Book Review - Private selves: Legal personhood in European privacy protection, Susanna Lindroos-Hovinheimo, 2021

Book Reviews

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Private Selves: Legal Personhood in European Privacy Protection

By Susanna Lindroos-Hovinheimo
Cambridge University Press (Cambridge Studies in European Law and Policy) 2021; 186 pp.
Hardback; £85

*Katherine Nolan**

Professor Lindroos-Hovinheimo, of the University of Helsinki, offers in *Private Selves: Legal Personhood in European Privacy Protection* an ambitious and compelling book. [1] Her project marries philosophy and political theory with doctrinal study to deconstruct and re-conceptualise personhood within privacy and data protection. This review primarily focuses on the work's contribution to data protection scholars, though it likely has important resonance beyond this sphere.

This book grapples simultaneously with multiple debates: (i) EU privacy law as a site for the investigation of legal constructions of personhood, (ii) theories of relationships between individuals and community, and (iii) the philosophical underpinnings of privacy and data protection law. Lindroos-Hovinheimo is interested in uncovering ideological presuppositions which underpin EU privacy, particularly the General Data Protection Regulation (GDPR), and re-conceptualises privacy founded on a pluralistic relationality.

The analytical framework is notable in its relative novelty in this field, being grounded in critical legal theory and continental philosophy. A broad range of theorists are introduced with remarkable clarity and used to counter orthodox conceptions. Her approach combines deconstruction and re-conceptualisation of personhood. This understanding of the person primarily derives from an analysis of key decisions of the Court of Justice of the European Union (CJEU) in EU data protection and privacy law, a methodological choice which has some limitations, an issue the author herself recognises.

After an introduction of the legal regime and theories of legal personhood, each chapter follows a similar structure. A theory of subjectivity is mapped onto an element of the privacy regime, and illustrated through a detailed case study of a CJEU decision. Four chapters relate to assumptions within the regime which Lindroos-Hovinheimo subverts, and the final two chapters contain a re-conceptualisation of personhood.

Chapter one introduces legal personhood. Lindroos-Hovinheimo does not ascribe to a particular theory of personhood, but rather, in a Foucauldian approach, seeks to uncover from the legal material particular constructions of the person. In doing so, she seeks to uncover how privacy rights individualise the people of Europe.[2] Chapter two engages with the 'person in control'. Lindroos-Hovinheimo draws on the role of consent in data protection as illustrating "a subject who is, or at least can be, in control and whose self-determinacy needs to be protected by law."[3] She posits that liberal individualism has shaped European privacy rights, pointing in particular to the individualised definition of personal data. This she contrasts to the less-individualised approach seen under the European Convention of Human Rights.[4]

Chapter three relates to the 'autonomous person', as an "all or nothing" approach to autonomy is rejected.[5] Lindroos-Hovinheimo writes that while autono-

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1 Susanna Lindroos-Hovinheimo, *Private Selves: Legal Personhood in European Privacy Protection* (Cambridge University Press 2021).

2 ibid 37.

3 ibid 49.

4 ibid 63.

5 ibid 70.

my is rarely questioned in mainstream privacy scholarship,[6] the legal regime illustrates a balance between the interests of the autonomous and the vulnerable.[7] She argues that the myth of absolute self-control which underlies privacy law calls for other protective approaches, and that individual rights should be seen in their community context.[8] In this context, purely subjective approaches to privacy are flawed.[9]

Chapter four concerns the 'immune person'. Immunity functions as a metaphor for how a person may be individualised from their community.[10] Lindroos-Hovinheimo argues that privacy rights have such an anti-communal function:[11] by carving out boundaries for the personal sphere, the right to privacy operates as an individualisation mechanism.[12] Citing the right to be forgotten cases, Lindroos-Hovinheimo argues that the moderation seen from the absolutist approach of *Google Spain*[13] to the greater balancing of competing interests seen in *GC*[14] and *Google v CNIL*[15] demonstrates an alternative to immunitary logics.[16] By moving away from understanding the person in individualistic ways, the potential is opened up for ideas of "generality, commonality and community."[17]

