Such a goal presents itself as one of the most difficult challenges facing democracies right now, in the context of a globalized digital world that has brought into contact so many different cultures, governments, personalities, and value-s. Notwithstanding, these are indeed crucial points related to the development of *trust* in order to build *more friendly and enduring relationships* not only among individuals but also among democratic societies. As we shall see in the following section, the UN has since recently been attempting to go more strongly in this direction.

4.3. What about privacy?

Arguing that you don't care about privacy, because you have nothing to hide, is like saying that you don't care about freedom of speech because you have nothing to say.
(E. Snowden 2016)¹³⁹

Compared with paper-based data records, privacy concerns about the Internet have changed due to the proliferation and transferability of personal data, as new technologies allow personal data to be processed and manipulated in ways previously unimagined. Data can now more easily be shared, copied, searched, mined, compiled, compared, matched, combined, or transferred worldwide at the click of a mouse, leading to a proliferation of personal data and the development of what some privacy researchers have termed a “digital persona”—a collection of an individual’s data available in digital form.

Also, the Internet has changed privacy as a result of the “stickiness” of digital data. Not only has personally identifiable information proliferated on the Internet, but once there, it tends to be difficult to remove. For example, data may reside on servers to which individuals have no access, remain cached (stored for easy retrieval) in search engines, or have been copied and sent on to third parties (other sites or discussion forums), many times without the users’ consent. In any case, data remain in the system, creating permanent searchable records, so that the extent to which individuals can control their data is increasingly reduced.¹⁴⁰

Privacy on the Internet may also be characterized by a lack of transparency in data

¹³⁹ Extracted from an informative discussion about privacy (animated by Nualo O’Connor) among Edward Snowden, Glenn Greenwald, and Noam Chomsky, accessible at YOUTUBE [Online], published on March 26, 2016: <https://www.youtube.com/watch?v=IOksJKfapVM>.

¹⁴⁰ Recall, e.g., the recent case (August 2016) of Facebook getting users data imported (synchronized) from their other application WhatsApp, by default, unless the user decides to go figure on how to opt-out: <https://www.google.ca/amp/s/techcrunch.com/2016/08/25/whatsapp-to-share-user-data-with-facebook-for-ad-targeting-heres-how-to-opt-out/amp/?client=safari>.

collection practices. Given special interests of businesses and political parties in collecting personal data from Internet users for marketing, advertising, and other various purposes, as well as the interests of criminals in obtaining personal financial data, technologies designed to collect personal data from Internet users have proliferated. For the most part, such technologies have been designed to make data collection unnoticeable. Because of the variety of opportunities for online personal data collection, methods for data compilation, and uses for the data, the Internet raises the stakes of privacy. More data are frequently made available for a variety of uses—many of them unauthorized (or simply not acknowledged) by the individual in the first place.

Privacy thus became a serious issue for the Internet, if compared with previous paper-based data storage and communication systems, both quantitatively and qualitatively. Because personal data proliferate and can be manipulated concerning an unprecedented array of uses, it is more difficult for individuals to control such a process, given that data can be collected more easily without a person's awareness and may also entail severe (non-anticipated) consequences for particular individuals.

As Sissela Bok warns us, it is important to keep *secrecy* and *privacy* from being engulfed together at the very definitional stage.¹⁴¹ For, although the two are closely linked and their relationship is relevant to this work, they should not otherwise be taken as merely identical to one another. It is thus essential that we understand both how they are related and how they differ as well. Bok defines them as follows:

Having defined secrecy as intentional concealment, I obviously cannot take it as identical with privacy. I shall then define privacy as *the condition* of being protected from unwanted access by others—*either physical access, personal information, or attention*. Claims to privacy are claims to control access to what one takes—however grandiosely—to be one's personal domain. Through such claims, and the counterclaims they often generate, people try to reinforce or expand this control. Privacy and secrecy overlap

¹⁴¹ See, e.g., BOK, S.: *Lying* 1978 and *Secrets* 1989.

whenever the efforts at such control rely on hiding. But privacy need not hide; and secrecy hides far more than what is private. A private garden need not be a secret garden; a private life is rarely a secret life. (...) Why then are privacy and secrecy so often equated? In part, this is so because privacy is such a central part of what secrecy protects that it can easily be seen as the whole. In each case, their (people's) purpose is to become less vulnerable, more in control. In these efforts at control, how do individuals protect privacy? They guard, first of all, against others coming too near by protecting what has come to be called personal space and territoriality. To be sure, the boundaries of this space are differently envisaged according to culture and personality and imagination.¹⁴²

She points out that secrecy and privacy may differ primarily with respect to their scope, intentions, and purposes. Subsequently, she also points to the fact that secrecy often includes but is not limited to just privacy protection as it may also include all additional efforts involved into keeping control within a situation that may threaten such control. Wish of control, therefore, is paramount for secrecy as opposed to transparency. This is the main point that explains, for example, why it is so common among authoritarian governments the appeal to the need of national security control, also for avoiding transparency (more about this below, on section 4.4).

Does that mean that we should always be against transparency and in favour of secrecy (which may dangerously be conflated with privacy), in general and indiscriminately, so as to prevent us from relinquishing our privacy rights inadvertently? Or, yet, if we take privacy as something other than mere secrecy, then accordingly we should ask: How are we supposed to keep privacy and transparency balanced so as to foster co-operation even within and among different and plural nations in a democratic way?

Under the insignia of modernity, especially after Warren and Brandeis (1890), Oscar Wilde (1891), and throughout the 20th century, the notion of “privacy” no longer means only the individual freedom “to be left alone,” which would be renounced just in

¹⁴² BOK, S. 1989: pp. 10-11 (our emphasis).

the name of so-called public interest. Such explicitly defined frontiers, back then, allowed to identify more easily the limits and convergences among actions and movements specific to the State (linked to public interest), distinguished from other actions emerging from private interests (with specific goals and results aimed at benefiting particular individuals or groups of individuals).

In the contemporary context, the right “to be left alone” has acquired an additional dimension, due to the popularization of the Internet and the expansion of documentation and publicity about individuals, namely: the right to be forgotten. This has brought a whole new range of possibilities and challenges concerning the boundaries between what is to be considered public *vis-à-vis* private information.¹⁴³ In this new context, one of the most heated current debates, involving both the general public and juridical professionals, concern questions such as: *What is the point of intersection between an individual right and a collective right, and when are we to protect one to the detriment of the other?*

Although the effective application of a “right to be forgotten” has implicitly permeated various institutions and legal principles, such a foundation now has reappeared with new nuances in a highly connected society, concerned with the flow of information and personal data throughout the Internet that forgets apparently nothing. Thus, it is necessary to separate “the right to be forgotten” as a broader guarantee of not being punished upon already outdated “passed facts,” from the right to control one’s history on

¹⁴³ For more details about this additional preoccupation nowadays and the many challenges it incurs, see e.g.: IPDC (International Programme for the Development of Communication), *Intergovernmental Council Report*, “Online Privacy And Freedom Of Expression” [Online], Published on October 10th 2014, <https://itsrio.org/wp-content/uploads/2017/01/230176E.pdf> .

the Internet (or the right-to-the indexation) by the deletion or removal of content online.¹⁴⁴

By observing our habits in the digital environment and, especially, the way in which the Internet has been building our “histories” over the years, we get the sense of a permanent (traceable) memory. In fact, such “permanent memory” can cause individuals much harm, as in the case of the Pennsylvania teacher who posted an old photo of her pirate costume during Halloween (with the title “Drunken Pirate”) and ended up losing her teaching licence in consequence. Also, another example is that of a Canadian psychotherapist who attempted to visit the United States, but was prevented from entering at the border due to a scientific paper previously published about his own experiences with LSD more than thirty years before.

To a certain extent, therefore, aiming for the recognition of the “right to be forgotten” on the Internet would help prevent a “permanent memory” and the individual taxation in the present by past acts and opinions (s) he may now regret and have already “paid for” somehow. On the other hand, enforcing a right to oblivion on the Internet may also be considered as censorship that hinders the access to information and more transparency.

For Latin American countries, for example, with more recent and fragile democracies, including a history of violent dictatorships and repression, it is very delicate to defend a mechanism that facilitates any kind of censorship. The deletion or mere forgetting of information previously published in the Internet, some may argue, would run counter the democratic principles of freedom of expression and of access to

¹⁴⁴ For more on this issue, the reader may refer to MAYER-SCHONBERGER, V. 2009: *Delete - the virtue of forgetting in the digital era*. Princeton University Press, p. 2: “Today, with the help of widespread technology, forgetting has become the exception, and remembering the default.”

information, and it may hinder the search for a more comprehensive truth. On the other hand, at our post-truth times, when personal opinions sometimes became more important than facts, the defense of truthfulness in the detriment of privacy rights may sound even more utopian.

Now, to get further acquainted with the broader topic of privacy, two “anchor” essays can be very useful: one by Professor Judith DeCew (1997) who offers a wide-ranging treatise on the philosophical foundations of privacy,¹⁴⁵ and the other by Professor Anita Allen (1988) with an insightful entry on the definition of privacy that traces its deep roots in the West, from Aristotle through the major political traditions, most of which having assumed and theorized some form of distinction between “the public” and “the private.”¹⁴⁶

Towards the end of the 20th century and in the first two decades of the 21st century, with the advent and spreading of the Internet, we have further witnessed a considerable dilution of the frontiers between the public and the private spheres, both with respect to people’s professional and social lives. Thus, one can observe an increasing consolidation of privacy as a “right”, to be respected and protected by liberal democracies (however complex it may turn out to be), as it does make sense presuppose, alongside the advocacy for the laic State, a wider acceptance that the State should not interfere with the private lives (including, of course, religious and gender preferences) of its citizens (Habermas 2002, Ferrajoli 2006).

This transformation happened especially from the mid to the end of last century, through many processes representing micro-phenomena of intimacy and changes in the

¹⁴⁵ DeCEW, J.W. *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology*. Ithaca, N.Y.: Cornell University Press. 1997.

¹⁴⁶ See, e.g.: *Stanford Encyclopedia of Philosophy* (Online - May 14, 2002, substantively revised on Aug 9, 2013), accessible at <https://plato.stanford.edu/entries/privacy/#pagetopright>

ways of living, e.g.: suburban, more spacious housing with private rooms for each child, private phone lines, increase of the use of private cars in the detriment of public transportation, etc. It thus became part of an informational dual name such as “freedom control” within Western societies of consumption (Aries and Duby 2009). Anton Alterman (2003) discusses various privacy and ethical issues arising from expanding use of biometric identification (*Ethics and Information Technology* 5, 3 - 2003).

However, somewhat paradoxically, this may also favour demands for more transparency, especially with respect to governments and public figures, as public accountability and ethics are now much more explicitly called for. We suspect (as we’ve already mentioned earlier, in chapter 2) that this may be due, among other contextual features, to the fact that utilitarian ethics now prove themselves incapable of deciphering new affective and social protocols forged by digital social networks, which seem to behave in a way that defies rational calculi.

As we dive in the contemporary “digital context,” we have to look at ourselves as individuals that have now much more access to information and communication tools, which allow us to engage in many different forms of interactions among regular citizens, politicians, and experts as never before (i.e., as “*inforgs*,” in Floridi’s terminology). Thus, educating both users and service providers became critical for building constructive collaborative environments such as those envisioned by participative and deliberative democracies.

Hence, let us consider more carefully this increasingly problematic tension between what is considered to be “private” and what is to be taken more broadly as “public” information. This is one big challenge that definitely surrounds all civic territories along which citizens try to understand and exercise their duties within and

among contemporary democratic societies. Such tension, between what can be understood as private or public, is quite indefinable as separate singularities given that they are in constant relationship with each other. They have thus to be understood primarily in terms of how they mutually restrict (limit) one another. Dewey had already taken on this big issue in *The Public and Its Problems* (1927), which we've discussed in some detail above (chapter 2), though it is far from being a complete account of his position, given the scope and specific concerns of the present work.

With respect to (post) modern philosophical debates, therefore, DeCew sees several different “privacy camps” that she characterizes respectively as “reductionist,” “coherentist,” and “feminist.” Reductionists usually deny that there is anything coherent or analytically distinctive and useful about privacy. They mainly assert that “privacy rights” somewhat overlap with (and may be fully explained by) other “property rights” or “rights to bodily security.” Alternatively, “coherentists” find it coherent to defend the fundamental value of privacy because it is helping to define our essence as human beings, so as to be protected against demeaning intrusions and affronts to human dignity.

Finally, the feminist critique reminds us that there is a potential “dark side” to an unwavering defence of the special status of privacy rights. They may actually be detrimental to women in particular and others, if these rights are used as a shield to mask and maintain power, censorship, and abuses. What the feminist position illustrates is that the concept of individualized “privacy rights” is a highly contested view that may in fact run counter to other social and democratic values.

Allen helps us to better understand and define privacy by distinguishing “physical privacy,” “informational privacy,” “decisional privacy,” and “proprietary privacy.” By offering a number of examples of each type of privacy, she introduces us to what might

be called “the privacy paradox” (representative, but unfortunately not restricted just to the situation of her own country). She thus points out that we may observe cases showing this situation all around us, with citizens voicing their outrage when a government surveillance program comes to light, at one moment, then, with the same breath, advocating the fingerprinting of welfare recipients; while some take a stand against the adoption of a national identification card, others post intimate pictures of themselves on the Internet; consumers claim that they very much oppose companies tracking their shopping habits, and then they routinely and voluntarily offer personal information in the form of coupons, warranty cards, and contest registration forms wishing for rebates.

These and other examples suggest that the contemporary privacy landscape is quite complex. Especially after Edward Snowden revelations since 2013, the scenario became even more complex and it also defies mere simplistic and nostalgic interpretations suggesting that personal privacy is something that flourished in the past, but is now being systematically destroyed once and for all. It had better not be, if we are to keep having something called “freedom of the press,” which Snowden, Greenwald, and Chomsky have been so concerned about protecting.¹⁴⁷

Priscilla Regan argues, for example, “that privacy is not only of value to the individual, but also to society in general. Privacy is a *common value* in that all individuals value some degree of privacy and have some common perceptions about privacy. Privacy is also a *public value* in that it has value not just to the individual as an individual or to all individuals in common but also to the democratic political system. Privacy is rapidly becoming a *collective value* in that technology and market forces are making it hard for

¹⁴⁷ See, for example, their informative discussion already referred to above (note #21) at: <https://www.youtube.com/watch?v=IOksJKfapVM>.

any one person to have privacy without all people having a similar minimum level of privacy.”¹⁴⁸

Fried defines privacy more narrowly as control over information about oneself. However, he extends this definition in arguing that privacy has intrinsic value, and is necessarily related to and fundamental for one’s development. Any individual has a moral and social personality, and is able to form intimate relationships involving respect, love, friendship and trust. Privacy is therefore invaluable because it allows control over one’s information about oneself, which also protects varying degrees of intimacy. Indeed, love, friendship and trust are only possible if people enjoy some privacy and accord it to each other. Privacy is essential for such relationships, on Fried’s view, and this helps explain why a threat to privacy is a threat to our very integrity as human beings.

By characterizing privacy as a necessary context for love, friendship and trust, Fried is basing his account on a moral conception of individuals and their personalities. This is based on a Kantian notion of the person with basic rights and the need to define and pursue one’s own values free from the impingement of others. Privacy thus allows the freedom to define one’s relations with others as well as to define oneself. In this way, privacy is also closely connected with both self-respect and respect for others (Gerety 1977, Gerstein 1978).

Moreover, Abraham L. Newman (2008) and others have persuasively argued that the United States (US), and multiple countries in Asia, developed a “limited system of privacy protection” that focuses on self-regulation within industry and government, so that personal information is often “readily available.” In contrast, the European Union (EU) and also some countries in Latin American, have adopted an alternative vision

¹⁴⁸ REGAN, P. 1995: p. 213.

highlighting consumer protection and individual privacy against the economic interests of firms and public officials (Cohen 2002).

According to Ferdinand Schoeman, there is something “fundamental, integrated, and distinctive about the concerns traditionally grouped together under the rubric of privacy issues” (Schoeman 1984, p. 5). In opposing this position, some have argued that some cases labelled as “privacy issues” are so diverse and disparate that can only nominally or superficially be connected, if at all. When privacy claims are to be defended morally, their justifications must allude ultimately to general principles, which can be characterized quite independently of more specific concerns with privacy *per se*. Schoeman (1984), therefore, points out that the question of whether or not privacy is culturally relative can be interpreted in two ways, namely: (a) whether privacy is deemed valuable to all people (instead of its value being relatively depending on cultural differences); (b) whether or not there are any aspects of life that are inherently private and not just conventionally so dependent on culture.

Most writers have come to agree that, while almost all cultures appear to value privacy, societies differ in their ways of seeking and obtaining privacy, and probably do differ in the level they value privacy (Westin 1967, Rachels 1975). Allen (1988) and Moore (2003) are especially sensitive to the ways obligations from different cultures affect perceptions of privacy issues. However, there has been far less agreement about question (b). Some also argue that matters relating to one’s innermost self are inherently private, but characterizing this realm more succinctly and less vaguely remains an elusive task. Thus it may well be that one of the difficulties in defining the private realm is that privacy is a notion strongly culture-relative, contingent on such factors as the economic situation and status as well as the technology available in any given cultural domain.

Consequently, the argument continues, there is nothing morally distinctive about privacy.

We refer to the position that there is something common to most of the privacy claims as the “coherence thesis.” The position that privacy claims are to be defended morally by principles that are distinctive to privacy is labelled the “distinctiveness thesis.” Theorists who deny both the coherence thesis and the distinctiveness thesis argue that in each category of privacy claims there are diverse values at stake, of the sort common to many other social issues and that these values exhaust privacy claims. The thrust of this complex position is that we could do quite well if we eliminated all talk of privacy and simply defended our concerns in terms of standard moral and legal categories.¹⁴⁹

As we can see, therefore, the boundaries between private and public were and still remain quite unclear, so that reasonable concerns about “infringements of privacy” inevitably emerge, especially since the revelations by Edward Snowden in 2013.¹⁵⁰ This concern is well summarized by the quote below from cyber-expert Mikko Hypponen’s Ted Talk (http://www.ted.com/talks/mikko_hypponen_three_types_of_online_attack.html?quote=1296), with respect to the current controversy about State Surveillance and the big questions that arose about privacy protection via ICTs. Ted Talks have become a quite interesting space for discussion of public issues lately, where the main points of a variety of controversies are brought up to be more openly and accessibly addressed to the general public.¹⁵¹ Concerning the issue of privacy invasion, Mr. Hypponen emphasizes:

¹⁴⁹ *Ibid*: p. 5.

¹⁵⁰ Refer to chapter 2 above: pp. 40-42.

¹⁵¹ For more about Ted Talks from its own curator Chris Anderson: <http://www.theguardian.com/commentisfree/2014/jan/08/ted-not-civilisational-disaster-but-wikipedia> .

