Introduction

This book analyses privacy law, with a focus on legal personhood. The key question that forms the narrative of the book is this: What kind of persons does European Union (EU) law think we are?

Privacy and personal data protection are areas that demonstrate current social and political tensions. From a societal perspective, this field of law renders itself useful for enquiries into some of the main issues in contemporary European life. It reflects how we see the private and public divide, and it regulates the way we communicate with each other, both online and off.

Privacy is now very much on the global political agenda. The law reflects a general worry shared widely in politics, philosophy, the arts and popular culture: that privacy is under threat. This sense of something being lost, or soon to be lost, has become ever stronger.

The most important reason to study privacy and personal data regulation lies in the specific nature of this field, where legal practice is forced to continually develop both the definition of privacy and the conception of the person that privacy rights are meant to protect. Here, in difficult cases, the European courts face the thankless task of outlining various aspects of what it means to be a private person in the connected, digitalised and globalised world.

There is no unambiguous definition of privacy to be found in European law – or in American law for that matter – or in legal philosophy. The openness of the concept makes it such an interesting instrument in legal regulation. As a result, European case law offers compelling material that can be studied to point towards dominant legal constructions of personhood.

In order to keep the research confined to reasonable proportions, I have had to limit the material that will be used. My focus is on EU

law with special attention to the case law of the European Court of Justice (ECJ). Even though the Member States are components of the Union with their own legislation contributing to the way EU law develops, I will not discuss them in this study. The Member State courts, which function as important arbiters of justice in the Union, will also be left aside. The EU Court in Luxembourg will be our main concern and, hence, the material that will be read consists predominately of judgments given by this court. The other transnational European Court, the European Court of Human Rights (ECtHR), will not be studied in detail either.

This book is focused on the European Union and its legal system for a reason. The law has been changing. A shift of emphasis has been occurring, though gradually. Where the law of the EU used to be primarily concerned with free movement and trade, it has become increasingly attentive to the human beings who are its subjects. New fields of EU law that have developed as a result deserve the attention of scholars.

Privacy and personal data protection are areas enjoying increasing legal attention. They attest to the more general development, where fundamental rights are gaining more weight in the legal fabric of the Union. The most significant event in this field of law is the new personal data regulation (General Data Protection Regulation; GDPR), which became applicable in 2018.

In the EU, data protection is sometimes seen as a right of its own, and sometimes as a subcategory of the right to privacy. Indeed, the relationship between the two is not clear.[1] Both case law from the ECJ and academic scholarship show ambivalence in this regard. The difficulties are partly due to the fact that privacy itself is notoriously hard to define. It encompasses, for instance, the right to private life, domestic privacy, privacy in public premises, as well as informational privacy.

How exactly the new Regulation on data protection influences the law remains to be seen. It is certain, though, that it will have an impact on European societies. It emphasises a commitment to personal data protection as a fundamental right. Introducing the possibility to impose significant administrative fines for infringements, the GDPR has also

[1] On data protection and privacy generally, see e.g. Federico Ferretti, 'Data Protection and the Legitimate Interest of Data Controllers: Much Ado about Nothing or the Winter of Rights?' (2014) 51 *Common Market Law Review* 843–68; and Juliane Kokott and Christoph Sobotta, 'The Distinction between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR' (2013) 3 *International Data Privacy Law* 222–8.

made a telling gesture directed to private and public actors alike that privacy and personal data need stronger protection.

This is why it is so important to study privacy and data protection, especially in the EU setting. Because of the GDPR, the Union has become de facto – if not also *de jure* – the most important global regulator of privacy.[2] What the EU does is now followed with keen interest, and occasional dread, all across the globe.

From an internal Union point of view, on the other hand, I feel that it is worthwhile studying the connection between the kind of legal personhood that is emerging in fundamental rights protection and the problems in solidarity and equality that the Union as a polity continues to face. It may just be that legal constructions of personhood are linked with certain understandings of community.

The critique developed in this book engages with the kinds of presuppositions about personhood that are embedded in privacy protection in the EU. The aim is not, therefore, to criticise privacy rights per se. Nor is the book proposing that European legislators or courts should protect privacy less. The aim is only to give an account of the preconditions that are at work in privacy protection, as regards legal understandings of personhood.

Questioning protection of privacy and personal data is controversial, and not very common in critical legal research.[3] Much more often, critically minded scholars tend simply to promote more privacy in an attempt to salvage values such as human dignity and freedom against either multinational industry interests or, say, the interests of governments to enhance security and control.[4] These views are acknowledged in this book and no attempt is made to undermine them. Nevertheless,

[2] The Brussels effect is arguably quite potent in this area of law. See Anu Bradford, 'The Brussels Effect' (2012) 107 *Northwestern University Law Review* 1–68.