Chapter five considers 'the person at liberty', and offers a contextualisation of the person in privacy law. Situated within theories of liberalism, Lindroos-Hovinheimo argues European privacy rights bear an idea of possessive individualism, associated with a market-based society.[18] Here, she points to the legal logic that individuals "possess" their data.[19] Lindroos-Hovinheimo counters with an alternative (non-atomistic) vision of individualism, drawing on Durkheim's ideas of interdependence, and the notion that individual life emerges from the collective experience, rather than the reverse.[20] This alternative she places in contrast to Zuboff's work on surveillance capitalism.[21] Similarly to Cohen's critique,[22] she argues that Zuboff's work relies upon the same individualist presuppositions of possessive individualism, and fails to see that the problems articulated as ones of 'surveillance capitalism' are also problems of capitalism.[23] Such economic visions of persons, Lindroos-Hovinheimo persuasively argues, misses a discussion of solidarity, and she calls for alternatives.[24]

In the final chapters, an alternative is developed, as Lindroos-Hovinheimo considers 'the political person' and the 'person in the community'. Asking whether a person can have privacy rights, but also be a political person,[25] she looks to the use of law as a means of disrupting the order of things. Pointing to *Schrems I*,[26] she argues that framing privacy rights in terms of common values can serve to facilitate the contestation of public power.[27] In such cases, lies "[t]he emancipatory potential" of privacy rights.[28] To conceive of a communal approach to privacy rights, she turns to Jean-Luc Nancy and an ontological approach to the subject based on plurality—the idea that "existing is the sharing of the world."[29] Lindroos-Hovinheimo acknowledges that this re-conceptualisation does not necessarily clearly inform how competing interests and values may be balanced.[30] However, by beginning from the idea of community, a renewed understanding of the value of privacy emerges. Privacy is important as a means of regulating relations, and "privacy should not be used to pro-

6 ibid 75.

7 ibid 77–79.

8 ibid 83.

9 ibid 85.

10 Per Roberto Esposito, *Immunitas: The Protection and Negation of Life* (Cambridge: Polity Press 2013).

11 Lindroos-Hovinheimo (n 1) 96.

12 ibid 97.

13 *Google Spain v AEPD* (Case C-131/12) EU:C:2014:317.

14 *GC and Others v CNIL* (Case C-136/17) EU:C:2019:773.

15 *Google v CNIL* (Case C-507/17) EU:C:2019:772

16 Lindroos-Hovinheimo (n 1) 104.

17 ibid 108.

18 ibid 110.

19 ibid 111.

20 ibid 114.

21 Shoshana Zuboff, *The Age of Surveillance Capitalism* (Profile Books Ltd 2019).

22 Julie E Cohen, 'Review of Zuboff's The Age of Surveillance Capitalism' (2019) 17 Surveillance & Society 240.

23 Lindroos-Hovinheimo (n 1) 128.

24 ibid 130.

25 ibid 132.

26 *Schrems v Data Protection Commissioner* (Case C-362/14) EU:C:2015:650

27 Lindroos-Hovinheimo (n 1) 141–147.

28 ibid 147.

29 ibid 149–150.

30 ibid 153.

tect individuals alone, but rather as part of sharing a world."[31]

The strengths and weaknesses of this work tend to derive from the same source: the ambitious nature of the project. In seeking to unravel and further three significant academic debates, choices of focus and emphasis have been made, at times to great effect, but at others leading to a lack of specificity or underdevelopment of ideas. In this short review, I focus on three central aspects of her work.

This book makes a compelling case against overly individualised approaches to European privacy and data protection. Grounded in meticulous theoretical reasoning, a persuasive demonstration of the flaws of atomised approaches to data protection is made. This, in itself, is a valuable contribution, and its foundation in critical theory is a notable addition to scholarship on this topic to date. The focus upon the conception of the person as the grounding for this discussion is largely novel,[32] and Lindroos-Hovinheimo makes a convincing argument that the understanding of the subject is fundamental to EU privacy rights.

The re-conceptualisation of the subject is also an important contribution. It has something in common with relational works of information privacy in US scholarship,[33] but is grounded in EU values of solidarity and pluralism. As such, it offers a response to Neil Richards and Woodrow Hartzog's appeal for relational approaches to data protection.[34]

From a data protection perspective, there are some limitations to the argumentation and engagement with existing literature. By focussing primarily on CJEU judgments, an imbalance arises. While cases on consent and individual control certainly paint a picture of an autonomous data subject, aspects of the GDPR which suggest a less individualistic approach (e.g. data protection principles, legal obligation or public interest data processing, or representational actions) are all absent from her discussion, undermining some conclusions. Further, Lindroos-Hovinheimo asserts that the philosophy of data protection is largely under-theorised,[35] but does not engage with much of the relevant literature, her focus instead being primarily upon works of critical theory and continental philosophy. Nevertheless, one cannot expect such an ambitious project to be all things to all people, and data protection scholars certainly have much to appreciate in this work.