The obvious response from people is: “Okay, that sounds bad, but doesn’t really affect me because I’m a legal citizen. Why should I worry? I have nothing to hide.” But this argument doesn’t make sense. Privacy is to be implied, it is not up for discussion! This is not a question of privacy against security. It’s a question of freedom against control. And while we might trust our governments right now, any rights we give away now will be given away for a good time. And do we trust, can we blindly trust any future government, a government we might have 50 years from now? Only because we have this thing called privacy, people can still be honest in the Internet ... for that’s what it’s about! Privacy is non-negotiable. It should be built into all the systems we use.¹⁵²

His talk came up as another reaction, from him and other technical experts like Mr. Edward Snowden, to the worrying disinterest and/or lack of care (probably due to insufficient information) by the general public about all that is at stake regarding the disrespect for individual privacy posed by indiscriminate State surveillance. Such threat actually presents serious risks also to a basic democratic right such as freedom of expression, given possible intimidation and abuse. People may not very easily realize it yet, but with the fast technological developments regarding big data and text analytics, our digital footprint can extend very far so as to be used in a variety of ways, both abusive and not, of course. From shaping our search preferences on the web and the commercial adds we receive, based on our online shopping habits, to making inferences about our political leanings and even religious beliefs, etc. the capabilities and possibilities are numerous!

With all that said, the current state of affairs on the issue shows, however, that we still do not have much of a consensus on exactly what the “right to privacy” is, on what it is supposed to protect or prohibit, nor on what its justification is for supplying a principled basis to legislation or social policies. This is probably due to the fact that the notion of privacy seems to be very relative to each particular culture. That is to say,

¹⁵² Taken from TED TALK by Mikko Hypponen, Brussels (Online - November 2011): http://www.ted.com/talks/mikko_hypponen_three_types_of_online_attack.html?quote=1296 .

privacy claims are interpreted and applied in different societies depending on their cultural expectations, history, and accepted practices. Or, yet, as DeGeorge well puts it: “Different societies have different views about what constitutes privacy, about how important it is, and about how much it needs or deserves protection” (DeGeorge 2003, p. 40). The fact that philosophers, legislators, and judges still largely disagree on the specifics of the right to privacy also reflects to a considerable extent what we find in popular views and the media.

This is due to the fact that the notion of privacy is to a certain degree relative to one’s own culture, given that what is right or wrong, good or bad, with respect to privacy is in part culturally determined. That is to say that how privacy claims are interpreted and applied in different societies also depends on cultural expectations, history, accepted practices, existing laws, among other factors, whence derives its high complexity and wide space for controversy. Thus, to determine more consistently which practices do or do not violate privacy, so as to provide a reasonable basis for businesses and for possible legislation and social policy on this issue, it is of crucial importance first to get some clearer notion of the concept of privacy, of why it is important to protect, as well as a determination about the current status of any so claimed, “right to privacy.” A reasonable place to begin with might be the existing legislation about it.

We may start, for example, by noting that the Universal Declaration of Human Rights in its Article 12 states the following: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such

interferences or attacks.”¹⁵³ As DeGeorge (2003) sensibly claims, this may well be taken as an affirmation also of the human “right to privacy”, among other rights, which could serve as an international stand for it, no matter what medium of interaction one is using.

Yet, given existing disagreements and differences of approach about the “concept of privacy” as well as about its reaches and protection as a right, especially after the popularization of the Internet, we still find that legislation many times provide rather unclear characterizations of privacy. Not to mention the right to have it protected, leaving wide room for ambiguous interpretations and abuses. Thus, the creator of the World Wide Web (Sir. Tim Berners-Lee) also reasonably defends the need for a separate “Universal Declaration” (or *Magna Carta*) concerning human rights such as “the right to privacy,” now more specifically directed to Internet issues. It would have to state, e.g., more precise recommendations and requirements for the treatment of users’ personal data by companies and governments who have access to them.¹⁵⁴

Now, no matter which approaches one may choose about it, that is: whether favouring broader access to personal information and free exploration of Big Data (in the name of business expansion and innovation), or rather defending stronger restrictions (in the name of data protection); it is important to keep in mind that governance for the Internet is ultimately supposed to reflect and manage the continuing power struggles among competing interests of different stakeholders in societies. And this is so with the perspective that, hopefully, we come to find a middle ground (through legislation and

¹⁵³ BROWNIE, I. 1981: *Basic Documents on Human Rights*. Oxford, Clarendon Press (p. 253, 2nd edition).

¹⁵⁴ On this respect, one finds that the American and European approaches differ considerably, and would need to be reconciled to a big extent. See, e.g.: THE ECONOMIST, *Get off my cloud* (Oct 10th, 2015), available at: <http://www.economist.com/news/international/21671982-european-court-ruling-presages-transatlantic-battle-over-data-protection-and>

diplomatic treaties and agreements) for conciliating as many of those sides and concerns as possible; that is, in a fashion that protects democratic rights dear to any person in the liberal tradition, and which have been won the hard way.¹⁵⁵

When it comes to democratic environments, it may be easier to handle, as long as authorities and the general public can fast overcome the misrepresentation that privacy protection is unimportant and/or that the digital realm is not “really” affecting their lives that much. As Mr. Snowden has relentlessly warned us alongside his revelations concerning the threat of mass surveillance through digital media: “Arguing that you don’t care about the right to privacy because you have nothing to hide, is no different than saying you don’t care about free speech because you have nothing to say.”¹⁵⁶

4.4 Contemporary trademark

The type of counterargument to skeptics presented above by Mr. Hypponen illustrates a contemporary critical controversy concerning privacy and its protection with respect to Digital Media, which can be roughly summarized in the following way (Burk 2007):

- (1) European Union “opt-in” approach (i.e.: user-friendly, as privacy is generally taken as a universal human right to be protected “by default,” unless explicitly relinquished by those who decide to “opt in” and authorize to render their information public);
- (2) Anglo-American “opt-out” approach (i.e.: business-friendly, as clients’ information is

¹⁵⁵ Consider, e.g, this point: “*Big Data and mass surveillance are difficult to reconcile with the mandate of the European Union under Article 16 TFEU in the area of privacy and data protection.*” HIJMANS, H. *The European Union as Guardian of Internet Privacy*. Springer International Publishing (2016). For more interesting points with respect to the Big Data wave and the problems posed for data protection, one may also refer to the informative chapter on the subject at the present book, written (in Portuguese) by Rodrigo Dias de Pinho Gomes: « *Desafios à privacidade: big data, consentimento, legítimos interesses e novas formas de legitimar o tratamento de dados pessoais* ».

¹⁵⁶ Extracted from an informative discussion about privacy (animated by Nualo O’Connor) among Edward Snowden, Glenn Greenwald and Noam Chomsky, which one can find at: <https://www.youtube.com/watch?v=IOksJKfapVM>. Also, refer to Mr. Snowden’s TedTalk presentation at: https://www.ted.com/talks/edward_snowden_here_s_how_we_take_back_the_internet

generally considered by companies and agencies as “public-by-default,” their privacy being protected as a privilege, like other properties of those who have enough resources, time, and information to “opt out” explicitly from having them remain public).¹⁵⁷

Some big questions then arise in such a context, namely: *How much control do we have over our own information and on how governments and companies collect and use them? Also, what mechanisms are to be set in place for protecting sensitive data against misuse?* Depending on whether you are in America or Europe, the answers to these questions may vary considerably,¹⁵⁸ which has led to the tension highlighted above between officials and companies in both continents: “in the US, for example, a variety of laws apply to specific sectors and industries, like health and credit, in an ad hoc manner. In the EU, on the other hand, data protection is considered a fundamental right, which may imply far-reaching consequences affecting everyone in all its 28 member states.”¹⁵⁹

Such different approaches may not only lead to entangled political and legal disputes, but they may also have practical consequences for regular people in their daily lives, in a variety of situations, such as: your bank account or credit card being hacked

¹⁵⁷ For more information, for example, on the policy changes made by America since the 1990s, due to European pressure that led to the so-called ‘US – EU Safe Harbor Certification’, please refer to <http://www.export.gov/safeharbor> as well as to section 4.4.1. below for more details on the new ‘Privacy Shield’ framework more recently adopted (<https://www.privacyshield.gov>). In any case, unfortunately, such changes have been implemented just insofar as dealing with countries inside the European block, while rather controversial proposals such as the TPP (Trans-Pacific Partnership) are constantly under fierce negotiations between America and Pacific nations (see section 4.4 below for more up-to-date information on the current status of such negotiations as this work is being written and the article at <http://www.greenparty.ca/en/tpp-need-to-know>).

¹⁵⁸ See, e.g.: THE NEW YORK TIMES, *How Europe Protects Your Online Data Differently Than the U.S.*, by MARK SCOTT and NATASHA SINGER published on JAN. 31, 2016 (Online), <http://www.nytimes.com/interactive/2016/01/29/technology/data-privacy-policy-us-europe.html>

¹⁵⁹ Let us note that, as this work is being written, the UK has voted in a referendum (June 23, 2016), to exit the European Union. Such removal is not officially under effect as of yet, including on what concerns changes of rights for EU nationals living in the UK and of UK citizens living in EU member states in turn (<https://www.gov.uk/government/news/statement-the-status-of-eu-nationals-in-the-uk>).

more easily; your searches on Google and your health history being scrutinized by your prospective employer; your 10 year-old child creating a player profile on an online video game that collects your personal information such as real name, location, email address and even photo; your personal life mistake from 10 years ago ruining your current relationship; and the list of possibilities goes on and on.

By using the model adapted from Breton's triangle of ethical argumentation to such a dilemma, one can arrive at the following schematic representation, which makes emerge important relationships between two extreme positions of such conflicting approaches, e.g., as depicted in schemas 1 and 2 below.¹⁶⁰ With that goal in mind, we have placed each contrasting approach about privacy in the left box, to be designated as the factual "argument" being proposed by the "representative-in-charge" (e.g., of policy-making like government officials), with their respective main "opinion" (i.e., point-of-view or posture about privacy) being placed in the upper box, thus:

¹⁶⁰ We should note that the ethical triangle of argumentation is not supposed to represent the system, but it's suggested as a model that we wish will be kept in mind by developers (and later by users) of such systems towards protecting privacy and sensitive data 'by-default'. This, of course, if the ethics I recommend in the text were to be adopted more globally by their designers and developers, i.e.: a to-be-required 'ethics by-design' concerning data and privacy protection (see below, section 4.3.2).

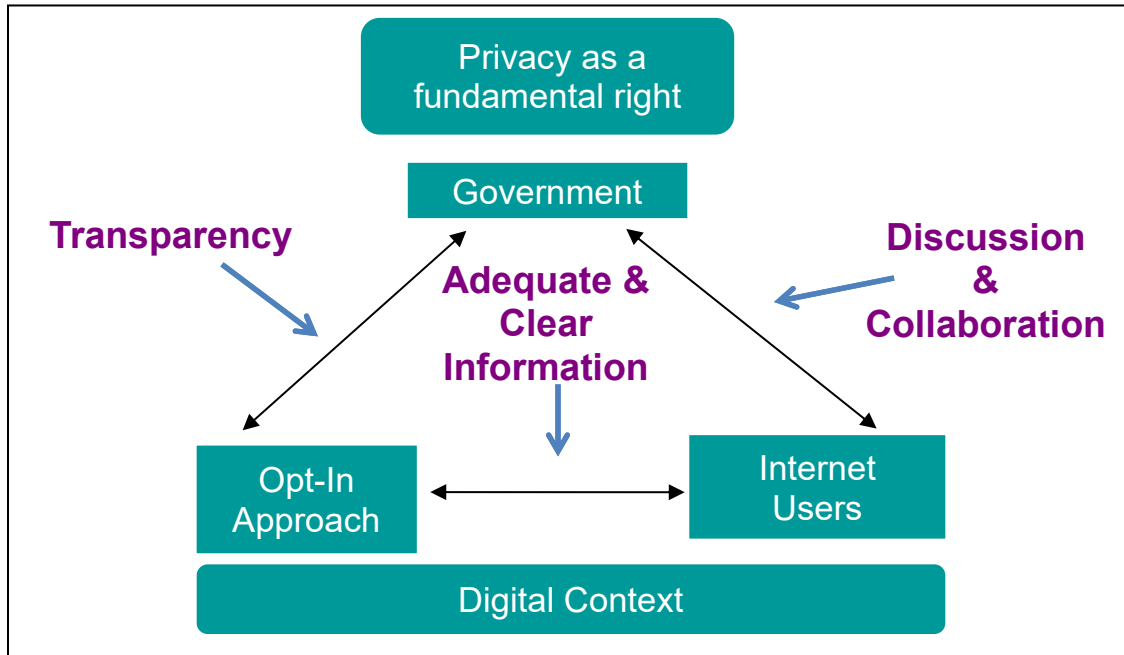


Figure 14 (Model 1)

When privacy is taken in the sense depicted in Model 1, as our parameter of reference, it means that this is a concept considered as a fundamental universal right of all individuals to be protected “by default,” that is: recognized for everyone in order for people to have their integrity respected (while still allowing each individual to choose otherwise if he/she decides to). Ignoring the ethical importance of such a protection of privacy rights would paradoxically mean to neglect the political significance (within a democracy) of individuals seen as people capable of respecting and fulfilling their (co) responsibilities as autonomous and equal citizens. The value of privacy protection becomes, in this case, as much personal (individual) as political (social).

The difficult issues of privacy and personality across cultures and continents, with their own political systems, have led the United Nations to create the new role of “Special Rapporteur on Privacy,” whose document about its mandate starts by the following:

This study responds to the crying need identified of achieving a better understanding of what privacy is or should be across cultures in 2016 in a way which makes the understanding of the right more relevant to a digital age where the internet operates without borders. In asking the question, “Why privacy?,” and positing privacy as an

enabling right as opposed to being an end in itself, the SRP is pursuing an analysis of privacy as an essential right which enables the achievement of an overarching fundamental right to the free, unhindered development of one's personality. This analysis is being carried out in close co-operation with several NGOs and is expected to be the focus of a major international conference which will be organized in 2016. This analysis of privacy is being carried out in a wider context and one where its intersection with other fundamental rights is also being examined. Thus the relationship of privacy with freedom of expression and freedom to access publicly held information is expected to be examined inter alia also through joint action with other UN Special Rapporteurs and discussions are already underway with the Special Rapporteur for Freedom of Expression in order to explore opportunities for joint action about this matter during the years 2016–2017.¹⁶¹

Such a standing presents itself as a counter-movement to the Anglo-American approach, illustrated by the second schema (Model 2) below, in which the sense of privacy is taken differently, more closely connected to the idea of property. It thus refers more restrictively just to information ownership (such as, e.g., issues of “intellectual property”). In this case, the balance of power seems to shift completely and the triangle may become explicitly unbalanced as privacy is considered as just a privilege to be held by some lucky ones (e.g., those who can afford to battle for it in court), while leaving disfavoured and uneducated regular citizens quite unprotected. It thus seems to constitute the expression of a rather non-egalitarian picture that is difficult to reconcile with legitimate (genuine) democratic principles. That is:

¹⁶¹ See its Introduction (p.4). For the whole report, the reader can refer to a document in .pdf given at the annexes: **Human Rights Council - Thirty-first session - Agenda item 3 – “Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development”** - Report of the Special Rapporteur on the right to privacy, Joseph A. Cannataci* (Note by the Secretariat: In the present report, submitted to the Human Rights Council pursuant to Council resolution 28/16, the Special Rapporteur on the right to privacy describes his vision for the mandate, his working methods and provides an insight into the state of privacy at the beginning of 2016 and a work plan for the first three years of the mandate.)

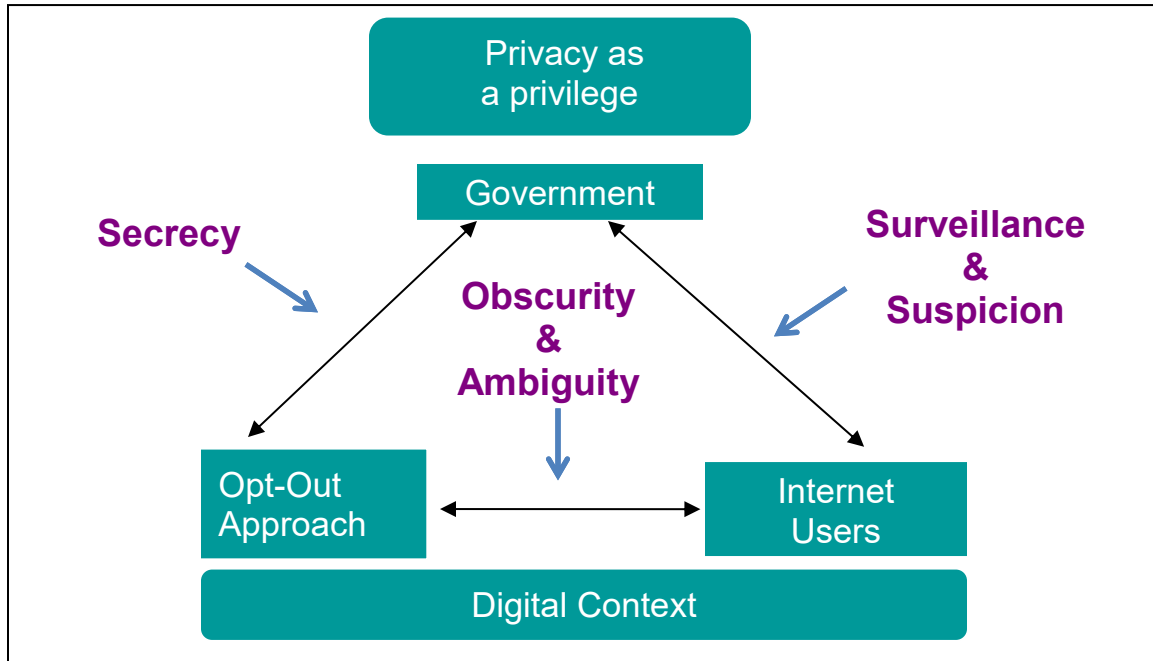


Figure 15 (Model 2)

The contrasted approaches depicted in Models 1 and 2, illustrated above, represent extreme postures on each pole of the spectrum concerning privacy (and framed in such extreme terms just for the sake of explicitness). It may sound just like coming out of a James Bond movie, but from what we have been shown by Mr. Snowden revelations, it is indeed pretty much in such lines that it has been treated by the so-called FIVE EYES group of allied agencies.¹⁶² Let us then consider more carefully some examples related to the digital realm (some more preposterous than others in demonstrating abuses of power), such as: the recent incident implicating Microsoft (the well-known giant American technology firm), in its capacity as an e-mail provider, has been asked by the FBI to hand over messages from a suspect in a drugs case that are stored in an Irish data centre.

Now, imagine this same scenario outside the virtual realm, namely: FBI agents, equipped with an American-based search warrant, break into a safety-deposit box that

¹⁶² The group is composed by the agencies of five Anglophone governments: England, Canada, New Zealand, Australia and the United States. We will refer to it more specifically in the following section.

happens to be owned by an American firm, but located in Dublin, so as to seize letters that might help catch a drug dealer (or say, a terrorist). It would probably provoke indignation by many, including the Irish authorities, not without good reasons and concerns about their sovereignty being bluntly disrespected in this way.

Cisco and Verizon, for example, have both sided with Microsoft in favour of protecting the privacy of its clients, by arguing that if the American government can force data stored elsewhere in the world to be handed over to them in this way, the companies' reputation with foreign clients, especially in Europe, would suffer even further.¹⁶³ Such reputation has been already damaged by the revelations by Edward Snowden about widespread spying by the American National Security Agency in a recent past (2014).