[3] Nevertheless, in feminist legal theory this has been done. See e.g. Janice Richardson, *Law and the Philosophy of Privacy* (Oxon, New York: Routledge, 2016). For a general critique of rights and neoliberalism, see e.g. Susan Marks (ed.), *International Law on the Left: Re-Examining Marxist Legacies* (Cambridge: Cambridge University Press, 2008); or Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, MA: Belknap Press, 2018).

[4] See e.g. Austin Sarat (ed.), *A World without Privacy: What Law Can and Should Do?* (Cambridge: Cambridge University Press, 2015); Viktor Mayer-Schönberger and Kenneth Cukier, *Big Data: A Revolution That Will Transform How We Live, Work, and Think* (New York: Hachette, Eamon Dolan/Mariner Books, 2014); or Daniel J. Solove, *Understanding Privacy* (Cambridge, MA: Harvard University Press, 2008) for views on what kind of privacy regulation is needed.

there is a need for greater in-depth analysis of the ways in which human beings are constructed through privacy rights.

The ideal way to organise the relationship between individuals and communities is the broader political problem involved in this research. This is an age-old issue that still today lurks behind the law. Differing answers make continual appearances in the form of legal questions that the European courts need to solve. In its own way, the book contributes to one of the fundamental debates in political and legal philosophy. It considers the relationship between the individual and the community by analysing some of the philosophical underpinnings of privacy and personal data law.

Main Objective: Deconstructing Private Personhood

A deconstructive gaze inspires this book. This kind of critical work on privacy has been done before, although not in as much detail. The starting point is an acknowledgement that privacy is not a pre-political space for individual freedom but a constituted notion that reproduces social power relations.[5]

Critical voices typically question the understanding of privacy as developed in the liberal paradigm. This liberal understanding is seen as: 'insufficient to grasp the forms of domination that emerge in the course of digital restructuring of interpersonal communication. Technological innovations are deeply entangled with socio-economic power relations and this raises questions about digital age privacy in a radical new way.'[6] The conditions of our social environment – including all the power relations we are entangled in – shape us, and they shape our privacy needs as well. Being embedded in a society, we may suffer domination even without knowing it but also, at times, contribute to dominating practices. Privacy rights are by no means a neutral instrument in all of this. They create social relations and are in turn created by them.

Following Marxist intuitions, one can see the legal right to privacy as genuinely ambivalent. Even though it may enable domination, the right to privacy can have emancipating and liberating functions, too. Few

[5] Sandra Seubert and Carlos Becker, 'The Culture Industry Revisited: Sociophilosophical Reflections on "Privacy" in the Digital Age' (2019) 45 *Philosophy and Social Criticism* 930–47 at 930.
[6] Seubert and Becker, 'The Culture Industry Revisited', 931.

critical theories, therefore, question the value of privacy altogether, nor will that be done here.

The main argument of the book is developed through a reading of case law from the ECJ in combination with an analysis of regulatory sources, especially the GDPR. Presuppositions of personhood portrayed in these are neither uniform nor unambivalent. Nevertheless, both the case law and the interpretations that can be made of the GDPR show certain tendencies towards individualist views. The book considers whether these developments in the law can pose a threat to community values, such as solidarity and equality.[7]

The philosophical roots of the study lie in the deconstruction of the subject in late-modern philosophy. Different ways of questioning subjectivity were developed by Michel Foucault in his hermeneutics of the subject, as well as by Jacques Derrida in his deconstruction of prevailing patterns of thought. Both philosophers' work is guided by a mistrust of liberalism and includes attempts to address the inequality-producing mechanisms of global capitalism.

This continental philosophical tradition forms the theoretical framework for the analysis undertaken in this book. However, it draws predominantly on contemporary political philosophy, namely the works of Jacques Rancière, Roberto Esposito and Jean-Luc Nancy, in order to scrutinise how the individualising practices of the self are becoming normalised by various aspects of privacy law. Nancy's thinking is especially valuable because it enables ways of conceptualising community without succumbing to unifying or totalitarian ideas. A pluralistic community, where rights are respected without individualising undertones, becomes possible in this philosophy.

Legal scholarship on the EU has lately evolved in new directions. In addition to doctrinal research on existing norms, their content and systematisation, it now encompasses approaches and methods acquired from social and human sciences. Additionally, a growing volume of critical legal research has begun to emerge. This book situates itself in this kind of scholarship, which exhibits disillusionment with the content and application of EU law, even though it does not question the integration project as such. The worry is that if the Union favours questionable views of personhood – views that are insufficiently

[7] For a similar approach, though more theoretical, see Einar Øverenget, 'Heidegger and Arendt against the Imperialism of Privacy' (1995) *Philosophy Today* 430–44.

recognised while nevertheless embedded in the law – it will not be able to fulfil its sociopolitical potential.