Lindroos-Hovinheimo is to be congratulated on a rich and detailed book. It is a compelling piece of scholarship, which takes a novel perspective on privacy theory. In uncovering implicit aspects of the EU privacy and data protection regime, it opens up an important arena of the regime for scrutiny and debate.

Private Selves: Legal Personhood in European Privacy Protection

By Susanna Lindroos-Hovinheimo
Cambridge University Press (Cambridge Studies in European Law and Policy) 2021; 186 pp. Hardback; £85

*Bart van der Sloot**

Susanna Lindroos-Hovinheimo is Professor of Law at the University of Helsinki. She specializes in analysing the philosophical and normative foundations of European Union (EU) law. Her new book, *Private Selves: Legal Personhood in European Privacy Protection,* is emblematic of that approach. The book assesses the different rationales engrained in EU data protection law (especially the GDPR) and the jurisprudence of the EU Court of Justice. In each chapter Lindroos-Hovinheimo discusses a different rationale, combining a detailed legal analysis of data protection law and jurisprudence with philosophical insights. Doing so, the work is accessible for both data protection and privacy scholars looking for a book that deepens their thinking about the GDPR and CJEU court cases, as well as for legal and political philosophers interested in privacy and data protection law. By discussing a rationale per chapter, the author is able to uncover the different interests protected through data protection law, assess how the GDPR affects citizens and society as a whole, and

31 ibid 169.

32 With the notable exception of Peter Blume, 'The Data Subject' (2015) 1 EDPL 258.

33 For example, Solon Barocas and Karen Levy, 'Privacy Dependencies' (2020) 95 Washington Law Review 555; Salome Viljoen, 'Democratic Data: A Relational Theory For Data Governance' (2021) 131 Yale Law Journal 573.

34 Neil Richards and Woodrow Hartzog, 'A Relational Turn for Data Protection?' (2020) 4 EDPL 1.

35 Lindroos-Hovinheimo (n 1) 6.

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show the various ways through which privacy can be understood.

In the first chapter, she delves into the concept of legal personhood through the work of Foucault, and mirrors that with the empowerment rationale in the GDPR. She suggests that through focusing on and protecting the private person, the public person is also produced, just like giving a special status to the private sphere by necessity also creates a public sphere, with different rules and normative presumptions. Chapter 2 deals with the problems of consent and illustrates that through the CJEU cases of *Wirtschaftsakademie*, *Breyer*, *Nowak* and *Buivids*. She deepens the notion of control and the focus on the individual by analysing Bauman's seminal *Liquid Modernity,* as well as the work of several others (eg Fried, Roessler and Mokrosinska). Then, in Chapter 3, she moves to the much-haunted concept of individual autonomy. She opens with a reference to the work of Lon Fuller, and then moves to intellectual output of, inter alia, Butler, Žižek and Raz. She illustrates the importance of autonomy in the data protection realm through a detailed analysis of the CJEU case of *Fashion ID* and then offers a final reflection of that case through the work of Althusser. Chapter 4 draws from the work of Esposito and the *Psara* and *Google Spain* cases to understand the concept of immunity. Chapter 5 deals with the *Deutsche Post AG* case and Zuboff's concept of surveillance capitalism.

In the first five chapters, Lindroos-Hovinheimo argues that the dominant view of the person constructed by EU privacy law is a person in control. Although in data protection law there are many rules that address how personal data can be collected, stored and processed, one of the most important aims of the GDPR is to empower people, to give them control. This approach shows that the EU primarily views the individual as a rational individual, a person capable of control, a person wanting to be in control. She suggests that there may be several problems with this approach, such as that in the Big Data era, people can hardly be expected to control their data and exert their rights vis-à-vis data controllers given the multitude of data controllers and the complexity of data processes. In addition, certain data processing operations or technologies simply need to be prohibited and certain people protected (against others, against themselves). The author shows that the individualistic mode in data protection law fits in the broader legal and societal paradigm, which focusses on individual rights and which is grounded in the believe that as long as the individual is given control rights and sufficient information, she will be able to make rational decisions that further her individual interests. While this paradigm had a significant positive impact on individual empowerment and control, it also meant that when data processing operations affected societal interests, these were difficult to address.