The judge's decision thus depends on choosing between two interpretations: Microsoft's defense based on guaranteeing the privacy of its clients through the argument that, since the e-mails are stored abroad, they have no obligation to hand them over to the FBI, unless their clients decide to relinquish their own right to such privacy or if they are found guilty of a crime by an international court judgment; the American government, on the other hand, defends the position that, since Microsoft is an American firm, it is bound to comply with their government orders even abroad.

It is important to keep in mind that the ECPA (Electronic Communications Privacy Act), to which the judges of this case can legally refer, was written back in 1986, that is: a decade before the Internet actually started spreading all over the world and about two decades before our hearing about cloud computing at all. ECPA, under which the American government also claims the right to such requests, is therefore not only very outdated, but also open to ambiguous interpretations in such cases, as it only limits

¹⁶³ See, e.g., LAW360 (Online - December 15, 2014): <https://www.law360.com/articles/604744/verizon-others-back-microsoft-in-overseas-warrant-battle>

what American providers can hand over (without a warrant from an American judge) on their own territory. Other governments, besides the Irish, are also watching the case with much interest (e.g., Brazil, Chile, France, Germany, Japan, Spain, etc.), not only because they also fear similar threats to their own territorial sovereignty, but also because America denies all of them precisely what it is now seeking to accomplish abroad.¹⁶⁴

What we can see by the above case is one more instance of a common problem to democracies in general, which is known as “the indeterminacy of legal rules” (Dworkin 1986), namely: in attempting to remain faithful to the basic code (i.e. a constitution), legal systems risk becoming too *indeterminate* (e.g., containing ambiguous and vague terminology) in order to allow for its general *compatibility* (i.e., articulate consistency and coherent connection between general principles and policies in the text) and, yet, for its adaptable application to particular cases as they appear in practice. I thus wish to emphasize in connection with this point the challenge facing us right now of coming up with a theoretically consistent and, yet, practically appropriate approach to global Digital Media Ethics, which well addresses such points. It is a problem that brings up not only important dilemmas about privacy, as we have just seen above, but also further related questions about transparency and secrecy, both with respect to individuals and governments, as we shall see in the following.

¹⁶⁴ THE ECONOMIST, “Privacy and Data – Under my Thumb: Governments grapple with law enforcement in the virtual world” [Online], published on Oct 10th 2015: <http://www.economist.com/news/international/21672204-governments-grapple-law-enforcement-virtual-world-under-my-thumb> . As the article explains, Google is exempting itself from such concerns because it manages its ‘global cloud’ as one big computer, instead of offering cloud-computing services that allow data to be stored in local data centers at different countries. But in the lack of global ‘international guidelines’ to rely upon, being an American company, it has assumed that it’s bound by American law whenever disputes like this may occur to them. This leaves their users who are also American citizens pretty much protected in their own territory, as the sender or recipient of their e-mails may even be disclosed but not the content of the text itself. However, foreigner citizens and even Americans living in other countries may not have such warranties applied to them, thus, being much more vulnerable to privacy breaches. See, also: THE NY TIMES, “US and Europe in ‘Safe Harbor’ data deal” (by MARK SCOTT), published on Feb. 2nd 2016 [Online]: http://www.nytimes.com/2016/02/03/technology/us-europe-safe-harbor-data-deal.html?_r=0 .

In addressing such difficult questions, we shall also consider interesting initiatives to deal with the issue, ranging from the World Internet Project (International Report—www.worldinterproject.net) and the Mapping Digital Media Project (<http://www.opensocietyfoundations.org/reports/mapping-digital-media-canada>), to the Institute of Technology and Society (ITS—www.itsrio.org, main contributor for the elaboration of Brazil’s pioneering Bill of Rights for the Internet: “Marco Civil da Internet”), as well as the Germany-Brazil “Anti-Spying Proposal” that has been endorsed by the UN. We also take into account important issues brought by other concerned NGO’s such as Open Media International (<https://openmedia.org/declaration>) and the one led by the World Wide Web creator, Sir Tim Berners-Lee (<https://webwewant.org>). All such institutions and non-profit civil organizations have been very active in raising public awareness towards threats to nothing less than the very core of our democratic rights and diplomatic commitments.

The pressure, especially from Europeans, who generally [view an individual’s right to privacy](#) side-by-side with freedom of expression, makes it very explicit that privacy became much more than just a privilege or a mere “right to be left alone” (as originally conceptualized by Warren and Brandeis, 1890). As already mentioned above (section 4.3, p. 30), in the contemporary “global” information society, the theme of “privacy” now also requires, among other concerns, to incorporate, “the right to be forgotten,”¹⁶⁵ and this due to many reasons, for example: our digital footprint can quickly extend far and wide and be used in multiple ways. Our interactions on Facebook shape [the ads we see there](#). The kinds of films and music we stream may allow online

¹⁶⁵ See, e.g.: MAYER-SCHÖNBERGER, Viktor. “Delete: The Virtue of Forgetting in the Digital Age.” Princeton University Press. 2011 [Online], <http://press.princeton.edu/titles/9436.html>.

companies to make inferences about our [political leanings](#) or religious beliefs. Our health insurer may analyze details about our [online shopping habits](#), etc.¹⁶⁶

This is a context that certainly brings up important questions in the minds of those concerned with preserving our democratic rights, namely: *How much control does one have over how companies and governments collect and use his/her information? And what mechanisms are in place to protect such data against misuse and abuses?* Let us tackle some of these issues, as we address the theme of surveillance more carefully in the next section.

4.4.1. On Surveillance

In the previous sections we have looked at two extreme comparative schemas (using our compounded triangular model) for illustrating the main conflicting approaches with respect to privacy. Thus, we may now be in a better position to analyze some explicit examples involving such questions and to grasp why *transparency* regarding public policies and citizens' rights may turn out to be a key element for allowing people to "trust back" and feel more inclined to collaborate with their governments and businesses, especially on matters of protecting their privacy and handling their personal (private) information. For there seem to be crucial dilemmas between *transparency* vis-à-vis *secrecy* (especially when the notion of privacy is conflated with that of secrecy, as mentioned earlier), for example: what sort of information are administrators and officials supposed to release rather than keep secrets both from and about their citizens and their own administrative procedures or requirements of access to information?

¹⁶⁶ See, e.g.: NYTIMES, "When a Health Plan Knows How You Shop" [Online], Published on June 28th 2014, <http://www.nytimes.com/2014/06/29/technology/when-a-health-plan-knows-how-you-shop.html>.

Though there seems to be no sharp or obvious line that could be drawn on this, not to mention with respect to the many actions regular citizens could take accordingly, it is necessary to draw some distinctions by taking some pressing and important cases. One interesting example is the following: in his annual report tabled in 2015, privacy commissioner of Canada, Daniel Therrien, underscored a record-high number of federal government data breaches that came to his knowledge. Mr. Therrien then concluded that, while many institutions may have made strides since then, there is still much room for improvement—particularly with the use of portable storage devices. Without proper controls, federal institutions are running the risk that the personal information of Canadians will be lost or inappropriately accessed, as the commissioner emphasized, given that federal institutions reported 256 data breaches in 2014-15, up from 228 the year before. Even more worrisome were more recent declarations by the commissioner of the Communications Security Establishment (CSE), Mr. Jean-Pierre Plouffe, about the indeterminacy on the number of breaches that could have previously taken place during the Harper era, given that many traces were erased by the systems before his team’s inspections in 2016.¹⁶⁷

With such cases in mind, are citizens nevertheless supposed to blindly trust that their information are being or shall be adequately retained and used by their governments, institutions, or private corporations like Google, Facebook and Microsoft? Moreover, if citizens are not sufficiently informed with respect to public regulations as well as their

¹⁶⁷ See, e.g.:

CBC, “Privacy watchdog urges more care with memory sticks containing Canadians' data” [Online], Published on December 10th 2015, <http://www.cbc.ca/news/technology/privacy-commissioner-report-portable-storage-concerns-1.3359034> ;

CBC, “Difficult to determine scope of privacy breach in Five Eyes data sharing” [Online], Published on February 23rd 2016, <http://www.cbc.ca/news/politics/cse-metadata-five-eyes-sharing-1.3459717> .

own rights and conditions about privacy in digital environments, how are they even able to decide whether to consent or not (in order to opt-in or opt-out features of their services) in the first place?

Democratic laws and institutions are supposed to encompass and guarantee the respect of all citizens' *integrity* and *freedom of expression*, in order to foster their shared sense of *responsibility* (i.e.: "co-responsibility," in Discourse Ethics terms) as autonomous co-citizens (i.e. equal peers), as we've already mentioned above (section 3.1.). This thanks to main principles requiring that association, choice, and expression are taken as basic freedoms within democratic societies (Lever 2011). As such, they are not to be dependent on wealth, status, or special connections, even though the contours of public-private boundaries may become increasingly blurred and controversial in practice, as we have already discussed earlier (chapter 2 and section 4.3 above).

Accordingly, legitimate governments are supposedly elected to represent and protect their citizens' rights to the best of their competencies and powers. But how can elected representatives keep a good balance between protecting everyone's privacy rights, on the one hand, at the same time that they are transparent enough to their electorate about their own actions as public administrators, on the other? There seems to be precisely where the core line is to be traced between private and public. First of all, official representatives are required to keep a continuous discussion with their constituents about issues of common public interest and to be transparent about policies and procedures to affect them, especially concerning crucial issues such as protection of citizens' sensitive information and freedom of expression, as well as the neutrality and

collaboration from communication service providers'.¹⁶⁸

On those lines, it looks like a rather thoroughly “transparent perspective” about such issues should be expected from genuine democratic governments and companies (according to Model 1 presented above). This, of course, by always keeping in mind the limitations that may be presented with respect to specific requirements for each situation, yet, so as to accommodate privacy as a fundamental right of each and every citizen, no matter whether rich or poor, utilitarian or humanist, Pragmatist or Romanticist, Europeans or Americans.

Now, pointedly, by reading the articles cited above as well as certification deals such as the “Safe Harbour” (changed in 2017 to a new “Privacy Shield” framework, so as to include more safeguards concerning privacy issues, by an European Union request), we can see that European and American contrasting approaches to privacy are basically grounded on their different ideas about the very relationship between citizens and their governments. Thus, we find the elements encoded into different types of implementation and application of consequential regulations by each side.¹⁶⁹ On the one hand, tougher general regulations are advocated as, in fact, being required to limit the abilities of the State (and of companies) to record, store, and distribute data from and about individuals.

¹⁶⁸ Another important debate concerns ‘metadata’ (‘bigdata’), as discussed e.g. in the following article: NATIONAL POST, “Cavoukian & Levin: Metadata surveillance is an invasion of our privacy” [Online], Published on February 10th 2014, <http://fullcomment.nationalpost.com/2014/02/10/cavoukian-levin-metadata-surveillance-is-an-invasion-of-our-privacy/>. (One may also refer to Snowden’s interview both on TED talk in Canada at http://www.ted.com/talks/edward_snowden_here_s_how_we_take_back_the_internet?language=en# and in the American television at <http://globalnews.ca/video/1923012/john-oliver-interviews-edward-snowden> , as well as a full interview at https://www.youtube.com/watch?v=XEVlyP4_11M).

¹⁶⁹ See, e.g.:

for Germany, <http://www.loc.gov/law/help/online-privacy-law/germany.php>, <http://germanitlaw.com>; for the USA, <https://it.ojp.gov/privacyliberty/authorities/statutes/1285>, and <http://www.internetsociety.org/regulation> .

Such concerns, unsurprisingly, appear to be much stronger in Europe, mainly in Germany, as the Gestapo phantom recalls obvious scary reasons for concern in the minds of the general public. Thus, already in 1970, Hesse (a German state) passed the world's first data-protection statute with a federal law following it six years later (refer to article cited in the footnote above).

On the other hand, due to German rigid patient-confidentiality rules, it has been hard for journalists, prosecutors, and German biggest airline company Lufthansa, for example, to manage to get the full medical facts about the co-pilot who let its aircraft (flight 9525, from Barcelona to El Prat Airport in Spain) into a French mountain on its way, sadly killing 150 people (144 passengers and 6 crew members, including the co-pilot himself). It was Germanwings' (a low-cost carrier owned by [Lufthansa](#)) first fatal crash in the 18-year history of the company.¹⁷⁰

The crash was found to have been deliberately caused by the co-pilot, who had previously been treated for suicidal tendencies and declared "unfit to work" by a doctor. Lubitz kept this information from his employer and reported for duty nevertheless. During the flight, he locked the pilot out of the cockpit before initiating a descent that caused the aircraft to crash. Lufthansa has thus faced charges with corporate manslaughter over the Airbus 320 disaster, as it had laid itself open to criminal proceedings because its own psychiatrists had apparently allowed Mr. Lubitz to have returned to the cockpit, despite his previous diagnosis.

In response to this tragic incident, aviation authorities in Australia, Canada, Germany, New Zealand, Norway, and the United Kingdom have all implemented new regulations that now require the presence of two authorized personnel in the cockpit

¹⁷⁰ Refer, e.g., to: WIKIPEDIA, "Germanwings Flight 9525" [Online], accessed on June 2015, https://en.wikipedia.org/wiki/Germanwings_Flight_9525.

during all flights (except for repair tests). But it's certainly been much harder for German prosecutors to make their case against Lufthansa, due to privacy protection concerns about releasing the co-pilot's medical records. This is a case where "protection of privacy" may not have equated with "protection of the public interest", and where very tough choices have had to be made for accommodating the security and rights of both the public and professional pilots.

However, even in an exceptional and complicated case like this, upon closer consideration, as we inquire after the fact (keeping the suggested triangular model in mind as our parameter of referential limits), we can identify the following important points: **(i)** one of the main questions is to appoint who is the responsible individual (or individuals) "in-charge" to respond to this particular situation (given that the pilot is dead); **(ii)** based on the answer given to (i), judges can request the release of more sensitive information towards applying appropriate accountability for all considered to be responsible for the tragedy (the pilot's doctor certainly has a main role to play here, and so has the company who kept the pilot in service as well as the pilot's own family, especially because he is no longer alive to respond for himself); **(iii)** thus, the(s) person(s) who will be responding in the name of the dead pilot (probably a lawyer representing his family) may perhaps be required to relinquish the pilot's privacy rights for further investigation, if it comes to be judged as essential for further handling of the case.¹⁷¹

If we go the other way around, that is, leaving everybody's privacy unprotected "by default" just to prevent such exceptional complicated cases like the one just mentioned involving Lufthansa, the implications may be a rather irresponsible (though

¹⁷¹ In the end, we hope, the supreme court will be able to decide the case according to the best arguments presented by lawyers from both sides, instead of favoring the more powerful no matter what, or yet just allowing for the use of 'backdoors' (like it happened to the case involving the FBI against Apple, for example).

probably faster) shortcut to avoid the appointment of “people-in-charge” for the situation at stake. In such an alternative scenario (as roughly illustrated in general terms by Model 2 in Figure 15 above), where privacy is NOT taken as a fundamental right for all, everybody would be penalized by having their sensitive information left unprotected just for the sake of making specific cases (which are rather rare) to be investigated in a quicker (though much more intrusive) fashion.¹⁷² Is it indeed worthwhile to make such a sacrifice in the name of expediency? Though it may be tempting, the matter does not seem so obvious to be treated in a black-and-white fashion.

Such difficulties would, perhaps, be harder to imagine in America, where “data protection” still is mostly an issue of consumer regulation to be solved pretty much in a case-by-case manner, where incidents like the one just cited above may be considered as giving particular strength to ad hoc approaches. Let us therefore consider, for the sake of citing also an American example, the recent case involving the giant American tech firm Apple and the FBI, in connection with the San Bernardino case.¹⁷³

In February 16 (2016), Apple CEO (Mr. Tim Cook) wisely published a *Message to Our Customers* starting with the following passage: “The United States government has demanded that Apple take an unprecedented step which threatens the security of our customers. We oppose this order, which has implications far beyond the legal case at hand. This moment calls for public discussion, and we want our customers and people

¹⁷² We should recall that Lufthansa is at least responsible for having allowed the pilot back to work, despite the company’s awareness of his previous suicidal tendencies prior to this tragedy. Therefore, the effects of privacy related issues discussed now have more to do with the investigations of the aftermath, but would probably not have prevented the tragedy in the first place, as far as I understand the case.

¹⁷³ For more details about this case, see e.g.: CBCNEWS, “San Bernardino Shooters” [Online], published on December 8th 2015, <http://www.cbc.ca/news/world/san-bernardino-shooters-radicalized-fbi-investigation-1.3354426>.

around the country to understand what is at stake.”¹⁷⁴

His message goes on to explain important implications to its customers, if Apple would abide to such a request, and even though Mr. Cook also pointed out that he does not disregard specific cases of terrorism as presenting serious threats that require careful investigation. However, he also made explicit in his message that it would not be acceptable taking this as a justification to relinquish the protection of all his customers’ privacy rights, for example, by creating a “backdoor” that would circumvent crucial security measures to iPhones. To use his own words, he emphasized once again the need for general encryption safeguards for the public in general, thus:

All that information needs to be protected from hackers and criminals who want to access it, steal it, and use it without our knowledge or permission. Customers expect Apple and other technology companies to do everything in our power to protect their personal information, and at Apple we are deeply committed to safeguarding their data. Compromising the security of our personal information can ultimately put our personal safety at risk. That is why encryption has become so important to all of us. (...) Specifically, the FBI wants us to make a new version of the iPhone operating system, circumventing several important security features, and install it on an iPhone recovered during the investigation. In the wrong hands, this software—which does not exist today—would have the potential to unlock any iPhone in someone’s physical possession. The FBI may use different words to describe this tool, but make no mistake: Building a version of iOS that bypasses security in this way would undeniably create a backdoor. And while the government may argue that its use would be limited to this case, there is no way to guarantee such control.¹⁷⁵

Without disagreeing with Mr. Cook’s arguments for not abiding to the FBI request nor wishing to diminish his personal merits for having had the courage to do so, being the CEO of an important giant firm like Apple also gave him much leverage, as well as financial resources, not only for pronouncing such public statements, but also challenging in Court a powerful agency like the FBI. Moreover, his public standing on the issue may have turned out as a very good marketing strategy for Apple. Customers probably felt

¹⁷⁴ For the integral note, please refer to: APPLE, “A Message to Our Customers” [Online], published on February 16th 2016, <https://www.apple.com/customer-letter/> .

¹⁷⁵ Refer to the integral letter: *Ibid*, <http://www.apple.com/customer-letter/> .

privileged and relieved to hear such a public position coming from a private-sector CEO (not a public official), who was not formally required (by law) to do so on behalf of the concerned citizens.

Nevertheless, the outcome of the confrontation was quite disappointing to the general public, especially to those people concerned with democratic rights, namely: The FBI decided to dismiss the legal case and hired someone else to open a “backdoor” for unblocking the I-phones anyway. Thus, we have had another clear demonstration of power abuse (going explicitly off-limits the schema illustrated in Model 1 and going towards meeting the other extreme illustrated by the schema in Model 2), with a blunt disregard for the Supreme Court’s representation of “the rule of law” as the main arbitrator of disputes in the largest democracy of the world.

