

Locke's Tacit Consent in Social Networking Sites: A Case for Tacit Online Consent

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ABSTRACT

As the number of users of Social Networking Sites' (SNSs) increases and the amount of data collected about people becomes massive, the issue of online consent given to these websites is central. John Locke argued that consent is given to a government simply by living in the territory of that state. This paper holds that the same can be said for SNSs: consent is given by simply using the website. The research is conducted by arguing that governments and SNSs are analogue entities. The General Data Protection Regulation (GDPR) definition of consent is explained and then used as a comparative framework for the analysis. Facebook is taken as a case study for SNSs in order to simplify the comparison process. Findings suggest that the two types of consent are indeed equal, and the conclusion states that consent given to SNSs could be defined as "tacit online consent".

Introduction

In the last few years, usage of Social Networking Sites (SNSs) has steadily increased. These SNSs, Social Media in general, work thanks to and are fuelled by social data (Alaimo & Kallinikos, forthcoming). These social data are extremely precious for many agents, as they open new paths towards understanding individuals' and groups' social, economic and political behaviours (Bechmann, 2014, p. 21). Users do indeed produce billions of personal and sensitive data every day simply by using the services provided by SNSs. The combination of computational practices and Big Data makes social data incredibly powerful (Tufekci, 2014).

Collection, analysis, and usage of the information is conducted according to certain conditions that users have previously agreed to. Thus, it is no surprise that the issue of consent has become central even, if not especially, when framed in an online context. Consent is the key mechanism for enabling data management (Whitley, 2013, p. 165). As the amount of data collected increases and as evidence supports the belief that people are not aware of what kind of information they produce and how it is used, international organisations are trying to set new standards in order to regulate the practice of consent. Just recently, the European Union has issued a regulation – the General Data Protection Regulation, GDPR – that aims at making consent more unambiguous and explicit (European Union, 2016). However, it is still not clear what kind of consent people are giving to Social Networking Sites.

It will be held here that consent given to a SNS resembles John Locke's tacit consent. Consent has usually been studied in the fields of law and moral philosophy. The reason for which this work compares it to a political thought doctrine is that states and SNSs are indeed parallel realities and societies. In December 2016, Facebook's "population" reached 1.86 billion users (Facebook, 2016). This, plus other factors illustrated and explained later on during the course of this work, should stress the importance of considering Social Networking Sites as proper communities presenting classic social and political dynamics. Consent is one of these.

On Consent and Tacit Consent

In traditional Western liberal societies, consent is considered a fundamental right. Even more so, property is strongly valued, and with that the belief that people should have some sort of control over what belongs to them, be it goods or data. Indeed, consent strongly relies on the concepts of control, self-determination, and respect for autonomy (Article 29 Data Protection Working Party, 2011, p. 8; Bechmann, 2014; Faden & Beauchamp, 1986).

Consent is a recognised method through which two or more independent parts enter an agreement creating obligations and conferring rights (Carr, 1990). No legitimate power can arise without consent. When consent concerns the collection of sensitive information from an individual its role and definition can be described as "offering people genuine choice and control over how to use their data" (ICO, 2017, p. 4). Consent is of particular importance when talking about social research or experiments conducted on Social Networking Sites, as the data controller can

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often use it in order to transfer his liability to the data producer (Article 29 Data Protection Working Party, 2011, p. 9).

A very important notion in the history of political thought is the one of *tacit consent*. This idea became notorious among scholar after John Locke wrote about it in “The Second Treatise of Civil Government”.

John Locke acknowledges and recognises the fact that no man can obey the rules of someone or something else without having previously given his consent. However, writing in 1690, when the majority of regimes were autocratic and people respected rules they did not agree upon, he had to justify this libertarian statement.

Thus, he came up with the doctrine of tacit consent. According to Locke, consent does not have to be expressed in order to be considered valid. He holds that a man gives tacit consent to a government simply by living in the territory in which that government operates or by benefitting from the services it provides (Locke, 1690). An individual, should he have previously given tacit consent, is free to withdraw it by leaving the territory of the state in which he is living and by renouncing his possessions within it. As long as he lives there though, he agrees with the government’s decisions.