What these chapters add to existing literature is the depth of analysis they offer, and the way in which the author combines detailed legal analysis with insightful philosophical discussions. The selection of authors is illustrative of the originality of the book, as although the author does refer to the standard works of Westin, Foucault and Warren and Brandeis, among others, she adds to this list a number of authors, thinkers and philosophers seldom seen in literature on privacy and data protection. The final two chapters, 6 and 7, are innovative in that they address a rather unexplored side of privacy and data protection law, and that is the political and public side of privacy rights. Chapter 6 deals mainly with the philosophy of Jacques Rancière, on which the author has published in the past, and Chapter 7 concerns Jean-Luc Nancy's ideas on communities and the role of private individuals in them.

To give an example of how the author approaches these topics, Chapter 6 may serve as a point in case. Lindroos discusses the work of Rancière, who has stressed that becoming a political person requires, to an extent, the denial of the private person. It requires deidentification with a given private situation. To give a very plain example, a person born in poverty needs to resist that situation and address that issue in a public and political setting, rather than dwell in private in order to overcome it. While the private domain can be seen as one of diversity, Rancière would stress that the public domain is one of equality, at least in terms of rights and freedoms attributed to persons. To act out that equality, however, to use those rights, for example to vote or to speak out, one needs to show dissensus with someone or something. The law can facilitate that process, by giving rights and allowing citizens to dissent with a given situation through the legal procedure.

Lindroos-Hovinheimo shows how even this rationale may be visible in data protection law by analysing the *Schrems* case. Schrems was not so much concerned with his private situation, although

he may have wanted to put an end to his position via-vis Facebook, but primarily used his rights as political instruments to show dissensus with a given situation and to tackle general problem for the community at large. Doing so, Scherms did use a private right to defend a broader, general interests; the private person, through denying his private situation in the public domain, forms a group or represents a group of persons that are in similar situations. Thus, by denying the private self, the public realm is born.

Lindroos-Hovinheimo closes this chapter by asking how to engage in resistance and drive for change. 'Privacy rights are one obvious choice for such contestation', she argues, noting that legal acts 'can be political and they can push for change', but 'the assumption of the equality of everyone has to be at the heart of the discussion'. In her view, 'Data protection offers one instrument by which some of the exploitative results of technological government can be fought. The GDPR does include elements to this effect, including stringent rules on automated decision-making and profiling. They are meant as an answer to the injustices caused by algorithmic governance that escape legal control, due process requirements or other legal safeguards.'

It is difficult to find a weak spot in such a perfect book, but it may be that the book's strength, namely the fact that it combines insights from two worlds (the philosophical realm and privacy law) is also its weakness. The data protection community will often know the cases discussed and the laws analysed, while the philosophers may be familiar with the general gist of the philosophical thoughts discussed. Both sides may find that this book does not provide the level of detail a classic, disciplinary (instead of interdisciplinary) work would offer. This may be true, but this book's added value lies precisely in the interdisciplinary approach it offers, and the new insights that combining two worlds may yield. For lawyers looking for detailed juridical analysis, there are many detailed commentaries on the GDPR and of CJEU cases, and philosophers only interested in philosophers and philosophers philosophising about philosophers, there is always Derrida's criticism of Hegel in *Glas*. This book is written for scholars that are interested in moving beyond their own discipline and for them, this book is warmly recommended.

Protecting Genetic Privacy in Biobanking Through Data Protection Law

By Dara Hallinan
Oxford University Press 2021, 305 pp.
£85.00

*Bart van der Sloot**

Dara Hallinan, one of the leading forces behind the Computers, Privacy and Data Protection (CPDP) conference, now a researcher at Fraunhofer ISI in Karlsruhe, wrote his doctoral thesis under the supervision of Paul De Hert at the Vrije Universiteit Brussel (VUB) on 'Feeding Biobanks with Genetic Data: What role can the General Data Protection Regulation play in the protection of genetic privacy in research biobanking in the European Union?'. Under a slightly revised title, the manuscript has now been published with Oxford University Press. The book has much to offer for anyone interested in the topic of genetic privacy, biobanking and bodily privacy.