Several sociologists and philosophers have raised concerns with individualism and a heightened focus on the personal in Western societies. Richard Sennett, Zygmunt Bauman, Esposito, Rancière and Nancy belong to those who have undertaken fundamental work in this regard and are important for the research done here The book also engages with contemporary debates in EU legal theory. In this area, for instance, Alexander Somek has put forward arguments against individualism, although from a slightly different point of view. Arguably, however, not enough attention has been paid to the legal person that is being constructed in EU law.[8]

In the field of personal data protection, a thorough and critical evaluation of the politics of personhood is clearly needed. This area of law remains generally under-theorised, too. A lot of research is currently being done on the GDPR, but most of it does not analyse the GDPR's philosophical underpinnings or its sociopolitical outcomes. The focus is usually on doctrinal analysis of the instrument.

Critical legal research has strong roots in legal realism, as well as Marxism. Both traditions have provided inspiration for this book, too. It is indebted to them in many ways. However, the legacy of realism and Marxism is often incorporated into critical scholarship on EU law in ways that focus on the gap between the ideal and actual practice. Thus the critique concerns the ways in which law fails to live up to its promises, and falls short of delivering the good that it claims to.

This book, however, takes a slightly different approach. The aim is to deconstruct not only the practice, but the ideal, too. This is where the critique of individualism is located: both on the level of what the law produces, but also on the level of its promises. One of the main suggestions will be to show that the ideal of privacy, as it has been understood in liberal Western legal thinking, has its fundamental problems as well.

The book does not aim at promoting any normative claim. However, the critique of privacy rights will be situated within a normative framework in the last chapters of the book. By doing so, I will approach conclusions of an ethical or an ideological nature. The main arguments will end up with the thought that privacy rights are valuable because

[8] One notable exception being Loïc Azoulai, Ségolène Barbou des Places and Etienne Pataut (eds.), *Constructing the Person in EU Law: Rights, Roles, Identities* (Oxford: Hart Publishing, 2016).

they can protect our co-existence. This means, however, that their primary target should not be the immunisation of private individuals. Privacy is not valuable because it enables a life left in peace but because it protects lives lived in common.

I also suggest, after a careful reading of case law, that privacy rights should not be used to trump all other rights. Protection of people as social beings means that other rights need careful balancing in all cases. The weight of privacy claims requires evaluation on a scale of many values, not just individualist ones.

An Outline of EU Privacy Rights

Reading the more recent accounts of privacy, both legal and philosophical, one notices similarities between many of them. Regardless of various points of emphasis, most theorists tend to end up with the same conclusions: no definition of privacy is to be found, nor any one value that the right to privacy protects. Many writers nevertheless go on to claim that a more nuanced view is needed. Several scholars list all the different aspects of privacy that need to be taken into consideration in philosophy, political theory and law.

This book does not attempt such a task. It neither presupposes nor denies one theoretical definition of privacy. The book starts off with the legal material that is available and tries to conceptualise personhood as it emerges from that material.

The most important regulatory sources for privacy and personal data protection in Europe are the European Convention on Human Rights (ECHR), the EU Charter of Fundamental Rights (the Charter) and the General Data Protection Regulation (GDPR). The focus of this study is on EU law and, hence, the ECHR or its corresponding legal praxis are not studied in detail, even though interpretations by the European Court of Human Rights do play a role in the development of EU law as well.

Data protection, or informational privacy as it is sometimes called, is being regulated in new – and stronger – ways. The GDPR includes some significant changes to this area of law. Other legal reforms are also being made and show that questions of data protection traverse many areas of European society.[9]

[9] See e.g. the Police Directive (Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal

The main primary law source at Union level is Article 16 of the Treaty on the Functioning of the European Union (TFEU), which gives the mandate to the Union to introduce regulation in data protection. Protection of privacy rights also has strong legal support in the Charter. In contrast to the ECHR,[10] the Charter includes separate provisions for protection of private and family life and for protection of personal data.[11]

According to Article 7 of the Charter, everyone has the right to respect for their private and family life, home and communications. Article 8, on the other hand, stipulates that everyone has the right to protection of personal data concerning them. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Article 8 also states that everyone has the right of access to data that has been collected concerning them, and the right to have it rectified.