We should also keep in mind that other (smaller) firms, not to mention simple (regular) individuals, would not be any close to a comparable position (including for not having enough financial resources such as Mr. Cook for going to court) in order to confront the FBI in the same way: just recall Edward Snowden’s example in confronting the NSA, for an interesting comparative case of disproportionate power struggle.

If we consider the various sensibilities from different countries in this respect, it is not so surprising to see that Mr. Snowden’s astonishing revelations since 2013 (about the NSA’s snooping activities, including into government leaders that are usually taken as American allies) have not had much of a lasting impact on the general public in America, such as they have had in Europe and other parts of the world. Accordingly, despite all that has been already revealed by Mr. Snowden and, now, by Mr. Cook’s statements in defying the FBI, a considerable number of American citizens do not seem to have realized, yet, how dangerously connected these issues are and how the non-protection of

people's privacy rights shall actually open doors for further abuses of power, instead of helping us to prevent them in the future (e.g.: 51% are said to be in favour of FBI posture and 38% against it).¹⁷⁶

In such a context, however, the growth of transatlantic travel and commerce (including e-commerce) keeps forcing problematic compromises among countries, despite their disparate approaches on privacy, whose strains are increasingly emerging more explicitly as time goes by. In countries historically more sensitive to the matter of State surveillance (e.g., Germany and Brazil), such activities have been taken very seriously. Among other things, these facts both reveal and led to diplomatic and commercial breaches caused by other related scandals, such as the tapping of Chancellor Angela Merkel's and President Dilma Rousseff's telephone calls.¹⁷⁷

For example, the European Union, through the European Parliament influenced by Germany has been struggling with American officials and companies lately, regarding additional difficulties and restrictions posed to all sorts of bilateral collaborations. These consultations include tougher negotiations for transatlantic PNR ("passenger names record") arrangements with the EU, taken care by US officials since the September 11th (2001) attacks in New York City. Such pressure, among other travel and trade challenges exerted by the EU, has led the United States to adopt a special procedure for companies

¹⁷⁶ CBCNEWS, "U.S. government wants Apple to unlock at least 15 iPhones" [Online], published on February 23rd 2016, <http://www.cbc.ca/news/technology/bill-gates-apple-iphone-unlock-1.3459619>

¹⁷⁷ See, e.g.:

RTNEWS, "Privacy essential to democracy: Germany, Brazil introduce anti-spying UN resolution" [Online], published on November 7th 2013, <http://rt.com/news/germany-brazil-un-spying-resolution-394/>;

DWNEWS, "Germany, Brazil introduce anti-spying resolution at UN General Assembly" [Online], published on November 8th 2013, <http://www.dw.de/germany-brazil-introduce-anti-spying-resolution-at-un-general-assembly/a-17213179>;

BBCNEWS, "The UN General Assembly adopts anti-spy resolution" [Online], published on December 18th 2013, <http://www.bbc.com/news/world-latin-america-25441408>

dealing with European companies and organizations, namely the “Safe Harbour Certification”, whose framework was based upon the following main principles, attempting to balance the two extreme approaches (opt in/opt out) as roughly described above. Its main principles are:

Notice: Organizations must notify individuals about the purposes for which they collect and use information about them. They must provide information about how individuals can contact the organization with any enquiries or complaints, the types of third parties to which it discloses the information and the choices and means the organization offers for limiting its use and disclosure.

Choice: Organizations must give individuals the opportunity to choose (opt out) whether their personal information will be disclosed to a third party or used for a purpose incompatible with the purpose for which it was originally collected or subsequently authorized by the individual. For more sensitive information, affirmative or explicit (opt-in) choice must be made if the information is to be disclosed to a third party or used for a purpose other than its original purpose or the purpose authorized subsequently by the individual.

Onward Transfer (Transfers to Third Parties): To disclose information to a third party, organizations must apply the notice and choice principles. Where an organization hopes to transfer information to a third party that is acting as an agent, it may do so if it makes sure that the third party subscribes to the Safe Harbour Privacy Principles or is subject to the Directive or another adequacy finding. As an alternative, the organization can enter into a written agreement with such third party requiring that the third party provide at least the same level of privacy protection as is required by the relevant principles.

Access: Individuals must have access to personal information about them that an organization holds and be able to correct, amend, or delete that information where it is inaccurate, except where the burden or expense of providing access would be disproportionate to the risks to the individual’s privacy in the case in question, or where the rights of people other than the individual would be violated.

Security: Organizations must take reasonable precautions to protect personal information from loss, misuse and unauthorized access, disclosure, alteration and destruction.

Data integrity: Personal information must be relevant for the purposes for which it is to be used. An organization should take reasonable steps to ensure that data is reliable for its intended use, accurate, complete, and current.

Enforcement: In order to ensure compliance with the safe harbour principles, there must be (a) readily available and affordable independent recourse mechanisms so that each individual’s complaints and disputes can be investigated and resolved and damages awarded where the applicable law or private sector initiatives so provide; (b) procedures for verifying that the commitment companies make to adhere to the safe harbour principles have been implemented; and (c) obligations to remedy problems arising out of a failure to comply with the principles. Sanctions must be sufficiently rigorous to ensure compliance with the organization. Organizations that fail to provide annual self-certification letters will

no longer appear in the list of participants and safe harbour benefits will no longer be assured.¹⁷⁸

More recently (since October 2015), however, due to the European Union increased concerns about this procedure, it was judged insufficient and cancelled by the European Parliament that has called for a new regulatory framework, which is now named “EU-US Privacy Shield” (adopted since July 12, 2016).¹⁷⁹ As stated by the EU Commission on their official page, in this regard:

The EU-US Privacy Shield reflects the requirements set out by the European Court of Justice in its ruling on 6 October 2015, which declared the old “Safe Harbour” framework invalid. The new arrangement will provide stronger obligations on companies in the US to protect the personal data of Europeans and stronger monitoring and enforcement by the US Department of Commerce and Federal Trade Commission (FTC), including through increased co-operation with European Data Protection Authorities. The new arrangement includes commitments by the US that possibilities, under US law, for public authorities to access personal data transferred under the new arrangement will be subject to clear conditions, limitations and oversight, preventing generalized access. Europeans will have the possibility to raise any enquiry or complaint in this context with a dedicated new Ombudsperson.¹⁸⁰

Such a tougher European position is understandable, especially once we look more

¹⁷⁸ Extracted from: EXPORT US Government, “Safe Harbour” [Online], <http://www.export.gov/SafeHarbor/>. To provide organizations with still further guidance, the Department of Commerce also issued a set of frequently asked questions and answers (FAQs) that clarify and supplement these Safe Harbor Privacy Principles at http://www.export.gov/safeharbor/eu/eg_main_018493.asp (see also: http://www.nytimes.com/2016/02/03/technology/us-europe-safe-harbor-data-deal.html?_r=2). Such documents were available and in force until July 2016 but, as also mentioned in the next paragraph, the ‘Safe Harbor’ agreement has now been replaced with a new framework called ‘Privacy Shield’ to include extra safeguards concerning privacy issues, which can be accessed at: http://ec.europa.eu/justice/data-protection/international-transfers/eu-us-privacy-shield/index_en.htm.

¹⁷⁹ See e.g.:

THE ECONOMIST, “New EU privacy rules could widen the policy gap with America” [Online], published on October 5th 2015, <http://www.economist.com/news/international/21671081-court-ruling-october-6th-could-alter-way-data-flow-around-internet-new-european-privacy> ;

EUROPA, *Press Release* [Online], published on February 2nd 2016, http://europa.eu/rapid/press-release_IP-16-216_en.htm ;

NYTIMES, “US-Europe Safe Harbour” [Online], published on February 3rd 2016, http://www.nytimes.com/2016/02/03/technology/us-europe-safe-harbor-data-deal.html?_r=0

¹⁸⁰ For the integral text, please refer to: EUROPA, *Press Release* [Online], accessed on June 2016, http://europa.eu/rapid/press-release_IP-16-216_en.htm.

carefully into the following fact: by merely adding some clauses that apparently give the option for customers “to choose” between opting in/out with respect to few particular features *within* applications (e.g., with respect to further dissemination of users’ sensitive information), instead of simply adopting a general “opt-in” approach “by default” applied to everyone by all applications, it does not actually give the general public (including those people not so technically literate) any substantial power or control. Such “cosmetic” options are usually given in an already unbalanced context of “everything or nothing” for customers with respect to the licence agreements of software (for instance, if you do not abide to all rules proposed by the provider, you simply cannot download the application, i.e.: it’s everything or nothing at all).

Once one has already previously agreed (and legally abide) to all the contract rules being “proposed”, only then one can indeed go on searching for those features. You can thus “choose”, afterwards, to change some details inside each particular application you have already accepted to use. Does that look like a fair procedure that aims at a balanced “equality” between “autonomous” and “co-responsible” inter-actors (e.g.: service providers and its customers, tech firms and its users, etc.), for example? Is it in fact approaching what is depicted by the sketched *Model 1* illustrated earlier (i.e., respecting privacy as a fundamental right) or it, rather, tends towards what is depicted in *Model 2* (i.e., taking privacy rights as just a privilege to be held by some few fortunate individuals)?

In addition to such concerns, disputes over privacy approaches have also threatened one of the biggest joint projects between European and American continents, namely, the Transatlantic Trade and Investment Partnership (TTIP), an ambitious but staggering proposal to lower tariffs and boost investment both ways. The Snowden affair

has helped to set off a wave of anti-Americanism in Germany and Austria, where there has been fiercest expression in opposition to the TTIP, as people feared not only about filling their shelves with chlorine-dipped chicken and GMO products, but also about importing America's rather lax "data standards" for privacy protection. Agreements on this front (if ever reached at all, given the current much more radical and protectionist approach adopted by current American President Trump) on these negotiations would also affect another agreement negotiated in parallel with countries in other continents, namely: the TPP (Trans-Pacific Partnership), which mainly affects the so-called group FIVEYS (Australia, Britain, Canada, Japan, United States).¹⁸¹

Thus, we have seen the so-called "transatlantic data divide" only increase, that is, a wall of hostility American firms are facing in Europe.¹⁸² After Mr. Snowden's revelations, Europeans became increasingly worried about today's unprecedented "data-hoovering" by America, with its dominant Internet giants like Apple, Google, and Facebook, given that public policy has failed to keep up with American dominance and power (recall e.g. the explicit NSA and FBI abuses mentioned above). This is also due to the fact that the American approach does not yet substantially recognize privacy as a right for all citizens that should be better respected and protected in practice, for the sake of

¹⁸¹ See, e.g.:

*GLOBAL AFFAIRS CANADA [Online], published on February 4th 2016, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/index.aspx?lang=eng> ;

*OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE [Online], published on March 12th 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership> (As of May 2017, the new US government, under President Trump, had already formally withdrawn from the agreement, with the previously published content on the TPP now being available at <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> .)

¹⁸² See, e.g.:

THE ECONOMIST, "*Can America and Europe ever get over their differences on data protection?*" [Online], published on April 4th 2015, <http://www.economist.com/news/europe/21647634-can-america-and-europe-ever-get-over-their-differences-data-protection-not-so-private-lives> .

citizens' integrity and freedom of expression. This, unless in exceptional cases, where there is enough legal evidence and justification for such right to be *appropriately* relinquished from particular individuals due to serious law infringements.

Instead, they tend to make no clear distinction between the interests and powers exerted by big private companies and the government agencies that are supposed to work for and protect the general public, non-distinctively, in the handling of their influence and power. No surprise, lobbyists are being paid enormous amounts of money to keep such mechanism working well in Washington. It's a vicious circle that is damaging the democratic system enormously, as former President Obama has been alerting us.¹⁸³

However, for that very reason, Europeans should better seek to steer the debate, instead of eschewing it, by attempting not to overreact in such a way as barring innovation or blocking information exchange, which would be damaging on all fronts. Also, there are indeed at least two important facts to be considered for justifying or refraining from protecting our privacy rights, namely: **(i)** the growth of online services and e-commerce that require data to be transferred and stored among different countries; and **(ii)** the inescapable and undeniable threat of terrorism for national security. Nevertheless, we should be all very careful about not letting such facts be overused as acceptable justification for extrapolations either, as Snowden and other privacy rights advocates have been insisting on alerting us so vehemently, lest it may open serious and risky precedents for further unjustifiable abuses of power over our basic democratic rights and freedoms.¹⁸⁴

¹⁸³ See, e.g.: THE GUARDIAN, "Barack Obama makes first public appearance since leaving office" [Online], published on April 24th 2017, <https://www.theguardian.com/us-news/video/2017/apr/24/barack-obama-makes-first-public-appearance-since-leaving-office-video> .

¹⁸⁴ You may refer to the talk among Mr. Snowden, Prof. Chomsky and Mr. Greenwald about privacy, e.g.: *Op. Cit.*, <https://www.youtube.com/watch?v=IOksJKfapVM> .

Therefore, it makes sense that both tech firms and governments (many of which are sensibly anxious about these issues, such as the FIVEYS and also Germany, Ireland, Brazil, Chile, Mexico, etc.) have been struggling for negotiating new rules that may more appropriately balance security, commerce, and their citizens' rights.¹⁸⁵ Those with already well-established democracies may take comfort from the appeasing idea that they have robust democratic institutions already in place, so that they can take the appropriate measures to alter that balance occasionally, if necessary, even though the examples we've seen above show many reasons for concerns even in such cases. However, such comfort is unfortunately denied to many younger and much more fragile democratic systems (we just need to look at the recent crisis in both Egypt and Brazil for some disrupting and worrisome examples of such instability).

Accordingly, more established democracies must bear the responsibility to lead the way for giving the example and setting benchmarks as well as guiding standards (inasmuch as respecting and emphasizing the role of the United Nations on such issues) to those who are still struggling to get their democratic institutions working as needed. This may serve as a precious help for protecting important democratic rights at the

¹⁸⁵ For example, there is a big debate involving negotiations about the TPP (Trans-Pacific Partnership and TTIP (Transatlantic Trade and Investment Partnership), see e.g.:

*USTR [Online], <http://www.ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/direct-stakholder-engagement>;

*HOUSE OF REPRESENTATIVES (Judiciary Committee) [Online], <https://judiciary.house.gov> ;

*MPI (Max Planck Institute for Innovation and Competition) [Online], <http://www.ip.mpg.de/de/aktuelles.html> ;

*EUROPA [Online], <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF> ;

*THE GUARDIAN [Online], Published on February 13th 2012, <http://www.guardian.co.uk/technology/2012/feb/13/actaprotests-europe>.

present unsettled period.¹⁸⁶

The UN has recently created the Special Rapporteur position for Privacy so as to help with such a challenge. The person in this position now works in close collaboration with the Special Rapporteur for Freedom of Expression. Such positions are supposed to provide an overview of the regulatory “ecosystem” that underpins the Internet and sets the trends for State and private action with respect to privacy and freedom of expression online. Among the issues that the Special Rapporteurs are supposed to address are the key role of participants in the ICT sector, the relevant human rights standards applicable to States and the private sector, and the legal and policy concerns related to such issues. Their initial report already stated some important recommendations such as:

1. States must not require or otherwise pressure the private sector to take steps that unnecessarily or disproportionately interfere with freedom of expression, whether through laws, policies, or extralegal means.
2. Any demands, requests and other measures to take down digital content or access customer information must be based on validly enacted law, subject to external and independent oversight, and demonstrate a necessary and proportionate means of achieving one or more aims under article 19 (3) of the International Covenant on Civil and Political Rights. Particularly in the context of regulating the private sector, State laws and policies must be transparently adopted and implemented.
3. Governments must also adopt and implement laws and policies that protect private development and the provision of technical measures, products and services that advance freedom of expression. They must ensure legislative, policymaking and other relevant norm-setting processes concerning rights and restrictions on the Internet in order to provide the private sector, civil society, the technical community and academia meaningful opportunities for input and participation.
4. Among the most important steps that private actors should take is the development and implementation of transparent human rights assessment procedures. They should develop and implement policies that take into account their potential impact on human rights. Such assessments should critically review the wide range of private sector activities in which they are engaged, such as the formulation and enforcement of terms of service and community standards on users’ freedom of expression, including the outsourcing of such enforcement; the impact of products, services and other commercial

¹⁸⁶ For more preoccupations with respect to the Internet, see, e.g.: THE ECONOMIST, “Sir Tim Berners-Lee founded web and now head its standards agency” [Online], accessed on January 2017, <http://www.economist.com/news/international/21699511-sir-tim-berners-lee-founded-web-1989-and-now-head-its-standards-agency-w3c-he>; <https://youtu.be/IOksJKfapVM>

initiatives on users' freedom of expression as they are being developed, including design and engineering choices, and plans for differential pricing of or access to Internet content and services; and the human rights impact of doing business with potential government customers, such as the operation of telecommunication infrastructure or the transfer of content-regulation or surveillance technologies.

5. Private entities ensure the greatest possible transparency in their policies, standards and actions that implicate the freedom of expression and other fundamental rights.

6. Private entities should also integrate commitments to freedom of expression into internal policymaking, product engineering, business development, staff training and other relevant internal processes. International organizations provide meaningful public access to policies, standards, reports and other information concerning Internet governance created or generated by the organization and/or its membership, including through facilitating access to free online resources and public education initiatives. More generally, the multi-stakeholder process for Internet governance has been an important driver for policies supportive of freedom of expression. With that in mind, international organizations should ensure meaningful civil society participation in policymaking and other standard-setting processes, including through increasing the presence of technical experts sensitive to human rights concerns.¹⁸⁷

This initial report attempts at providing an overview to present the regulatory ecosystem that underpins the Internet. Measures like this become increasingly important and pressing, as we shall see in more detail in the next section, given that an influential democratic country in the global scene, like Canada, has surprisingly decided to stop sharing certain metadata with its international partners due to security preoccupations. This happened once this country finally transitioned to a more liberal government since October 2015 (after eight years of conservative rule), and the new Canadian Defence Minister, Mr. Harjit Sajjan, has affirmed that such sharing will not resume until he is sufficiently satisfied that proper protections for Canadian citizens are set in place.

We find a similarly sensible reaction from Ontario's former privacy commissioner, Ann Cavoukian. She has declared that the Canadian agency CSE

¹⁸⁷ Extracted from the complete original document, available at: UNITED NATIONS HUMAN RIGHTS OFFICE OF HIGH COMMISSIONER, "Freedom of expression and the private sector in the digital age" [Online], accessed on January 2017, <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Privatesectorinthedigitalage.aspx> .

(Communications Security Establishment) should have never collected the metadata of Canadians, in the first place, thus having collaborated with the illegitimate actions by the American NSA. She also stated that this practice should end immediately. In other words: “It has been illegally collected. It’s unscrupulous they’re doing this. The whole thing from A to Z is unacceptable.”¹⁸⁸

In addressing such issues, we should also consider interesting initiatives from civil societies in dealing with the situation, ranging from the World Internet Project (International Report—www.worldinternetproject.net) and the Mapping Digital Media Project (<http://www.opensocietyfoundations.org/reports/mapping-digital-media-canada>), to the Germany-Brazil anti-spying proposal endorsed by the UN following Edward Snowden’s revelations. We also take into account concerns by civil organizations such as Open Media International (<https://openmedia.org/declaration>), Coding Rights (<https://www.codingrights.org>), and the one founded by the World Wide Web creator, Sir. Tim Berners-Lee (Web Foundation—<http://webfoundation.org>). Such non-profit organizations have been very active in raising public awareness towards what seems to be shattering nothing less than the very core of democratic principles and diplomatic commitments in the Internet era.