Analogies between a State and a Social Networking Site

The notion of tacit consent is very intuitive and straightforward when framed in a political context with regards to states and governments. However, the aim of this work is to prove that the concept of tacit consent resembles the kind of consent we are giving to SNS platforms, as they are characterised by the same features. Before proceeding with the analysis and comparison of the two, it is necessary to demonstrate how consent to governments relates to consent to SNSs.

They are both communities: the first element of collision between a state and a SNS is the definition of what they are. Although the exact definition of “state” is still debated, the most widespread and accepted one was given by Weber in a speech at Munich University (Weber, 1918). Weber defines the state as a “[...] *human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory*” (Weber, 1918, p. 1). Attention here shall be given here to the first word used by the sociologist, that being, “community”.

Both a state and a SNS are indeed communities. The former being defined as such by scholars, sociologists, and political scientists. The latter describing itself as such. The Head of Facebook’s Global Product Policy and the Vice President of Global Operations, for example, clearly state and repeat that Facebook is a community (Bickert & Osofsky, n.d.). Furthermore, simply by looking at the Community Standards of the website, the platform is defined as “a community of more than one billion people” (Facebook Community

Standards, n.d.). Other platforms defining themselves as communities include Wikipedia (Wikipedia:About, 2017); Snapchat (Snapchat Community Guidelines, n.d.); and Youtube (Youtube Community Guidelines, n.d.).

This said, it is clear that the “given territory” in the case of SNSs is not physical, but rather intangible. Facebook will exercise power over activities conducted within its web territory, meaning, its internet address.

They both exercise political power: political power is exercised both in states and in SNSs. Political power allows governments to make and execute laws (Locke, 1960, § 3). These laws concern regulation of property, rights and duties of the citizens, tax collection, and so on. In the same way, when it comes to SNSs, the owner of the company sets policies regarding the regulation of the website, community standards, and the right to gather and use personal data (Nissenbaum, 2010).

They both generate money through their citizens or users: states collect money from their own citizens in order to generate government income. The price to pay in order to be able to benefit from the services provided is translated into taxation – be it direct or indirect.

Similarly, SNSs collect personal and social data from their users, which are the “fuel” of the platform, and are the practical translation of profit online. In both cases, should consent be retrieved, people would not get back the taxes previously paid or the data produced.

The difference between a state and a SNS is that in the latter the owner of the website mainly aims at making some profit for himself. On the contrary, states mainly re-invest the money collected in order to improve themselves as collective communities. Nevertheless, if we think about how states were until a few years ago, and even about how some monarchies or dictatorships still are, we can arguably say that the same can happen on a state level: some authoritarian regimes do use part of the money coming from their citizens in order to enrich the sovereign.

Comparative Framework: The Definition of Consent according to the GDPR

Having outlined the analogies between a state and a SNS, it is possible to proceed in demonstrating why and how consent given to the latter is identifiable with the notion of tacit consent.

The framework adopted in order to analyse and compare online consent and tacit consent is derived from the definition of consent outlined in the General Data Protection Regulation. This definition reflects the general understanding of what consent is. Furthermore, it is the most recent legal definition of consent to this day. The characteristics that define consent in the GDPR will be explained according to the ICO GDPR consent guidance and then used to analyse and compare both types of consent.

The legal definition of consent of a data subject as

adopted by the 28 EU Member states can be found in Art. 4.11 of the General Data Protection Regulation from 2016. Here, some basic characteristics defining consent are outlined. Consent must be “*freely given, specific, informed and unambiguous*” and must furthermore be *explicit* when concerning the processing of personal data, according to Art. 9.2(a) (European Union, 2016).

Freely given: the fact that consent must be freely given means that an individual giving consent must be able to exercise a real choice, without being forced or coerced (Article 29 Data Protection Working Party, 2011, p. 12). Another important trait of the attribute “freely given” is the fact that the individual should not be facing negative consequences in the case where he does not give consent (*ibid.*).

Freely given consent cannot, therefore, derive from a Hobson’s choice. A Hobson’s choice “is not a choice at all” (Barrett, 2009). When faced with a Hobson’s choice, individuals either fully accept what is offered (e.g. accepting every clause of T&C and accepting the service) or they do not accept it at all (e.g. not accepting T&C and therefore not accepting the service). A great example to understand what a Hobson’s choice is can be found in Henry Ford’s famous words: “Any customer can have a car painted any colour that he wants so long as it is black” (Ford, 1923, p. 72).