Regulation of privacy rights in the EU is a complex field partly because it incorporates EU law as well as older conceptions of privacy stemming from the Member States' constitutional systems. Complexities in the application of different rules derive especially from the fast pace with which the law has been changing. The GDPR is meant to function as *lex specialis* and therefore has wide application. Other instruments have been passed or are in the process of being passed to support and complement it. To complicate matters further, even though the GDPR is a regulation, many of its articles leave room for national implementation in the Member States, which results in slightly different legal regimes across Europe.

penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ 2016 No. L119, 4 May 2016). See also ePrivacy reform: Commission, 'Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications)', COM (2017) 10 final; eEvidence: Commission, 'Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters', COM (2018) 225 final; etc., which are under preparation at the time of writing.

[10] The ECHR differs from the Charter in that it does not include a separate article that would protect personal data. Informational privacy, in many of its aspects, has been developed in the Strasbourg court's case law through interpretational devices.

[11] On the development of the right to personal data protection in the EU, see Gloria González Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (Cham: Springer, 2014).

The GDPR

Extensive data protection reform started in the EU in 2012 and the General Data Protection Regulation[12] became applicable in late May 2018. Although the GDPR did not completely revolutionise the field, bearing in mind that many of the main principles and rules include extensions or specifications of its preceding Data Protection Directive[13] (DPD), the GDPR did introduce new norms. The aim of the Regulation is to increase legal certainty through harmonisation and to afford more efficient protection for data subjects.

There are, of course, also economic purposes. The Regulation aims at safeguarding the free flow of personal data throughout the Union, thus enhancing the development of a strong single market. However, because of the many requirements that the Regulation places on processing personal data, it also shows genuine concern for fundamental rights, as well as an attempt to catch up with the law in action as developed by the ECJ.[14] It remains to be seen how the two goals of strengthening citizens' fundamental rights and facilitating business will operate in tandem, or collide, in future applications of the Regulation.

The legal nature of the Regulation is slightly complex. It includes elements of fundamental rights regulation and, when interpreted as such, many of its specifics will make sense. On the other hand, it also includes elements that resemble EU consumer law, for instance a strong emphasis on data subjects' control and consent. It also displays features

[12] Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 No. L119, 4 May 2016.

[13] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 No. L281, 23 November 1995.

[14] The ECJ has for some years been very active in interpreting privacy and personal data protection cases in a manner that has strengthened their position as fundamental rights of the Union. Landmark cases, which we will discuss further on, include Case C-131/12, *Google Spain SL and Google Inc.* v. *Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, EU:C:2014:317; and Case C-362/14, *Maximillian Schrems* v. *Data Protection Commissioner*, EU:C:2015:650. In the latter case the court re-affirms its view that the Directive must be interpreted in light of the Charter: 'It should be recalled first of all that the provisions of Directive 95/46, inasmuch as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to respect for private life, must necessarily be interpreted in the light of the fundamental rights guaranteed by the Charter', para. 38.

of EU competition law origins, such as administrative fines that can be ordered for significant breaches of personal data protection.

In essence, the Regulation works so that it lays down rules on the protection of natural persons with regard to the processing of personal data (the rights element) but it also expresses the need to allow for free movement of personal data (the internal market element).

'Personal data' is defined in a similar way as in the previous Directive. This definition has become commonplace in European personal data law and receives support from settled case law. Personal data means *any information relating to an identified or identifiable natural person.* The natural person is in this context called a 'data subject'. In order for data to be regarded as personal, it is enough that a data subject can be identified, directly or indirectly, for instance by reference to a name, an identification number, location data, an online identifier or to factors specific to physical, physiological, genetic, mental, economic, cultural or social identity.

The decisive factor for data to be regarded as personal, and for the GDPR to apply to its processing, is whether or not the data relates to an identified or identifiable individual.[15] Processing of such data is lawful according to the Regulation only under certain circumstances. These include, for instance, situations where the data subject has consented to processing, and situations where processing is necessary for some other reason that is specified in the Regulation.[16] Processing is therefore possible on grounds other than the data subject's consent but, also in these instances, there are transparency requirements. The subject has a right to know what data is processed. In a nutshell the general idea is the same as Warren and Brandeis formulated in their groundbreaking definition of a legal right to privacy:[17] individuals shall be granted the right to govern information about themselves.[18]

[15] Art. 4.
[16] Art. 6.
[17] See Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193–220.
[18] Whether the Regulation will be an effective instrument in terms of protecting individuals against gathering of Big Data is debatable. Big Data refers to data that is gathered and processed in mass quantities combining various kinds of information and analysed by computer algorithms. The individual is not central to this process. For a critical account see e.g. Bart van der Sloot, 'Do Data Protection Rules Protect the Individual and Should They? An Assessment of the Proposed General Data Protection Regulation' (2014) 4 *International Data Privacy Law* 307–25.