4.4.2. The prospect of a *Magna Carta* for the Internet: discussion and analysis

¹⁸⁸ Extracted from: CBCNEWS, “Difficult to determine the scope of privacy breach in Five Eyes data sharing” [Online], published on February 23th 2016, <http://www.cbc.ca/news/politics/cse-metadata-five-eyes-sharing-1.3459717>.

Some of us may still recall the preoccupations with the turning of the millennium for computer systems and operations, due to the change from year 1999 to year 2000 (a problem that was referred to as the “Y2K bug”). This seemed to present a huge problem, given that many (if not most) algorithms had been written without accounting for such change in the first two digits of the year. This problem had been postponed for decades by developers and managers due to mere commodities or more immediate financial concerns. The typical rationale was that programmers or managers were no longer so sure about what their programs contained or how they were structured (sometimes in millions of lines of accumulated code), and the cost of documenting or redoing it all from scratch would have been enormous.

The Y2K problem thus serves to highlight its main cause, that is: the so-called Myth of Amoral Computing and Information Technology (MACIT).¹⁸⁹ It can come up in many ways, but it basically consists of disclaiming responsibility (or postponing it as much as possible) with respect to Information Technology and Systems. Thus, it is no longer clear at what point we can begin to hold people responsible for what is in such programs and for the products they sell or use involving them. The MACIT mainly springs from the fact that moral responsibility requires not only causal responsibility (i.e., causal connection with a sequence of events in question), but also knowledge of what one does and the consent for doing it.

If any of those conditions are not met, there is then a tendency to mitigate responsibility to a greater or lesser extent, according to “excusing conditions” offered for not meeting such requirements. Most often the favoured disclaimer is ignorance or lack

¹⁸⁹ For more details about the Y2K Bug and the MACIT, please refer to: DE GEORGE, R. *The Ethics of Information Technology and Business* (series Foundations of Business Ethics). Blackwell Publishing. 2003.

of transparency (i.e. the opacity of programs). But, of course, last century's programmers knew the year 2000 was coming, and many foresaw the problem, but it was considerably and persistently ignored. As it turned out, there were no major disasters caused by the Y2K bug, after all, but not because it did not present a real threat.

Actually, its avoidance was possible thanks to the stepping up of accountable administrators and technical managers who came together and finally took the necessary steps to prevent major crashes with the arrival of the new century. As Richard DeGeorge well summarizes it:

The delayed response to the Y2K problem indicated that management for the most part still tends to think of Information Technology and Systems as something that remains a service function for their corporations, off in a back set of rooms, instead of being prominently in the centre of it. The disconnection between corporate leaders and their technical divisions is the clearest indication that firms have not moved consciously into the Information Age. They are backing into it or being pulled by a technology they do not completely understand, even as they become more and more dependent on it. Yet if we are truly in a developing Information Age, then Information Technology and Systems need to be at the centre of things, and management has to both understand it and take responsibility for it.¹⁹⁰

The point can accordingly be generalized beyond the Y2K problem, as those who produce or incorporate programs into products are responsible for those products and programs, just as they are responsible for other products or goods they sell. Yet, as already noted with respect to the MACIT, there is a tendency for companies to disown responsibility for computer malfunctions or breakdowns, and for commercial software producers to issue disclaimers with their products, claiming for example that by downloading or opening the product, the user relieves the company of all responsibility. That this is usually accepted without much complaint by the general public is, at least, puzzling and probably a symptom of our increasing dependence upon them.

¹⁹⁰ DE GEORGE 2003: p. 13.

Hence, further concerns arise from this new “world ecology” (*infosphere*), on what regards not only data protection (given the Big Data wave), but also “net neutrality,” which became another important controversial issue recently.¹⁹¹ Net neutrality basically refers to the indiscriminate (“isonomic”) treatment of content packages by service providers; such treatment is important, for example, to avoid that some users are allowed unequal bandwidth in proportion of their deemed “importance” as clients, based on the package they can afford.¹⁹²

The way governments and companies handle users’ communications over the Internet (and digital media governance more generally) thus became increasingly relevant also to protect other important democratic rights, such as freedom of expression and privacy. As Branco well puts it: “In short, we could say that if ‘all humans are equal before the law’, the correspondent parallel to the Internet would be, ‘all data is equal before the Web’.”¹⁹³

¹⁹¹ More information on net neutrality can also be found at a recent article on this issue, by ITS director Prof. Sergio Branco, accessible at: DROITNET, “Net Neutrality, you love it even if you don’t know what it is” [Online], published on November 2016, <http://droitdu.net/2016/11/net-neutrality-you-love-it-if-you-dont-really-know-what-is-is/>

¹⁹² As Sérgio Branco (2016) recalls it, Tim Wu (who coined the term) defines net neutrality as: “The principle that Internet service providers and governments regulating the Internet should treat all data on the Internet the same, not discriminating or charging differentially by user, content, website, platform, application, type of attached equipment, or mode of communication”. (*Ibid.*)

¹⁹³ *Ibid.* See, e.g.:

*CIRA [Online], <http://performance.cira.ca> (accessed on October 2016);

*OPEN MEDIA [Online], <https://openmedia.org/en/ca> (accessed on November 2016);

*ELECTRONIC FRONTIER FOUNDATION [Online], <https://www.eff.org> (accessed on December 2016),

*ONLINE COMPLIANCE PANEL [Online], <http://www.onlinecompliancepanel.com> (accessed on January 2017);

*CJFE [Online], <https://cjfe.org> (accessed on January 2017).

*INSTITUTE OF TECHNOLOGY AND SOCIETY (ITS-RIO) [Online], <http://itsrio.org/en/> (accessed on March 2017), this organization is formed and under the direction by the main formulators of Brazil’s Internet Civil Code (‘Marco Civil da Internet’), who elaborated the main text for the legislation as a result of the engagement among general citizens, legal and IT experts, and politicians, under the supervision of the Brazilian Ministry of Communications (the text of this bill can be consulted online at: <http://www.ebc.com.br/tecnologia/2014/03/veja-o-texto-aprovado-na-camara-sobre-marco-civil-da-internet> and <http://jornalggm.com.br/noticia/brasil-tem-6o-orcamento-mais-transparente-do-mundo-diz-organizacao>).

In an article dated from 2012, Boyd and Crawford already indicated some of the main changes and challenges that Data-Driven Science was bringing us, by emphasizing that Big Data creates a radical shift in how we think about research, in the first place. This because it offers a profound change at the levels of epistemology and ethics: “Big Data reframes key questions about the constitution of knowledge, the processes of research, how we should engage with information, and the nature and the categorization of reality... Big Data stakes out new terrains of objects, methods of knowing, and definitions of social life.”¹⁹⁴

This quote has also been emphasized in another article (2014), entitled “Big Data, new epistemologies and paradigm shifts,” by the scholar on philosophy of science Rob Kitchin. By also relying on other articles on the subject, Kitchin details, for example, the following main points about the issue of Big Data:

- . huge in volume, consisting of terabytes or petabytes of data;
- . high in velocity, being created in or near real time;
- . diverse in variety, being structured and unstructured in nature;
- . exhaustive in scope, striving to capture entire populations or systems (n = all);
- . fine-grained in resolution and uniquely indexical in identification;
- . relational in nature, containing common fields that enable the conjoining of different data sets;
- . flexible, holding the traits of extensionality (can add new fields easily) and

¹⁹⁴ BOYD D. and CRAWFORD K. “Critical questions for big data” in *Information, Communication and Society* 15 (5). 2012, pp. 662–679.

“scaleability” (can expand in size rapidly).¹⁹⁵

In other words, we may say that Big Data analytics enables an entirely new epistemological approach for making sense of the world. Rather than testing a theory by analyzing relevant data afterwards, new data analytics seeks to gain insights “born from the data”, as the jargon goes. Since this publication, other scholars were also realizing that the explosion in the production of Big Data, along with the development of new epistemologies, was bringing a data revolution that would have far-reaching consequences to how knowledge is produced, business conducted, and governance enacted (Bollier 2010, Floridi 2012).

There is, accordingly, a powerful and attractive set of new ideas at work in this sort of empiricist epistemology (that seem to run counter to the deductive approach that had been hegemonic within modern science in the past century), and that work together to suggest that a new mode of science is being created, one in which the *modus operandi* is purely inductive in nature, that is (Kitchin 2014):

- . Big Data can capture a whole domain and provide full resolution;
- . there is no need for a priori theory, models or hypotheses;
- . through the application of agnostic data analytics data can speak for themselves free of human bias or framing, and any patterns and relationships within Big Data are inherently meaningful and truthful;
- . meaning transcends context or domain-specific knowledge, thus can be interpreted by anyone who can decode a statistic or data visualization.

¹⁹⁵ One can access the whole article at:
SAGE JOURNALS, “Big Data, new epistemologies and paradigm shifts” [Online], published on April 1st 2014, <http://m.bds.sagepub.com/content/1/1/2053951714528481> .

Furthermore, it also purports to have totally removed the human element that goes into data mining—and, as such, the human bias that goes with it. Instead of waiting to be asked a question or be directed to specific existing data links, the system will—undirected—deliver patterns a human controller might not have thought to look for (Clark 2013, Mayer-Schonberger and Cukier 2013). To some ears the story may sound familiar, echoing the kinds of expectations that positivists had raised in the mid 20th century.

In a similar tone, such an empiricist epistemology may sound very attractive, especially for computer scientists and business people who are eager to test and sell new applications and tools being developed in a frenetic pace as never before. But it is, nevertheless, based on fallacies with respect to the four main ideas underpinning its formulation (Kitchin 2014):

- (i) Though Big Data may seek to be exhaustive, capturing a whole domain and providing full resolution, it is both a representation and a sample, shaped by the technologies and platforms being designed and used, as well as the data ontology being employed and the regulatory environment set in place, being thus still subjected to sampling bias (Crawford 2013, Kitchin 2014).
- (ii) It's not the case that Big Data arise from nowhere, free from the “the regulating force of philosophy” (Berry 2011), given that systems are designed to capture certain kinds of data, with the analytics and algorithms used to be based on more traditional scientific reasoning and also refined, nonetheless, through scientific testing. As such, an inductive strategy of identifying patterns within data “does not occur in a scientific vacuum and is discursively framed by previous findings,

theories, and training; by speculation that is grounded in experience and knowledge” (Leonelli 2012).

- (iii) Just as data are not generated free from theory, neither can they simply speak for themselves totally free of human bias or framing for analysis. As Gould notes: “inanimate data can never speak for themselves, and we always bring to bear some conceptual framework, either intuitive and ill-formed, or tightly and formally structured, to the task of investigation, analysis, and interpretation” (Gould 1981).
- (iv) The idea that data can speak for themselves suggests that anyone with a reasonable understanding of statistics should be able to interpret them without context or domain-specific knowledge (Bettencourt et al. 2007). This is a concept voiced by some data and computer scientists as well as by some physicists, all of whom have now become more active in practising social science and humanities research. “For example, a number of physicists have turned their attention to cities, employing Big Data analytics to model social and spatial processes and to identify supposed laws that underpin their formation and functions” (Lehrer 2010).

The studies mentioned (such as for example on item [iv] above), often willfully ignore a couple of centuries of social science scholarship, including nearly a century of quantitative analysis and model building. The result, thus, being an analysis of cities that turns out to be reductionist, functionalist, and ignores the effects of culture, politics, policy, governance, and capital (reproducing the same kinds of limitations generated by the quantitative/positivist social sciences in the mid-20th century). Indeed, all data provide “oligoptic” views of the world (i.e., views from certain vantage points, using particular tools), rather than an all-seeing, infallible God’s eye view (Amin and Thrift 2002, Haraway 1991). As such, data are not simply natural and essential elements

that can be abstracted from the world in neutral and objective ways and can be accepted at face value, as they are created within a complex assemblage that actively shapes its constitution (Jackson et al. 2012).¹⁹⁶

Therefore, new analytics might present the illusion of automatically discovering insights without asking questions, but the algorithms used most certainly did arise and were tested scientifically for validity and veracity, counting on the good sense and the basic choices from their developers.¹⁹⁷ Moreover, making sense of data is always framed, that is to say: data are examined through a particular lens that influences how they are interpreted. Even if the process is automated, the algorithms used to process the data are embedded with particular values and contextualized within particular scientific approaches. Also, patterns found within a data set are not inherently meaningful. Correlations between variables within a data set can be random in nature and have no or little causal association, but interpreting them as such can produce serious ecological fallacies (in the sense of the new “ecology”, named *infosphere* by Floridi, that has been designed in this information age). This can be exacerbated in the case of Big Data as the empiricist position appears to promote the practice of data dredging, i.e.: mere hunting for every association or model, popularly also called data mining.

Put more simply, while data can be interpreted free of context and domain-specific expertise, such a raw empiricist based epistemological interpretation is likely to be anemic or unhelpful, as it lacks embedding in wider debates and knowledge. Rather, better theoretically informed decisions are to be made so as to how best tackle a data set

¹⁹⁶ JACKSON, Steven et al. “Knowledge Infrastructures: Intellectual Frameworks and Research Challenges” [Online], report published on May 28 2012, http://pne.people.si.umich.edu/PDF/Edwards_etal_2013_Knowledge_Infrastructures.pdf.

¹⁹⁷ On this issue, also refer to: TIME, “Big Data Comes With the Biases of Its Creators” [Online], published on September 7th 2016, <http://time.com/4477557/big-data-biases/?xid=homepage>.

in a way that it will reveal information which will be of potential interest and worthy of further research. Instead of testing whether every relationship revealed accords to a certain particular pattern, attention should also be focused on a variety of relationships (based on some criteria, of course) that seemingly offer the most likely or valid ways looking forward ahead. Indeed, many supposed relationships within data sets can quickly be dismissed as trivial or absurd by domain specialists, while others are to be flagged as deserving more attention and care (Miller 2010).

Such decision-making process, with respect to methods of data generation and analysis, are based on the so-called *abductive* reasoning. Abduction is a mode of logical inference and reasoning, addressed mainly by C. S. Peirce (1839–1914), which seeks a conclusion that makes reasonable and logical sense, but is not definitive in its claim. For example, there is no attempt to deduce what is the best way to generate data, but rather to identify an approach that makes logical sense, given what is already known about such data production (Miller 2010).

Any relationships revealed within the data do come from somewhere and do not speak for themselves, as the process of induction (i.e., of insights emerging from the data) is always contextually framed. Those insights are not the end-point of an investigation, arranged and reasoned into a theory. Rather, such insights provide the basis for the formulation of hypotheses and the deductive testing of their validity (Kitchin 2014). In other words, data-driven science is just a reconfigured version of the traditional scientific method (i.e., providing a new way in which to build theories “from the data”), but the epistemological change is, no doubt, very significant nonetheless.

Now, as the Internet is redefining the privacy landscape through both its technical design and the social uses of such design, it allows for massive access to and

instantaneous surveillance of millions of messages. It allows for new ways of scanning and intercepting large amounts of data or packets as opposed to a simple connection between two points of a traditional phone line or a printed letter. When it comes to safeguards for people's privacy with the use of Big Data, the considerations above bring us inevitably to what is now being called "privacy by-design" and "privacy by-default" systems, or in a nutshell: the basic idea is that algorithms and their applications should conceptualize from the very beginning, embedded in their structure, the precepts for respecting people's privacy rights, indiscriminately.

Accordingly, the document with the directives led down by the European Union on Data Protection "by Design" and "by Default" states the following:

[It] provides a brief overview of the principles of Privacy by Design and Privacy by Default. Both principles are codified in Article 23 of the proposed European Data Protection Regulation. These elements are important to consider as a business in general and more specifically, as an IT professional. While it is a positive change for customers i.e. data subjects, the burden on organizations to comply with Data Protection legislation becomes significantly heavier as an active role in ensuring customer privacy becomes mandatory.

Privacy by Design

In short, privacy by design means that each new service or business process that makes use of personal data must take the protection of such data into consideration. An organization needs to be able to show that they have adequate security in place and that compliance is monitored. In practice this means that an IT department must take privacy into account during the whole life cycle of the system or process development.

Privacy by Default

Privacy by Default simply means that the strictest privacy settings automatically apply once a customer acquires a new product or service. In other words, no manual change to the privacy settings should be required on the part of the user. There is also a temporal element to this principle, as personal information must by default only be kept for the amount of time necessary to provide the product or service.¹⁹⁸

¹⁹⁸ See the official documents available at:

*EU DATA PROTECTION REGULATION, "Data Protection by Design and by Default" [Online], accessed on February 2017, <http://www.eudataprotectionregulation.com/data-protection-design-by-default>

*UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, "Freedom of expression and the private sector in the digital age" [Online], accessed on January 2017, <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/PrivateSectorinthedigitalage.aspx>

Such directives represent a considerable attempt at allowing prerogatives of trust and respect to favour a more balanced triangular approach of interactions (such as proposed above in chapter 2), to be kept in place among developers (ICT companies), users, and governments alike, so as to keep abuses of power in check as much as possible. If we consider the huge amount of power that large companies (like Google and Facebook) as well as governmental agencies (like the NSA and CSA) can now exert upon regular citizens, especially after Edward Snowden revelations, one may more easily acknowledge the importance of implementing such safeguards, as we have been attempting to show by all the above.

Hence the validity of a proposal like the one advocated by Sir Tim Berners-Lee, through his Web Foundation founded in 2009 (<http://webfoundation.org>), which becomes all the more relevant “to advance the open web as a public good.” Sir Berners-Lee has also been pinpointing worldwide, including in a recent article in *The Economist* entitled “Wider World Web,” what are some of his visions and hopes concerning the future for his creation, such as, for example:

Balancing the interests and rights of individuals, companies and states—without undermining the universal architecture of the Internet itself—is increasingly hard. This is nowhere more evident than in escalating disputes over privacy, encryption and anonymity... Faced with such knotty problems, countries will seek new legal frameworks for the Internet. But will these be transparent and democratic—and preserve an open Internet? A raft of poorly conceived “cybercrime” laws are emerging, authorizing everything from politically motivated censorship to indiscriminate surveillance, while at the same time leaving engineers with good intentions and a little curiosity open to overly harsh punishment. Also of concern are efforts in America and elsewhere to make companies “voluntarily” share user information with security agencies, without a legal process. However, forward-thinking governments are developing national Internet Bills of Rights based upon broad public participation, which entrenches human rights and safeguards space for innovation, while recognizing the legitimate needs of companies to make profits and of governments to fight crime. Brazil pioneered this approach in 2014; Italy followed suit in 2015... At the global level, efforts to agree on core principles for the digital age in a new *Magna Carta* for the Internet will intensify.¹⁹⁹

¹⁹⁹ See, e.g., THE ECONOMIST (*Op.Cit.*), available at: <http://www.economist.com/news/international/21699511-sir-tim-berners-lee-founded-web-1989-and-now-head-its-standards-agency-w3c-he> and <http://www.theworldin.com/article/10648/wider-world-web> .

It is precisely with such goal in mind that we discuss below two examples of countries that are striving to set such regulations in place towards preserving the hard-conquered democratic rights and security of their citizens, while still leaving room for innovation and creativity of their businesses.