Informed: consent can be defined as informed where people fully understand what they are agreeing to and the implications of their action (Article 29 Data Protection Working Party, 2011, p. 19). It is of fundamental importance for consent to be informed, as it allows participants to make a real and proper choice (Gleibs, 2014, p. 356). Furthermore, within the scope of the informed characteristic, consent needs to be “specific”, meaning that it must be clear to people what they are agreeing to.

Explicit: explicit consent means that consent must be clearly confirmed by words, and that even a clear affirmative action is not enough to manifest consent (ICO, 2017, p. 24). The individual can express consent with a statement or, in the online environment, by ticking a box agreeing to the conditions (*ibid.*, p. 25). The “unambiguous” feature of consent is tied to the fact that it must be explicit. Unambiguous consent entails “clear affirmative action” (*ibid.*).

Analysis of Tacit Consent

Analysing Locke’s doctrine, there are some interesting points that clearly emerge and pose the main ground for objections and confutations of his theory, were it to be judged according to the GDPR definition of consent. Is the consent Locke is talking about informed, freely given, and explicit?

Informed: Locke’s principle of tacit consent does not require the citizen to be informed about his government’s policies. There is no political obligation to be informed about them. No one forbids a citizen to be politically involved or interested in what kind of government he is giving consent to. However,

whether he actually takes part in political life or not, he is still giving tacit consent. Whether this tacit consent is informed or not depends entirely and solely on him. In any case, the law accepts no ignorance on his part.

Freely given: when coming into this world, an individual is bound to a given territory. This person had no choice in deciding which land he found more appropriate to spend his life. At the time of birth, he is automatically inserted into a certain social context and will shape his life according to it, following the derived laws, rules and political or social obligations.

Locke does state that should a person realise that the territory he was born into does not suit his moral or political values, that person is always free to move away from it in order to withdraw his consent to the government that rules the territory. However, there are many factors for which a person might be unable to move away from the territory he is living in. These factors might include the individual’s economic or social situation, health conditions, or simply the impossibility of leaving family attachments behind. In other words, the individual might face negative consequences when withdrawing consent. Therefore, even if an individual gives tacit consent, this consent is not freely given, as it does not derive from a conscious and/or free choice.

Furthermore, it is not possible to live in a given territory without giving consent to the government. This classifies tacit consent as deriving from Hobson’s choice. In order for the individual to benefit from the services provided by the state, he has to accept all of the rules and obligations deriving from it.

Explicit: Locke’s tacit consent is not explicit, as the individual does not have to express it in order to give consent to the state.

Analysis of Online Consent given to SNSs

In order to simplify the analysis of online consent, Facebook will be taken as a case study in the following paragraphs. Facebook can be considered an adequate case study because of the popularity and importance this SNS has gained in the last years. Nevertheless, the dynamics and main points of the following analysis can be applied to the majority of most used SNSs.

A person wishing to join the Facebook community, when opening the home page without being a user yet, will be presented with a simple and quick form to fill out in order to start using the service.

Facebook explicitly states that by clicking the button “Join Facebook” one is automatically agreeing to their Terms, their Data Policy, and their Cookie Use Policy. Starting from this point, we shall thus analyse what kind of consent is given to Facebook – and what kind is not.

Informed: when presented with the scenario outlined above, people are not giving informed consent. Article 29 Working Party (Art. 29 WP), clearly states that information about what one is agreeing

to must be given to individuals directly and that it is not sufficient to make this information available somewhere in order to consider the given consent informed (2011, p. 20).

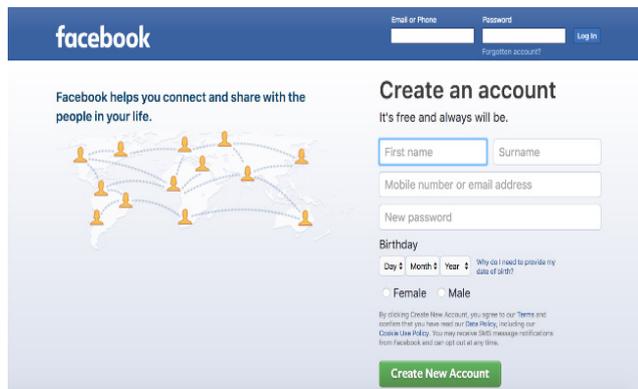


Figure 1. www.facebook.com

When joining the Facebook community people are just given the opportunity to click on a link redirecting them to the Terms of Use and Privacy Policy. Not only are potential users not required to read them, but it could also be argued that they are not incentivised. The process of registering is very easy and fast. The fields to fill out are big and clear to see. On the other hand, the warning regarding the fact that by subscribing, consent is automatically given, is written with a tiny font. It does not grab attention.