4.4.3. Cases of regulations in Brazil and Canada

Let us begin by noting that important elements are to be better observed with respect to Internet regulations on what regards the main triple axes, namely: **(i) net neutrality** (i.e.: indiscriminate “isonomic” treatment of content packages by service providers); such **treatment** is important to avoid that some users would be allowed unequal bandwidth in proportion of their deemed “importance” as clients, based on the package they pay for; **(ii) freedom of expression** (i.e.: legal protection against direct censorship from third parties, whether it is administrative, judicial, or political); and **(iii) right to privacy** (i.e.: protection of users’ “private space and information”). However, these were not (until very recently) formally included, for example, in the Brazilian legislation concerning the access and use of the Internet, as we shall see in more detail farther below.²⁰⁰

We take the cases of Brazil and Canada, respectively, which enable us to analyze in more practical terms the issues regarding the main controversial approaches with respect to the protection of privacy and other challenges related to it. These two countries present good examples of attempts to apply the contrasting approaches to their own

²⁰⁰ Brazil was pioneer in Latin America with the compilation of its first Bill of Rights for the Internet (*Marco Civil da Internet*) sanctioned by former President Dilma Rousseff on April 23rd 2014, see e.g.: EFF, “Marco Civil” [Online], published on February 2015, <https://www.eff.org/deeplinks/2015/02/marco-civil-devil-detail>

specific contexts: Brazil has passed and implemented its “Bill of Rights for the Internet” (*Marco Civil da Internet*) since 2014, based mainly on the European Union approach, while Canada has been pretty much relying on the American legislation on this issue, until the liberal party regained power (in 2015, after 8 years of conservative rule) and has begun to change gears in this respect since then, towards a more balanced approach.

(a) **Brazil** is a considerably young democracy that has fast become one of the major world markets for Internet users.²⁰¹ Known worldwide to be very sociable, Brazilians have become heavy users of social media and content platforms such as Facebook, WhatsApp and YouTube, which were registered as the most accessed platforms since 2013.²⁰² Access to mobile telecommunications is also now largely spread throughout the country and, as much as it may be hard to believe, there are more SIM cards circulating in Brazil than there are Brazilians themselves.

However, it was not until 2014 (April 23) that Brazil has formally passed and adopted legislation concerning the access and use of the Internet (Brazil’s *Marco Civil da Internet*—Internet Bill of Rights). Given the lack of more global international standards to use as reference at the time of its elaboration, the Brazilian government decided to take a leading position on the matter. Then president, Mr. Lula da Silva, requested (back in 2007) that a special committee was formed, composed by Brazilian experts and politicians, in consultation with the general public, to work towards what would become

²⁰¹ Brazil could finally overcome dictatorship in the early 1980s and, since then, the country has made big accomplishments as a fast growing democracy, having also elected their first female president (Mrs. Dilma Rousseff) in 2010, who was re-elected in 2014.

²⁰² Data source: OPENSOCIETY, “Mapping of Digital Media” [Online], accessed on December 2016, <http://www.opensocietyfoundations.org/reports/mapping-digital-media-brazil> .

the text of Brazil's Internet legislation.²⁰³ The initiative aimed mainly at filling important gaps in the law by drafting a "Bill" that would be jointly discussed among different levels of civil society, under the overview of the Ministry of Justice.

But the movement that led towards the elaboration of the Brazilian "Marco Civil da Internet" has its roots even farther back, in the 90s, when a public figure (i.e., top-model Daniella Cicarelli) requested the blocking of YouTube in Brazil, due to the publication of degrading content about her, which led to a judicial order to such an effect. The site was suspended for two days in the whole South region of Brazil, before the judicial order was finally retracted, due to protests from the general public.²⁰⁴

After that, towards the end of the decade, a formal proposition appeared at the Brazilian Congress, the "Azeredo Law" (PL 84/1999), suggesting criminalizing more broadly and in a similar radical fashion so-called offences that could be perpetrated via the Internet. In such a context, given that a big counter movement from civil society arose against such a proposal, the CGI ("Comitê Gestor da Internet"—Internet Governance Committee) has been created for uniting experts from all sectors of society (academic, political and private sectors) into promoting a larger and open discussion about the matter.

The CGI committee finally came up with a first resolution in 2009 (Resolution 03—principles for the use and governance of the Internet), stating the

²⁰³ The official text of this bill is available at: CONGRESSO NACIONAL BRASILEIRO, "Projeto De Lei Estabelece Princípios, Garantias, Direitos E Deveres Para O Uso Da Internet No Brasil" [Online], accessed on January 2015, http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=912989&filename=PL@126/201

²⁰⁴ For more on this issue, please refer e.g. to the conference by Sergio Branco (2016) given at the Université de Montréal, which can be accessed at:

CRDP, "Freedom of Expression and the Internet in Brazil" [Online], published on October 12th 2016, <http://www.crdp.umontreal.ca/nouvelles/2016/10/12/freedom-of-expression-and-internet-in-brazil-from-law-regulation-to-blocking-content/> Branco is one of the main elaborators of the text for the *Marco Civil*.

canonic principles for strategies and standardization of the Internet in Brazil. Such multi-sectorial consensual principles, as stated in Resolution 03 (2009), were very inspirational when aligned to the “Carta de Direitos” (Bill of Rights), which had already emerged from the IGF (Internet Governance Forum—Rio 2007), annually organized by the UN. These initial proposals led to the formulation and eventual approval of the Brazilian *Marco Civil da Internet* as law.

Public consultation towards the elaboration of the Marco Civil (started in 2009) mainly attempted at promoting more direct democratic participation, using a new Internet platform for preparing the text to the legislation. It was then made available for the public during four months, as a result of a partnership between the Brazilian Ministry of Justice, the Ministry of External Relations and the Foundation Getulio Vargas (FGV-Rio). The process for the formulation of the main text consisted of three basic stages:

* 1st phase—Genesis: The platform became available (four months) “to hear” the public discussing the concepts and its limits concerning 6 main themes: Privacy, Freedom of Expression, Rights of Access, Safeguards for Sites/Blogs, Net Neutrality, Governmental Data.²⁰⁵

* 2nd phase—Elaboration: a first draft of the main items (articles) of the law were then proposed through the use of appropriate platform for further discussion and suggestions from the general public (two more months), before going to the final phase of writing and publishing of the text as a ‘project of law,’ to be then submitted to the Brazilian Congress in 2011.

²⁰⁵ The platform used is still accessible at: CULTURADIGITAL, “Marco Civil da Internet: seus direitos e deveres em discussão” [Online], accessed on November 2015, <http://culturadigital.br/marcocivil/consulta/>

* 3rd phase—Submission for congressional approval: the final vote of the text had to be postponed 29 times in three years (2011 - 2014), before being finally approved, mainly due to controversial issues concerning net neutrality, privacy, and responsibility. The revelations by Edward Snowden in 2013 made such issues even more salient and controversial.

The final text of the *Marco Civil*, with its 32 articles, is consistent with the 5th Article of the Brazilian Federal Constitution that guarantees the “right to privacy and integrity” for all individual citizens. It states the main principles and safeguards towards protecting citizens’ civil rights with respect to privacy, net neutrality, and responsibility, as well as formally acknowledging the economic, social and cultural importance of the Internet in general. One of the most difficult challenges was that of leaving its general principles as flexible as possible in order to be sufficiently adaptable to new fast developments of ICT tools in a foreseen future. How effective its language is proving in practice is still open for observation, as close scrutiny by both judicial officials and the civil society might show us.

Now, in order to ensure freedom of expression and to prevent censorship, Internet application providers are to be held civilly liable for damages, resulting from content generated by third parties, if (after specific judicial order) the provider fails to take action for making the “offensive” content unavailable on its service by the stipulated deadline. This is subjected to the technical limitations of its service and any legal provisions (an exception being, for example: Article 9, Paragraph 1—emergency situations such as natural disasters, article 21—cases regarding sexual content or porn revenge, which may strongly damage someone’s personal integrity). Concerning net neutrality, the main

preoccupation for legislators has been to avoid degrading and/or blocking the flux of content (data) and services, independently of what applications and sites users wish to access freely (not to transform the Internet into a new sort of cable TV).²⁰⁶

However, although giant American corporations like Google, Yahoo, and Facebook now operates in the whole world, their data centres are still concentrated in American soil, being thus bound to the United States' own regulations (including with respect to the creation of Internet domains).²⁰⁷ It thus becomes a very difficult task, if not an impossible one, to control particular actions or complaints concerning such companies, especially when coming from the so-called developing world.

Moreover, the original text of the *Marco Civil da Internet* proposed in Brazil also faced, as one could expect, fierce opposition from big telecom lobbyists in their own soil. Having thus been written and rewritten, bouncing back and forth between the Brazilian judiciary and the National Congress many times, it's only by the end of 2013 that the

²⁰⁶ The conceivers of Brazil's Internet Bill for the Internet (*Marco Civil da Internet*), now the main directors of the ITS organization, have argued that the original text of the bill, as they conceived it, does not give allowance for the blocking of applications such as happened many times, for example, to WhatsApp in Brazil for not handing over users' private information to the police. On this respect, refer e.g. to:

ITS, "ITS ingressa no Supremo Federal contra bloqueios de aplicativos" [Online], published on September 14th 2016, <https://medium.com/@ITSriodejaneiro/its-ingressa-no-supremo-contra-bloqueios-de-sites-e-aplicativos-na-internet-83fe3eb40fdf#.8ajusrw5m>.

Accordingly, they also defend that 'net neutrality' (in Portuguese: *inimputabilidade da rede*) is to be respected according to the Articles 11 and 12 of the law (that preserve the so-called 'principle of proportionality'), which are supposed to prevent such abuses, if they were to be duly respected. On this regard, see also: PL 8771 (May 11, 2016); Article 19 - according to which connection providers (Claro, Vivo, Tim, etc) should keep information archived for 1 year, while application firms (Google, Facebook, Yahoo, etc.) are required to do it for only 6 months.

²⁰⁷ Such a control of 'domain ascription' by the US government is now also being challenged so that a more independent 'international board' would come to handle it in the future. See, e.g.:

PHYSORG, "Global support for reduction in govt. control of web domain names" [Online], published on March 27th 2014, <http://phys.org/news/2014-03-global-reduction-govt-web-domain.html>;

GADGETSNDTV360, "Meeting on US handing over Internet control inconclusive" [Online], published on March 28th 2014, <http://gadgets.ndtv.com/internet/news/meeting-on-us-handing-over-internet-control-inconclusive-501462>).

former President Dilma Rousseff has personally engaged into pressing for its vote, alongside a public petition in favour of it, created by former Minister of Culture and renowned composer Mr. Gilberto Gil (who coined about 330K signatures supporting it—http://www.avaaz.org/po/o_fim_da_internet_livre_gg/). As we saw above, the bill finally passed through Congress on March 25, 2014, to be finally approved by the Senate House and sanctioned by then President Rousseff on April 23, 2014.

The final text rectified in law kept important provisions of Articles 7–8 (Chapter II) concerning the *privacy rights* of users, as well as Articles 9 and 10 (chapter III) concerning *net neutrality* (i.e., the “isonomic” treatment of content). However, an important last-minute addition of three subsections to Chapter III (Articles 13–15), concerning the responsibilities of access to the registries of information by the providers, brought up substantial reasons for concern on the part of experts and the general public as well. Let us consider, for example, the following passage:

Chapter III—Subsection I:

Article 13. The time frame for keeping registries of information is extended from 6 months to 1 year, under the provisions that:

§ 1^o the responsibility for security and maintenance cannot be transferred to third parties before the prescribed period;

§ 2^o The Police or Administrative Boards and the Public Prosecutor all have the authority to request to keep those registries for a longer period than the year prescribed, as needed.²⁰⁸

We can note that this added subsection leaves a door open for abuses, as there is no explicit clause stating what the warrants are for protecting the data of individuals during

²⁰⁸ *N. of T.* - free translation from the original version in Portuguese. The official original publication of the text can be found at:

PLANALTO BRASIL, “Lei N° 12.965, de 23 de Abril de 2014” [Online], accessed on December 2016, http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/112965.htm ;

EFF (Electronic Frontier Foundation), “Marco Civil Da Internet: The Devil is in the Detail” [Online], published on Feb. 22nd 2015, <https://www.eff.org/deeplinks/2015/02/marco-civil-devil-detail> .

the period kept as a reference by the authorities. Also, a more robust legislation specifically concerned about Data Protection is still under discussion as of now, waiting for approval by the new Brazilian interim government.²⁰⁹

Questions thus remain about the extent to which the new law for the Internet can indeed well function in practice, within a complex and paradoxical country like Brazil, given for example its legal institutional problems and the many corruption scandals that are profoundly affecting the whole country lately.²¹⁰ Moreover, bettering the public education system (to also include e-literacy) so that citizens can be aware of their rights upfront is, of course, also essential. But an important step has definitely been taken by passing the *Marco Civil*, with its comprehensive and carefully designed overall text, especially in comparison to what there was before, namely, almost nothing to protect Internet users from abuses on their rights.

The hurry since 2013 to press harder on passing this sort of legislation was one of the important consequences from Edward Snowden's revelations about intrusive surveillance and spying practices, led by the American NSA (National Surveillance

²⁰⁹ Refer to:

ITS-RIO, "Varanda #19: Privacidade e Proteção de Dados Pessoais com OEA" [Online], published on November 26th 2015, <https://www.youtube.com/watch?v=7et6FQYc2cA#action=share> and <https://itsrio.org/wp-content/uploads/2015/07/Consulta-APL-de-Dados.pdf>

²¹⁰ See, e.g.:

THE ECONOMIST, "Deep impact" [Online], published on November 28th 2015, <http://www.economist.com/news/leaders/21679469-flawed-impeachment-risks-prolonging-countrys-agony-pot-and-kettle?zid=305&ah=417bd5664dc76da5d98af4f7a640fd8a> ;

THE ECONOMIST, "The pot and the kettle" [Online], published on December 3rd 2015, <http://www.economist.com/news/finance-and-economics/21679256-trouble-most-celebrated-investment-bank-emerging-markets-deep-impact?zid=305&ah=417bd5664dc76da5d98af4f7a640fd8a> ;

THE ECONOMIST, "Special report on Dilma's disasters" [Online], published on December 5th 2015, <http://www.economist.com/news/americas/21679516-impeachment-proceedings-against-dilma-rousseff-are-bad-brazil-they-make-it-more?zid=305&ah=417bd5664dc76da5d98af4f7a640fd8a> ,

Agency), scandalously affecting not only US democratic allies, but also regular citizens both inside and outside US borders.²¹¹ Heads of State, including the Brazilian President and the German Chancellor, were revealed to have been spied upon. The whole situation led to a diplomatic conflict mainly among Brazil, Germany, and the United States. Further revelations then also involved the Canadian agency (CSEC) to have spied on Brazil's ministry of energy, in order to acquire "upfront information" concerning future trade negotiations with that country. Such incidents were in fact the main motivation for Brazil to rush towards implementing new regulations and protections for the Internet. It caused a lot of commercial constraints among businesses too, due to the diplomatic conflicts that created an awkward situation and resentment until now, as the TPP and TTIP continue to be negotiated.

Brazil was mainly inspired by the German lead on this issue, given the lack at that point in time of more global international guidelines, thus, having pioneered among Latin American countries on the implementation of its first *Marco Civil da Internet*. Even after such an accomplishment, however, incidents such as the jailing of the vice-president of Facebook for Latin-America, Mr. Diego Dzodan, in Sao Paulo, for not having obeyed a request from the police to open up their WhatsApp application for them to read messages of some drug dealing suspects. The jailing request was based, however, on an older legislation, dated back from 2013, and Mr. Dzodan was then released on the same week by his lawyers appealing to "habeas corpus" and referring to the new law (*Marco*

²¹¹ For an interview with Edward Snowden providing his arguments on this, see e.g.:

TEDTALKS, "Here is how we take back the Internet" by Edward Snowden [Online], published on March 2014, http://www.ted.com/talks/edward_snowden_here_s_how_we_take_back_the_internet ;

TEDTALKS, "The NSA responds to Edward Snowden" by Richard Ledgett [Online], published on March 2014, http://www.ted.com/talks/richard_ledgett_the_nsa_responds_to_edward_snowden_s_ted_talk .

Civil, sanctioned in 2014).²¹² He pledged not to be purposively hindering police investigations, but rather to be following the Brazilian Constitution in protecting the right of all his clients with respect to privacy according to the *Marco Civil for the Internet*. The Brazilian Federal Police declared to have made such requests before to other companies like Google and Yahoo, which were compliant in releasing their clients' information, and that they were surprised by the non-compliance coming from Facebook.

Ronaldo Lemos, one of the directors and founders of ITS (Institute of Technology and Society—www.itsrio.org) responsible for the elaboration of the *Marco Civil* and who is also one of the main names about Internet governance currently outspoken in Brazil, reminds us of an important point in connection with this controversy:

Judicial decisions like this one (involving the Facebook vice-president for Latin America in Brazil), might have a disastrous consequence not only to Brazilian businesses and citizens in general, but also to the whole Internet culture in Brazil. For we may be slowly walking, from one such decision to another, towards an intimidating surveillance society within which people's online activities will be subjected to the control of authorities, and this should be inadmissible in democratic and free countries like Brazil.²¹³

Then, also recalling Mr. Snowden's revelations, it may come as no big surprise that the former Brazilian President Dilma Rousseff felt urged to join forces with German Chancellor Angela Merkel for officially demanding from the UN that global international standards be adopted, as soon as possible, so that local measures may also come to be more easily implemented by specific countries, in order to protect their citizens from

²¹² See, e.g.: BBCNEWS, "Executivo do Facebook é libertado em SP" [Online], published on March 2nd 2016, http://www.bbc.com/portuguese/noticias/2016/03/160225_prisao_facebook_sp_if.shtml .

²¹³ *N. of T.* - free translation from Mr. Lemos' interview to BBC-Brazil in Portuguese: "Mais decisões como essa (da Justiça brasileira) poderiam ter uma consequência desastrosa para a Internet e para os cidadãos Brasileiros. (...) Caso haja uma banalização crescente do sigilo na Internet, podemos estar caminhando, aos poucos, de decisão em decisão, rumo a uma perigosa sociedade de vigilância, em que as pessoas estarão expostas ao controle do que fazem online, e isso é inadmissível." Extracted from Mr. Lemos' complete interview, accessible at:

BBC, "Banalização de quebra de sigilo pode levar a sociedade de vigilância, diz pesquisador Ronaldo Lemos" [Online], published on March 1st 2016, http://www.bbc.com/portuguese/noticias/2016/03/160301_entrevista_ronaldo_lemos_facebook_jp .

“assaults on privacy.”²¹⁴ This bi-national resolution, which has been subsequently endorsed by the UN, defends that “*the same rights that people have offline must also be protected online,*” as the harm of such scrutiny (including spying in foreign states and the mass collection of personal data) may also turn out to have many crucial effects on human rights more broadly.²¹⁵ Below, we roughly depict the current situation in Brazil, according to a summary of the Marco Civil da Internet, adapting it to Breton’s triangle:

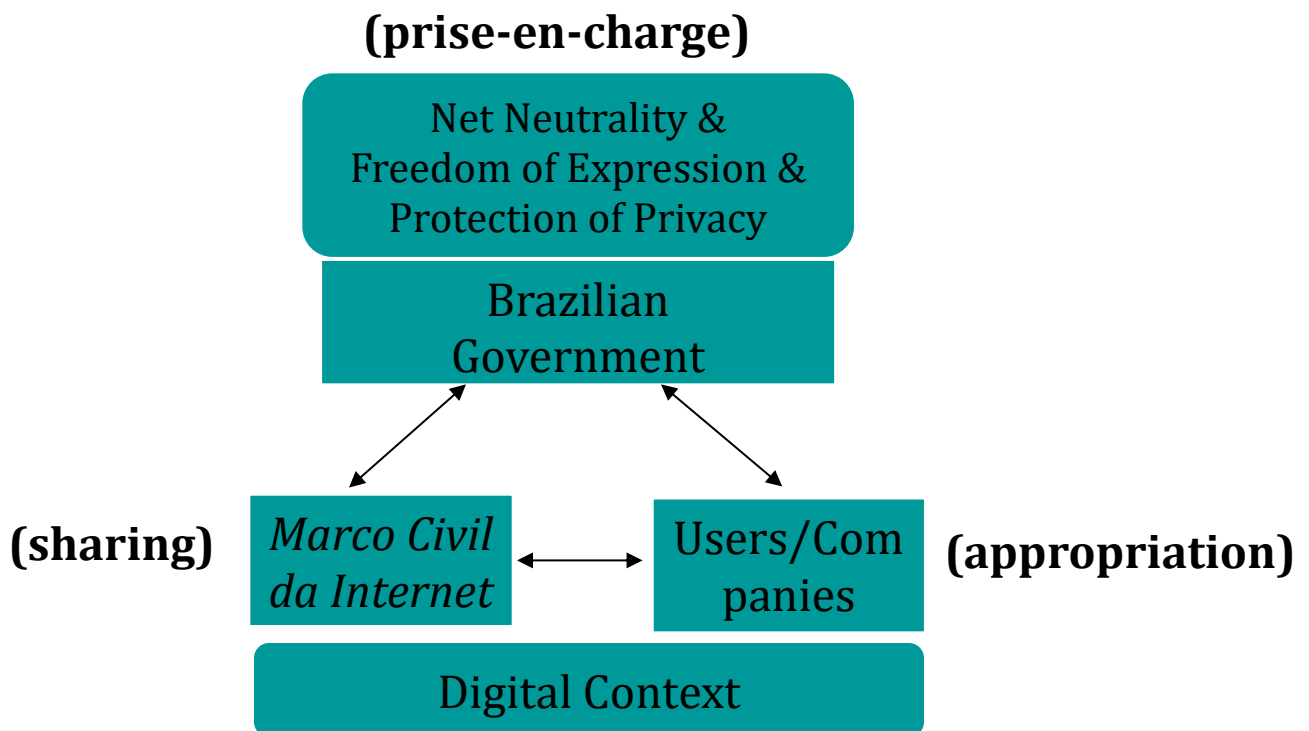


Fig. 16: Lacking yet a more robust treatment of data protection linked to privacy.

²¹⁴ We should note that, although the UN is not an institution (in an ideal ‘globally’ democratic world) intended as interventionist, it is the only option (other than engaging in actual war), besides continuous commercial sanctions (that may be needed to run in parallel), to which democratic governments can recur in a so-called ‘diplomatic’ fashion.

²¹⁵ See, e.g.:

*RT NEWS, “Privacy essential to democracy” Nov. 7th 2013 (23:43) and edited on Dec. 24th 2013 (13:20), <http://rt.com/news/germany-brazil-un-spying-resolution-394/> ;

*DW, “Germany, Brazil introduce anti-spying UN resolution” [Online], published on November 8th 2013, [http://www.dw.de/germany-brazil-introduce-anti-spying-resolution-at-un-general-assembly/a-17213179](http://www.dw.de/germany-brazil-introduce-anti-spying-resolution-at-un-general-assembly/a-17213179;);

*BBC, “The UN General Assembly adopts anti-spy resolution” [Online], published on December 18th 2013, <http://www.bbc.com/news/world-latin-america-25441408> .

MARCO CIVIL DA INTERNET

Office of the President of the Republic
Civil Chief of Staff
Legal Affairs Department

LAW 12.965 OF 23 APRIL 2014

Sets forth principles, guarantees, rights and duties for the use of the internet in Brazil.

I, THE PRESIDENT OF THE REPUBLIC, make it known that the National Congress has decreed and I have sanctioned the following Law:

CHAPTER I PRELIMINARY PROVISIONS

Art. 1. This Law sets forth principles, guarantees, rights and duties for the use of the internet in Brazil and establishes guidelines for action by the Union, the States, the Federal District and the Municipalities in relation to the internet.

Art. 2. The foundation of internet governance in Brazil is respect for the freedom of expression and:

I – recognition of the global scale of the network;

II – human rights, individual development and the exercise of citizenship through digital media;

III – pluralism and diversity;

IV – openness and collaboration;

V – free enterprise, free competition and consumer protection; and

VI – the social purposes of the network.

Art. 3. The following principles underlie internet governance in Brazil:

I – freedom of expression, communication and thought, as provided for in the Federal Constitution;

II – protection of privacy;

As we saw by the examples mentioned above, not only in Germany and Brazil, but also in the USA, such precedents may dangerously favour abusive requests and an increasing “banalization” towards creating backdoors for cryptography, despite the seriousness and legitimacy that may have first motivated such requests (e.g.: terrorism and drug traffic), which would end up hindering the security and liberties of all citizens, including what concerns routine daily activities such as managing our bank transactions and buying products online.

Thanks to the Internet openness and the international repercussion about Snowden’s spying revelations concerning the NSA general conduct, former President Barack Obama had to call for reform of the agency role, structure, and procedures.²¹⁶ Nevertheless, especially with the new American administration since January 2017, other documents and reasonable worries keep emerging, which remind both the general public and regulators that this is far from being a closed issue. Mr. Snowden, having been offered asylum in Russia for the time being, remains prevented from returning to his home country, lest he would be imprisoned as a traitor upon his return.

(b) Canada, meanwhile, being one of the world leaders in the development of Digital Media technology (especially in what concerns videogames and software creation and development), has been disappointingly slow in response to the pressing needs regarding this issue.²¹⁷ The Federal Government of Prime Minister Harper (2006 – 2014) never

²¹⁶ See, e.g.: THE GUARDIAN, *Obama presents NSA reforms with plan to end government storage of call data*, (Online) published on Jan. 17th 2014 (20:31), <http://www.theguardian.com/world/2014/jan/17/obama-nsa-reforms-end-storage-americans-call-data> .

²¹⁷ See, e.g.: CBCNEWS, “Bill C-51 passes in House of Commons” [Online], published on May 6th 2015 (6:57 PM ET) and last updated on May 7th 2015 (10:32 AM ET), <http://www.cbc.ca/news/politics/bill-c-51-passes-in-house-of-commons-1.3064235> ; ; <http://elizabethmaymp.ca/elizabeth-may-third-reading-speech-on-c-51/> .

came up with a comprehensive *digital strategy* that would, ideally, balance and accommodate the EU's Digital Agenda with the National Broadband Plan counter-proposed by the United States.²¹⁸

Now, after years of “surveillance-related leaks”, we have seen the opening of an intense and necessary international debate on privacy, spying, and Internet surveillance. Though much of the focus has understandably centered on the role of the US National Security Agency (NSA), there is also an important Canadian side to the story as an agency collaborating with the NSA, among other things. As the book entitled *Law, Privacy and Surveillance in Canada in the Post-Snowden Era* (2015, ed. by Michael Geist) clearly presents, the Communications Security Establishment (Canadian counterpart to the NSA) has played an active role in surveillance activities both at home and abroad, thus raising some challenging legal and policy questions for Canadians as well. With contributions by leading experts in the field, the book discusses issues ranging from “the effectiveness of accountability and oversight programs” for difficult legal issues raised by “metadata collection” with respect to privacy challenges surrounding new technologies, also in Canada.

One central issue, for example, concerns Canada's net neutrality rules, which require Internet providers to disclose how they manage their networks and to treat content

²¹⁸ I should note that, as this work is being written, the now famous Bill C-51 (i.e. the anti-terrorism bill) just passed its third reading at the Canadian House of Commons, despite some strong concerns and criticisms about it from experts, politicians, and the general public. See, e.g.:

CBCNEWS, “Bill C-51 passes in house of commons” [Online], published on March 6th 2015, <http://www.cbc.ca/news/politics/bill-c-51-passes-in-house-of-commons-1.3064235> ;

MAY, E. “Elizabeth May Third Reading Speech on Bill C-51” [Online], published on May 6th 2015, <http://elizabethmaymp.ca/elizabeth-may-third-reading-speech-on-c-51/> ;

LAPRESSE, “C-51: le Bloc Québécois fait volte-face et votera contre” [Online], published on April 1st 2015, <http://www.lapresse.ca/actualites/politique/politique-canadienne/201504/01/01-4857460-c-51-le-bloc-quebecois-fait-volte-face-et-votera-contre.php> .

in an equal manner, such as it's been established back in 2009.²¹⁹ Let us recall that “net neutrality” containing “isonomic” treatment is important for avoiding that some users would be allowed unequal bandwidth in proportion to their deemed “importance” as clients, based on the package they pay for, such as it happens with cable TV. This policy is administered by the Canadian Radio-television and Telecommunications Commission (CRTC), which releases quarterly reports on the number of complaints it receives and whether any have been escalated to enforcement actions.

At a first glance, the reports on the so-called “Internet traffic management guidelines” suggest that net neutrality violations are very rare. However, as Michael Geist has been emphasizing in his weekly technology columns: “until last year, there seems to have been typically just a few complaints each month and all were quickly resolved, although the CRTC have not disclosed the specific targets or subject matters of the complaints. Yet, it's been also reported that, according to documents obtained under the ‘Access to Information Act,’ some complaints and their resolutions give much cause for concern. There are generally two types of complaints: those involving throttling technologies that limit speeds to render real-time services unusable or treat similar content in different ways, and quality-of-service issues that seem like throttling to the customer.” The image that Geist uses in one of his articles illustrates the matter quite well (as shown below):²²⁰

²¹⁹ The CRTC (Canadian Radio-television and Telecommunications Commission) has recently ruled (as of Dec. 21st 2016) high-speed Internet to become a basic service for all Canadians, indiscriminately. See, e.g.: CRTC article [Online], accessed on January 2017, <http://www.crtc.gc.ca/eng/archive/2016/2016-496.htm> .

²²⁰ Source: THESTAR, “When it comes to net neutrality” [Online], published on August 7th 2015, <http://www.thestar.com/business/2015/08/07/when-it-comes-to-net-neutrality-canadas-going-at-half-throttle-geist.html>

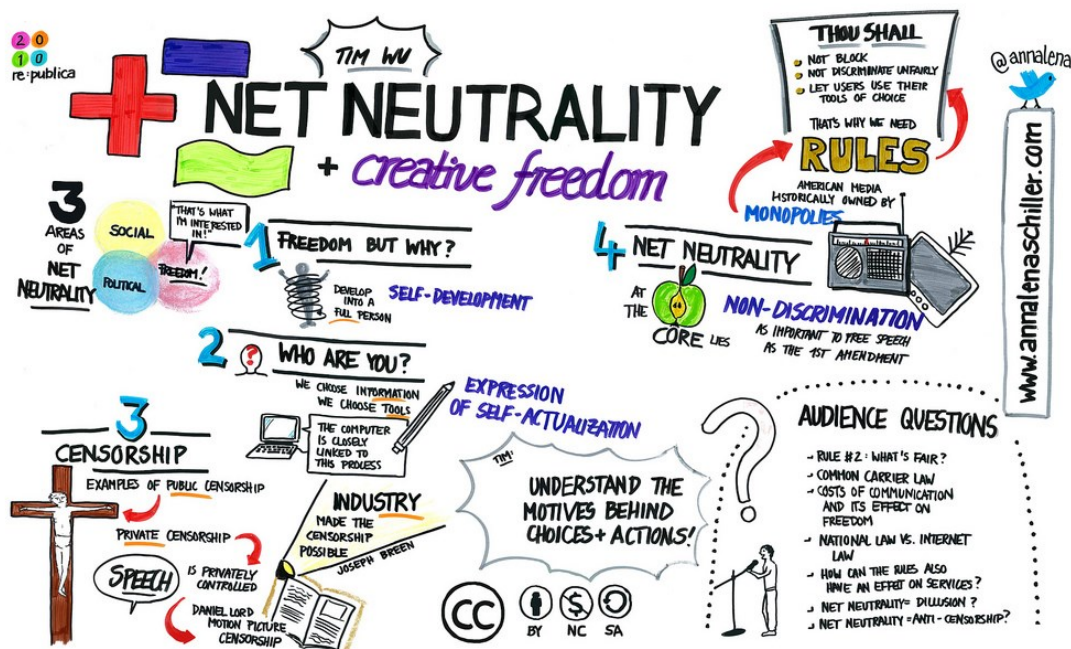


Fig. 17

As Geist also observed, net neutrality has emerged as a “top Internet policy” issue since 10 years ago, as some Internet service providers openly discussed creating a “two-tier system” with a fast lane for websites and applications willing to pay “additional fees” and a “slow lane” for everyone else: “The companies maintained that consumers would benefit from this approach by gaining faster access to premium content. Internet users and emerging technology companies banded together to oppose such an approach, arguing that all traffic should be treated in an equal manner (i.e., isonomic) regardless of content, source, or destination.” (*Ibid.*) They noted that the “two-tier approach” could lead to unfair competition and inability for “start-up companies” to challenge “established players” in this industry.

However, despite complaints and pressure from privacy experts and civil organizations, Conservative and Liberal MPs ended up voting in favor of Bill C-51 (the NDP, the Green Party, and the Bloc Quebecois have all opposed the Bill as it was—see

note #65 above). The bill then headed to the Senate, which has already conducted most of its hearings on the issue. Such hearings—which have included the participation of the Canadian Privacy Commissioner, Mr. Daniel Therrien—have been somewhat better than the embarrassing Public Safety and National Security review (witnesses, numerous hearings, and clause-by-clause reviews), though the final outcome may turn out to being pretty much the same. The bill was on a legislative fast track (as many other controversial ones such as became common practice during the Harper era), and Conservative Senators were incredibly passive about requiring amendments that would send the controversial bill back to the House, once it passed its first readings.

As the debate on Bill C-51 cooled down, as elections approached in October 2015, thus other pressing issues like the economy having come to the forefront, conservative MP Laurie Hawn (last in Parliament on October 2015, as conservative MP for Edmonton Centre—Alberta) surprisingly dared to question the values of some leading Canadian technology companies such as “Shopify” and “Hootsuite.”²²¹ This led to the CEOs of those companies, along with some other courageous ones, coming to sign a public letter calling on the federal government to go back to the drawing board on this bill. Their letter highlighted concerns with website takedowns, new CSIS powers, and data security issues. Hawn responded to the letter (and a related op-ed) in the House of Commons:

Several NDP members have cited an op-ed by some high-tech business owners critical

²²¹ See e.g.:

*THE HUFFINGTON POST, “Trudeau on Bill C-51” [Online], published on July 8th 2015, http://www.huffingtonpost.ca/2015/08/07/trudeau-bill-c51_n_7953724.html;

*CBCNEWS, “Privacy watchdog urges more care with memory sticks containing Canadians' data” [Online], published on December 10th 2015, <http://www.cbc.ca/news/technology/privacy-commissioner-report-portable-storage-concerns-1.3359034>.

of the bill. I admit that it is nice to see the NDP supporting business in some way, but I digress. I would suggest that if websites providing content, hosting services or other businesses are profiting from the dispersal of this type of horrific material, they should seriously reconsider their business model and lack of commitment to the values that bind us as Canadians.²²²

By suggesting that some of Canada's most prominent new technology companies "lack a commitment to Canadian values" is an important accusation coming from a public figure of his stature. Ironically, Shopify is the same company that Industry Minister James Moore recognized when pulling together his Digital Canada 150 as his leading example of a Canadian e-commerce success story. That turns out to be a better call than even Mr. Moore might have anticipated. Their speaking out on Bill C-51 demonstrated at least some willingness to place public policy concerns ahead of the possible consequences arising from government criticism, which had been the usual standing before, with the former conservative government. This brings up, after all, some optimism that this matter shall indeed be better dealt with from now on under the liberal government of Justin Trudeau, let us hope.

During the "Heartbleed bug" (a breach that happened back in April 2014)²²³, for example, we saw the embarrassing situation by which the Canadian government had to hurry-up to introduce what has been called the **Digital Privacy Act (Bill S-4)**.²²⁴ To our

²²² Refer, e.g., to: OPEN PARLIAMENT, *Bill C-51* [Online], accessed on January 2017, <https://openparliament.ca/bills/41-2/C-51/?tab=major-speeches>

²²³ See, e.g.: DEMOCRAT & CHRONICLE, "The Heartbleed computer bug: what you need to know" [Online], <http://www.democratandchronicle.com/story/money/business/2014/04/21/heartbleed-bug-means/7971473/>

²²⁴ See, e.g.:

*SENATE OF CANADA, "BILL S-4" [Online], published on April 8th 2014, <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6524312&File=24> ;

*CBCNEWS, "New privacy rules target data breaches, fraud" [Online], published on April 9th 2014, <http://www.cbc.ca/news/technology/new-privacy-rules-target-data-breaches-fraud-1.2604552> .

knowledge, that was the latest attempt to reform Canada's "privacy law" stemming from the 2006 PIPEDA review, with the prior two bills having bounced back and forth for months, before finally dying due to prorogation or elections. Not surprisingly, after the "Heartbleed bug" (referred to above), the focus then centred on new security breach disclosure requirements, towards demanding companies to be more attentive to breaches that may put Canadians at risk of identity theft. The rush upon the so-called **Digital Privacy Act (Bill S-4)** thus attempted to finally fix the most explicit shortcoming from earlier attempts, with the addition of penalties for violations of the law on such respect.

Despite such apparent positive changes, Bill S-4 still stops short, however, of granting the Privacy Commissioner full order making power (as we can find in some jurisdictions at the provincial level both in Alberta and British Columbia, for example). But the creation of compliance orders now has at least some promise of holding organizations to better account whenever identity theft occurs. Yet, the current bill made some definitions, such as for example that of "personal information," even vaguer than previously stated, leaving much room for concern, thus (clause 2): "personal information' means information about an identifiable individual."

Well, we suppose one does not need to be a legal expert nor a paranoid terrorist to identify dangers and rooms for abuses that could emerge from such an open and vague sort of definition. After all, it mainly depends on how one understands an open term such as "identifiable," which now varies considerably, depending on the amount of capabilities for scrutiny and surveillance gained by those collecting information about individuals (which current "metadata" gathering power has made become quite impressive). So, if the term is taken as "anything that can be identified" then it becomes quite open indeed, and the law should therefore rather include an explicit list (certainly open to further

revisions as technology developments eventually unfold to bring more gathering power in such respect). That is, something like what has been done for the Brazilian *Marco Civil*, following the European Union recommendations and requirements.