Should this not be enough to prove the fact that consent given to Facebook is not informed, one other aspect can be considered. It has been studied, shown, and proved, that people do not read Terms and Conditions (Stanley & Guido, 1996; Wogalter, Howe, Sifuentes, & Luginbuhl, 1999). In research conducted on informed consent, barely half of the participants read a consent document they agreed to before taking a phoney questionnaire (Varnhagen, et al., 2005). These results are not reassuring, considering the fact that the research can be regarded as conducted in a criticisable way. In fact, it should be noted that in this research (a) people had someone telling them how important it was to read Terms of Use; (b) people, when accepting the consent document, were observed from the back of the room and could have modified their behaviour because of the fear of being judged; (c) all the participants were enrolled in university, showing a high educational level; and finally (d) some participants even understood the real purpose of the experiment (ibid., p.42). Nevertheless, not only did almost half of them simply skim or not read the consent document, but the majority of the participants could not recall the main points there outlined.

To summarise, people do not read Terms of Use when specifically asked to do so. It can be inferred in the case of Facebook, where potential users are simply being told where they can find the information concerning what they are agreeing to, it is very unlikely that people will spend time analysing what they are accepting. And even if they did, they probably would

not entirely understand it (Solove, 2002). This, as stated above, classifies the consent given to Facebook as non-informed according to Article 29 Working Party (2011).

Explicit: the unfortunate characteristic of giving consent to Facebook is that potential users do not have to tick a box in order to express their consent. As seen above, consent is automatically given by joining the SNS. This hardly classifies consent given to Facebook as explicit, since “explicit consent must be expressly confirmed in words, rather than by any other positive action” (ICO, 2017, p. 18). The action of ticking a box can also be compared to confirming in words and therefore considered explicit consent (ibid., p. 25). Nevertheless, a clear affirmative action – such as, for example, joining Facebook – would not be considered enough to make consent explicit (ibid., p. 24).

Freely given: when joining Facebook, people have no choice but to give consent to its Terms, Data Policy, and Cookie Use Policy. As Facebook is an extremely convenient means that facilitates life, people are brought to prefer convenience and join the website despite wanting privacy and data protection (Nissenbaum, 2010). This phenomenon, referred to as the privacy paradox (Jorstad, 2001; Barnes, 2006), could be considered sufficient evidence for the fact that consent is somehow forced when entering the community. On the other hand, it could be argued that users do have a choice: to be on Facebook or to be off Facebook.

However, not everyone has the choice to decide whether to become part of the Facebook community or not. As Bechmann (2014) notes, Facebook has become extremely big and dominant – as mentioned before it has almost 2 billion users – and this creates a sort of necessity to be part of the community in order to participate in social life. Not having a profile on Facebook clearly means being left out of social life. Younger generations in particular, such as university students, young professionals, and so on, cannot freely decide whether to participate in the social platform or not without having some negative repercussions. As “freely given” means that the individual should not face negative consequences in the case where he should decide not to give his consent (Article 29 Data Protection Working Party, 2011, p. 12), consent given to Facebook does not classify as such.

Considering, in addition, the fact that Facebook presents many features typical of a monopoly, and that it does not have a competitor, it is clear that sometimes people really do have to be part of it. Furthermore, since it is not possible to join the community without agreeing to all of the Terms of Use and Privacy Policy, people are faced with a Hobson’s choice.

Discussion

It has been shown that both consent given to Facebook and that given to a state according to Locke’s theory of tacit consent are not informed. In both cases the degree of information regarding consent is left up

to the individual. In both cases, the fact that the individual is not actively informed about rules, laws, or policies, does not justify him not knowing or following them.

Furthermore, in both scenarios consent is not freely given. On the one hand, Locke's tacit consent derives from a situation in which the individual did not get to choose where to live in the first place. It is also not always possible for citizens to freely move away from a territory in order to live in another state without facing negative consequences. On the other hand, it has been shown that people cannot decide whether to be a part of the Facebook community nowadays. Indeed, the Social Network puts people in a more difficult position if they are not Facebook users.

In addition, both tacit consent and consent given to Facebook are provided through a Hobson's choice, meaning that, either one entirely accepts the government's rules and policies or the Social Media Terms of Service and Data policy or they are not allowed to be part of them.

Finally, tacit consent is clearly not explicit, as it is inferred from a positive behaviour – living in the state's territory – but not expressed through any sort of verbal or written agreement. Similarly, Facebook does not require the user to tick any box or make any statement, and the individual simply signifies his consent through the active behaviour of becoming or being a Facebook user.

Thus, by comparing Locke's tacit consent and consent given to SNSs it is possible to observe how similar the two are. Online consent given to SNSs could be defined as "tacit online consent". There is, however, a crucial point that needs to be considered, since it makes tacit online consent morally ambiguous. When consent is given to a state, the individuals' privacy is not compromised. Contrarily, giving consent to a SNS inevitably means providing personal and sensitive data. This intrusive practice undermines an individual's privacy.

To conclude, despite being similar, there is a substantial moral difference between tacit consent given to a government and tacit consent used to gather and use data produced by users of SNSs. However, the aim of this work, as stated in the introduction, is not to provide moral grounds concerning the practice of consent. Consent was considered through the whole work from an analytical point of view.

Research Limitations and Conclusion

It has been proven, by taking the example of Facebook as a case study, that consent given to SNSs presents the same key features that characterised John Locke's theory of tacit consent. As this work aimed at showing the analogies between the two, it did not deal with the moral nor legal implications of the issue. It would be ideal, for further research, to investigate whether tacit consent can be considered binding in an online environment. As stated previously, the two types of consent – the one given to governments and the one

given to SNSs – have different implications despite being both "tacit". One automatically frames the individual within a set of rules and laws. The other one does the same, making it however possible for the entity that receives consent to become intrusive in the individual's life, undermining his privacy.

Although important, the recent EU regulation fails to take into account the social value of SNSs, and does not consider the extreme level of dependency it has over people. It is clear thus that moving towards a more unambiguous and explicit consent does not offer individuals control over deciding how their data should be used. Making consent more explicit and unambiguous is a measure that merely legally transfers liability from the enterprise to the user. The problem that this work wishes the European Union will take into account in further regulations, is the issue of Facebook monopoly over SNSs and the problem of Hobson's choice.

Either individuals should be provided with other valid choices when deciding to join a SNS, or SNSs should get rid of the "take it all or take nothing" Hobson's consent they currently deploy/offer. It is undoubtedly true that the creation of a Social Media platform as important as Facebook could only happen under specific circumstances (e.g. mass migration of users to another platform). However, in the last few years, those few SNSs that started becoming popular were quickly acquired by Facebook (i.e. Instagram, WhatsApp). Those who did not accept selling the platform to Zuckerberg, like for example Snapchat, had proper online war declared on them by the company (Heath, 2016).

The EU, or other International Organisations, should therefore start treating Facebook for what it is: a monopoly. Anti-Trust regulations should be regarded as a possible means towards empowering people over their privacy when it comes to SNSs.

Should this not be a possible scenario, attention should then be given to consent. The current circumstances through which consent is given cannot be considered acceptable. A Hobson's choice, by definition, is no choice at all. And as has been shown, consent given to an SNS is undoubtedly a Hobson's choice, as the user has no choice but to accept all the Terms of Use and Data Policies. Solutions to this issue might be empowering the individual when deciding what he wishes to agree to, by for example allowing him to give consent to some measures and not to others.

Finally, it is hoped that this work will lead in the future to the analysis of Social Media consent not only from a legal or moral point of view, but under a political thought point of view as well. It is very likely that Social Media users are going to grow in the future, and given the fact that the online environment resembles social communities a little bit more everyday, the need for a political doctrine analysis arises. Online behaviours, norms, and doctrines, could benefit from the work that has been done in the past years in other fields.

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