Then, farther down the text, in the “explanatory notes” section, one can take comfort to also read the previous old definition, that is: “‘personal information’ means information about an identifiable individual, but does not include the name, title or business address and telephone number of an employer or organization.” These were to be considered separately as “business contact information”, I suppose, to safeguard the employer from unnecessary exposure (unfortunately, I don’t see many reasons to believe that such a formulation was given in order to protect the personal integrity of individual employees). This care not to disclose one’s “business information” may, of course, work both to help and confuse us at the same time.

For example, today a lot of people end up using mobile phones provided by their employers on a daily basis (and in their trips as well), not to pay for it from one’s own pocket or even if just not to carry multiple devices on them. Also, as big controversies concerning “metadata” bring up, even such a separation between “business” and “personal” information (about their individual employees) still leaves untouched the possibility of tracking one’s location, date and time. For example, whenever (s) he makes a call and sends an e-mail or text message, as well as listing those same features about all people that such individual has contacted, etc. Yet, the current simplified definition does not seem to help much on either of these respects either, being even more general and vague as it stands right now in order to control potential abuses of surveillance.

Moreover, directly related to this point, the bill also includes the immunity provision that may rather turn out to expand warrantless disclosure of “personal

information,” without explicit consent from users. Thus, it squarely counters the European Union more “user-friendly” standards of policy transparency and consent (see section 5.1 above about privacy).²²⁵ That is, instead of demanding of companies that they require explicit consent from users before using and disclosing their information, the bill states (clause 5): “the consent of an individual is only valid if it is reasonable to expect that an individual to whom the organization’s activities are directed would understand the nature, purpose and consequences of the collection, use or disclosure of personal information to which they are consenting.”

Unpacking the legalese and the vague appeal to “reasonability” here, one finds that organizations will now be permitted to disclose and exchange among themselves their users’ personal information without prior consent (and without a court order either).²²⁶ Moreover, this can apply not only to past breaches or violations of contract but also to “potential future violations”. In other words, the disclosure can now occur in secret, i.e. without knowledge by the affected person, who therefore may not even be able to challenge such disclosure at all, as (s) he is not necessarily aware of it until maybe too late to contest.

The former conservative government had already been working to expand warrantless disclosures of subscriber information to law enforcement through changes in the previous **Bill C-13** (“cyber-bullying bill”), including a provision from any criminal or

²²⁵ See also: CBC News, *Privacy watchdog urges more care with memory sticks containing Canadians’ data*, annual report from privacy commissioner Daniel Therrien tabled at The Canadian Press, (Online) published on Dec. 10th 2015 (12:17PM ET) and last updated on Dec. 10th 2015 (12:17PM ET), <http://www.cbc.ca/news/technology/privacy-commissioner-report-portable-storage-concerns-1.3359034>

²²⁶ This position probably has much to do with the Canadian Tri-Council conventions for collaboration about subvention procedures among the SSHRC (Social Sciences and Humanities Research Council), the NSERC (Natural Sciences and Engineering Research Council) and the CIHR (Canadian Institutes of Health Research). Yet, this does not seem to be enough to justify the lack of consent to be required from the individuals being scrutinized by such institutions.

civil liability (class action lawsuits included) for companies that archive users' information or disclose it "without a law enforcement warrant." But this bill, at least as previously drafted, entrusted companies with some "gatekeeper role" as it only permitted them to "*either voluntarily disclose personal information as part of a lawful investigation or demanded that law enforcement obtain a court order first.*" Although "cyber-bullying" is, of course, related to disclosing personal information without consent by the person being exposed, the former administration used the strategy of conflating all matters (as it also happened with many regulations concerning the environment) involving the archiving or disclosing of users' personal information (in this case, without the previously required law enforcement warrant) both in the same bucket, under the general title of "cyber-bullying bill," a new formulation which makes matters even more confusing.

Yet, in light of the revelations that Telecom and Internet companies have been disclosing subscriber information thousands of times in previous years, without even any court order whatsoever, the previous provision became enormously problematic.²²⁷ But it is rather modest in comparison to the *Digital Privacy Act* that then expanded the possibility of warrantless disclosure to "organizations" in general, not just to law enforcement officials. This new immunity provision thus risked making it even more likely that disclosures occurred without warrant, since the legal limits previously

²²⁷ See, e.g.:

*CBCNEWS, "CSEC exoneration, a mockery of public accountability" [Online], published on February 14th 2014, <http://www.cbc.ca/news/canada/csec-exoneration-a-mockery-of-public-accountability-1.2536561> ;

*HUFFPOST QUÉBEC, "Ecologistes sous surveillance" [Online], published on April 4th 2014, http://quebec.huffingtonpost.ca/karel-mayrand/ecologistes-sous-surveillance_b_4705199.html ;

*INTERNET ARCHIVE, "Five Fast Facts on Bill C-32, The Copyright Modernization Act" [Online], published on September 2010, <https://web.archive.org/web/20100927212220/http://www.copyrightgetitright.ca/fast-facts/> .

associated with such disclosures were considerably removed.²²⁸

The Canadian law for the Internet has more recently been amended with **Bill C-51** and **Bill C-59**, which attempted to ameliorate considerably on the aspects about net neutrality and the protection of freedom of expression, inspired by the push from the European Union. But it lacks yet a more robust provision concerning the protection of personal data (linked to the protection of privacy) and its appropriate link to trade (particularly pertinent for e-business), such as the Europeans have done in their formulation of the Privacy Shield deal with the US, which provides a whole pack of provisions protecting European citizens from abuses. The following schema (adapted from Breton's triangle) roughly depicts the current state of affairs for Canadians:

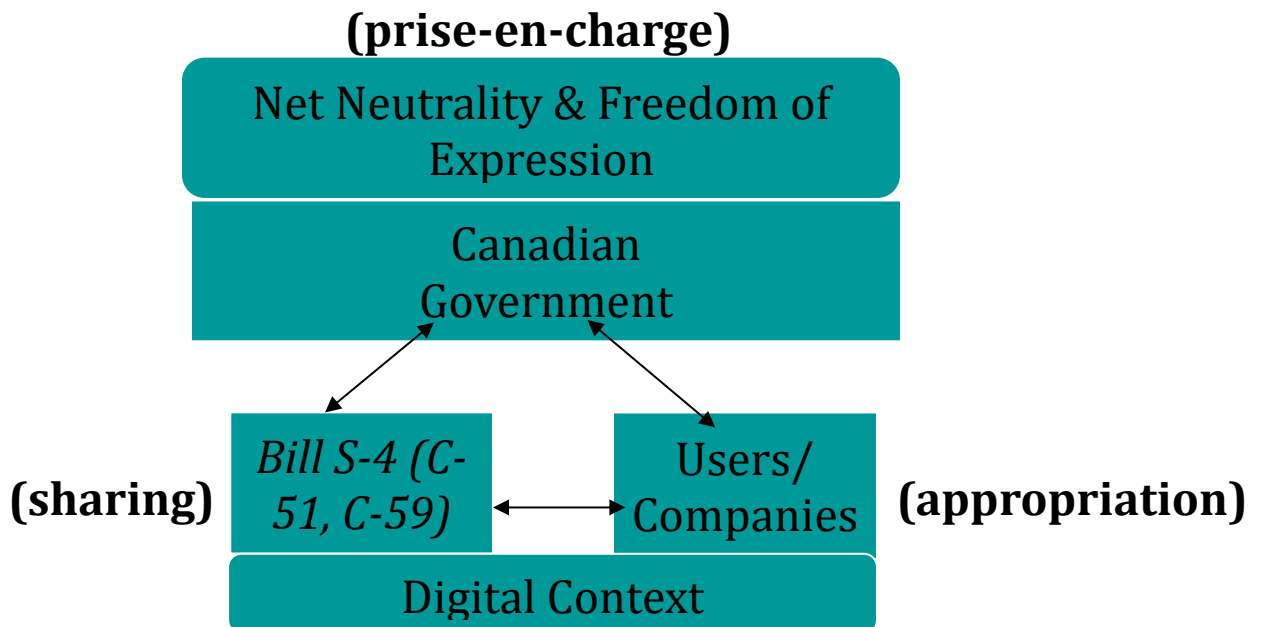


Fig.18: Digital Privacy Act with its amendments, lacking yet robust treatment of data protection.

²²⁸ As this is being written, we went through federal election in Canada (past October 2015) with Liberal candidate Justin Trudeau being elected, and the organization CJFE (Canadians Journalists for Free Expression) launched a campaign on the Internet, urging people to send letters for their MPs requesting reform to the ATI (Access to Information) code and procedures. The campaign can be accessed at: CJFE, "Protect Your Right To Information" [Online], accessed on February 2017, http://oneclickpolitics.com/messages/edit?promo_id=2248.

It is therefore expected that Canadians will soon manage to counter and rewrite such delicate regulations more adequately, so as to table comprehensive measures for addressing such important concerns, thus demanding better protection for the general public. Hopefully, also favoring more transparency from their governments towards more open consultation with citizens, so as to consider the perspectives from all stakeholders such as expected from representatives of robust and genuine (legitimate) democratic societies.

Some initiatives have been already significant in this respect, particularly in the province of Quebec, even before the publication of Snowden's files, for example: it is worth mentioning the *Open Democracy* organization (<http://www.opendemocracy.net>) and the outstanding *Commission de l'Éthique en Science et Technologie* (<http://www.ethique.gouv.qc.ca/en/>), which have been doing a good job in promoting a better informed discussion with the public about issues related to these matters, which are of most relevance both local and nationally.

5. Conclusions

We started this work by going back to an old problem for communication, which we have paraphrased, following Phillip Breton, as 'the paradox of argumentation.' Now, being in a period that has been named in 2016 as 'the post-truth era,' we could not escape to reconsider this paradox with care in Part A of the work. Hence, our investigations in Part B then turned around the question of *how we may promote democratic participation and discussion, in the age of the Internet, in ways that can work to motivate the improvement*

of our inter-subjective communicative performances in healthy and legitimate manners, instead of facilitating corruption via blunt censorship or other manipulative tricks.

The paradigm proposed by Discourse Ethics, under the light of a semiotic approach on autonomy, reflexivity and the self, is suggested as a reliable theoretical framework of departure. This has led us to a compounded ‘triadic’ model that incorporates the most relevant aspects from the views of Peirce, Mead, Grize and Breton. Then, Part B concerns the challenges brought by Digital Media to contemporary societies, whence we were inclined to conclude that, the more of one’s privacy an individual is required to relinquish for governments and/or companies (no matter the reasons involved), the more transparency by those handling one’s sensitive information should be required to be provided, in return. And this in order to prevent manipulation and abuses of power as much as possible, so as to keep a balanced communication triangle among interlocutors (the proposed triangular model) that is essential for democracies to thrive.

As mentioned in section 4.4.2, for example, the *Myth of Amoral Computing and Information Technology* (MACIT) points particularly to the tendency of equating whatever is expected of anyone by law, in any field, also to be applied for computing or information systems. If it is legal, it is permissible, and the reverse. But this view is yet too simplistic and fails to capture the reality of the relation between law and ethics, especially when dealing with complex issues arising from the fast spreading and extended reach of digital media. In the case of computer-related and mediated activities, part of the task, before even passing legislation, is coming to prior conclusion (while obtaining as broad a consensus as possible) about the ethicality of new practices as they arise.

After all, good legal practices in democratic environments are those that allow people freedom of activity to the broadest extent possible, compatible with a libertarian system of “freedoms for anyone” (Rawls 1971). Our societies would thus only criminalize activities when it becomes harmful to people’s integrity in some way and, thus, unethical. The extent to which it is unethical and harmful is not decided by looking at the law, in the first place, but the other way around. The law looks at ethics, because there is generally a lag of law behind ethical judgments and decisions, that is: we can and do consider actions or practices unethical before they are made illegal (cases to mention are slavery, sexual harassment, religious and racist discrimination, just to name a few).

Thus, after looking more closely at the particular cases of Brazil and Canada in chapter 4, it would be desirable that a critical mass of democratic governments also start or continue to show more transparency and further efforts for their people’s benefits, for example, by releasing public database and stats online, open licences, online surveys and campaigns, etc. This, so as for their citizens be able to use such “open data” as a tool to fight corruption and waste (e.g.: by cross-referencing government purchases with company registries and party-donation records; more feedback from constituents, etc.). Thus, having a global international charter, with clearer universal principles and regulations to be abided to, with the consensual support from democratic governments worldwide, would definitely be of critical importance for protecting the integrity of such data and of its citizens (at individual, group, and governmental levels) and for finally uplevelling the standards towards opening up data and collaboration more inclusively, such as proposed by the Creative Commons Initiative.

As one has seen Brazil’s struggle to accomplish (whatever their government original motivations may have been), new regulations through their “Marco Civil da

Internet” is, nevertheless, helping to better protect its citizens’ rights against censorship and unjustified disclosure of their privacy. And this both globally and at more local levels, as it also set examples of reference for other democracies in Latin America and elsewhere. Civil organizations such as the Institute of Technology and Society (ITS—www.its.org), BrazilLab (<http://www.brazillab.org.br>), Coding Rights (<https://www.codingrights.org>), among others, are doing a good job at promoting a more participative democracy and at keeping an eye on the moves of politicians and ICT companies in order to guarantee that new regulations are maintained and citizens’ rights are respected accordingly. After all, democratic societies that do not wish to take charge of such responsibility (thereby, taking charge of their own destiny through more participative governments) will continue to risk allowing despots and tyrants to take over their nations instead.

Moreover, in parallel to the implementation of more robust and globalized regulations, it is important to highlight how much of personal information humans are aware to give away in social networks, considering the effect of instant gratification, measured for example by their interaction through posts on Facebook. Therefore, there is plenty of room for regrettable situations to emerge, even when information is spontaneously published or consented for publication and archiving. When tested in a controlled environment with university students, most feedback from participants have confessed they actually had forgotten whom they were friends with.²²⁹

Research, conducted primarily in the United States, has pointed out at least five different designs of what is being called “privacy nudges” that could have a positive impact on how users interact online, namely: Third-Party Cookie Opt-in Nudge,

²²⁹ WANG et. al. 2013: p. 1321.

Audience Nudge (or Profile Picture Nudge), Timer Nudge, Sentiment Nudge, Data-sharing Awareness Nudge.²³⁰ Deserving especial attention with respect to privacy is the last one, that is, about data-sharing awareness.

To enable self-adaptive, user-centric privacy nudges, we make the following three observations. First, comparison is a natural human behaviour. People compare themselves to their peer groups every day based on a wide set of criteria ranging from salary to health. Second, comparison does not require ground truth or training data. Instead, self-reflection and decision-making is rather guided by relative values. The aggregated behaviour of the peer group dynamically provides individual “ground truth” for people to evaluate their own decisions. Third, people usually compare them not to those of random strangers. They are compared to those of people from their social environment whom they can individually relate to, e.g., people with the same profession, age, or other demographics. In doing so, they harmonize individual and social factors that influence their decision-making process.²³¹

Also, non-profit organizations, working in favour of keeping the Internet free and open (such as OPEN MEDIA and ITS-RIO), have ventured in this research too. The use of “privacy nudges” as a complement to existing regulation, thus, became an object of scrutiny by the European Commission as well. Since 2015, it released an extensive policy report, acknowledging how nudges may be a helpful ally for enhancing proper privacy notices and concerns to the general public.²³²

By scrutinizing and analyzing past mistakes, towards adopting more robust and clear legislation on this front, and thanks to organizations from civil society and a renewal commitment from governments, big countries like Canada and Brazil (the two cases upon which we focused in this work) can definitely be of help for increasing

²³⁰ Studies on this are being made mainly by Carnegie Mellon University, Syracuse University, and Pennsylvania State University researchers such as: Wang, Y. et. al (2013) and Jia and Xu, 2015. Lately, the Pennsylvania State University has also added to the list the ‘Interpersonal-Privacy Nudge / Comparison-based Privacy Nudge’, which is already being applied to Facebook posts since the beginning of 2017, and some users are being reported to have adjusted their privacy settings or cleared down their friends’ list in consequence.

²³¹ For more details about this and other types of ‘privacy nudges’ being currently studied, you may refer to IGLESIAS, D. 2017: pp. 3 – 9.

²³² MONTELEONE et al. 2015.

international pressure on this respect. Their efforts can put more pressure on both the UN and other democratic nations towards implementing more global standards for privacy and data protection. And this, hopefully, towards achieving the adoption of a global *Magna Carta for the Internet*, such as suggested by the World Wide Web creator, Sir Tim Berners-Lee.²³³

We have mentioned the attempt by the European Union to empower individual privacy commissioners or group agencies, thus: giving them technical expertise, and governmental authority, so as to be able to form political coalitions to lobby successfully for enhanced individual privacy protection, requiring that personal information not be collected or used for purposes other than those initially intended without individual consent. As we have seen (illustrated by Model 1, in section 4.4, p. 49), this approach contrasts sharply with the American approach (Model 2, in section 4.4, p. 51), allowing entities such as insurance companies and employers ample access to personal information not covered by the separate privacy guidelines, given a lack of governmental support for more comprehensive privacy legislation and a more fragmented political system.

Nonetheless, we also saw that the US has generally stood behind efficiency arguments that business and government need unfettered access to personal data to guarantee economic growth and national security. This despite the EU efforts to send a coherent signal that privacy has critical value in a robust information society, because citizens will only participate in an online environment if they feel their privacy is guaranteed against ubiquitous business and government surveillance.²³⁴

²³³ See, e.g.: THE GUARDIAN, “An online Magna Carta: Berners-Lee calls for bill of rights for web” [Online], published on March 12th 2014, <http://www.theguardian.com/technology/2014/mar/12/online-magna-carta-berners-lee-web>.

²³⁴ Recall, e.g.: UNESCO, *IPDC Report* [Online], published on October 10th 2014, <https://itsrio.org/wp-content/uploads/2017/01/230176E.pdf>

We thus join Sir. Berners-Lee on calling upon governments worldwide to update regulations for better fitting them to our digital age and its big ramifications; also, upon citizens to keep pushing both governments and businesses towards better controlling and protecting their sensitive data. This definitely challenges existing models and, hopefully, will help create an exciting market for new models and products, as applications will better integrate data from diverse aspects of people's lives (medical, financial, home automation, etc.). In other words: "As people assert control over their data, the web will 're-decentralize,' reducing dependency on technology giants, returning power to individuals and smaller businesses, and allowing developers a rich space for innovation."²³⁵

We also share, therefore, Sir Berners-Lee hopeful predictions, while we commemorate almost 25 years after the first website became publicly accessible, namely: the optimistic prospect that the Internet will become increasingly important to business and states, while also remaining democratic and accessible to people worldwide; with this goal in mind, however, we need to be very careful not to let financial greed make us refrain from keeping up with the World Wide Web original "open mission" of benefiting people (no matter who nor where), for the sake of research collaboration, innovation, and a healthy future for democracy.

²³⁵ Refer to Sir Berners-Lee's articles at:

*THE ECONOMIST, "The Wider World Web" [Online], accessed on January 2017, <http://www.theworldin.com/article/10648/wider-world-web> ;

*THE GUARDIAN, "Magna Carta for the Web" [Online], published on March 12th 2014, <https://www.theguardian.com/technology/2014/mar/12/online-magna-carta-berners-lee-web> .

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