Chapter 2 provides the reader with a careful description of how genetic data are produced, how genomes and DNA can be analysed and what type of information they may yield. Chapter 3 introduces several biobanks and projects to capture human tissues for the analysis of various diseases and variations. It provides a typology of biobanks, of the substances stored in those banks, and a definition of biobanks, and describes the uses they are put to. Chapter 4 discusses the privacy interests involved and the problems with applying the current privacy paradigm to the matter of genetic privacy. One problem is that of inferred data about relatives and groups that can be distilled from tissue/material from a single person, as the law attributes rights to individuals, not groups or genetic classes.

The book turns then to a legal analysis. Chapter 5 describes the international regulation of biobanks, Chapter 6 describes European law (both at European Union (EU) level and national level) other than data protection that applies to biobanks, whereas Chapters 7, 8 and 9 analyse biobanking from a GDPR-perspective. Those chapters contain a description of when the GDPR applies (when are personal data processed? can biological material itself qualify as

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personal data? etc.), data controllership, consent, data subject rights, data transfers to third countries, risk mitigation, sanctions, derogations (eg the derogations for scientific research in the GDPR), and so forth.

Finally, the quintessence of this book is Chapter 10, where Hallinan tackles the problems involved with the current regulatory regime when applied to biobanking, identifies the gaps that should be filled, and puts forward several suggestions are made for updating the current regulatory regime. Chapter 10 discusses in detail the facts that data protection rights do not apply to scientific conclusions, that limitations apply when law enforcement authorities use genetic data, that there is no right not to know certain information derived from genetic data, and that the GDPR does not give proper protection to groups' privacy rights, and it contains a number of further observations.

Each analysis is built up following the same structure: a description of the problem, an indication of a potential solution, and the potential benefits and drawbacks of such a solution. Let me give an example by way of illustration. Section D concerns the protection of research subjects' genetic privacy rights. It is further subdivided in two problems, the first being that the GDPR does not contain a *right not to know*, despite the fact that patients may want to remain oblivious about information found through genomic analysis (e.g. incidental medical findings concerning (uncurable) diseases) because they do not want to live in anxiety over a disease that they might have, which may never materialise or may not be curable. This, Hallinan explains, is a general oversight in the GDPR, based on a classic starting point that the data subject has control over her data and that only subsequently, others will gain access to that data, either with her consent or when there are overriding interests. The regime does not account for the situation in which data controllers may have data about an individual she was never aware of herself. The issues with genetic data are only an illustration of this gap. The author admits that this omission in the GDPR does not lead to severe negative consequences, stressing that a right not to know is not widely recognised in international or national law. Yet, he finds, a solution could be desirable. There are few arguments, he notes, not to include a right not to know in the GDPR. And he stresses that as the most practical solution, the European Data Protection Board (EDPB) could adopt a guideline on consent in the biobanking sphere, in which people should be given the option not to receive unwanted information about themselves.

The book is concise, well written and detailed. It focusses on a narrow topic and discusses anything that is relevant in relation to genetic privacy from a legal perspective. It provides a broad overview of the technical possibilities with respect to tissue analysis and practical developments in terms of storing and sharing data in biobanks, and provides a full overview of relevant regulation. It is not only relevant for academics working in this field, but is tailored to practitioners as well. Because the book is so clear and succinct, it can be used as a standard work for any medical practitioner interested in the field of data protection. Through this book, she will be able to understand the basics of privacy and data protection law and how they relate to her work field. In addition, it is relevant for regulators, as the book contains many suggestions for updating and revising the GDPR in ways that has relevance beyond the issue of genetic privacy.

It is difficult to find flaws in a book as strong as this one, but if I had to indicate one weak spot, it would be precisely that it is too structured. It is structured to the extreme. Hallinan seems the type of person which, when asked whether he has any good books to suggest to take on vacation, would answer: I distinguish between three types of books, fiction, non-fiction and poetry; this year, I've read 24 books, 10 falling in the first category, 12 in the second and two in the third; I judge books on three qualities, the writing style, their logical consistency and how inspiring they are; I read books in German, English and Russian; limiting myself to the books in English, I will suggest one fiction, one non-fiction and one poetry book; book A has five characters and stages at three locations; there are six reasons why this book is worthwhile bringing on vacation, namely...and so on. This way of structuring, with lists of arguments, lists of laws, lists of reasons to amend laws, lists of problems, lists of solutions and so on, makes it very easy to read. It also shows how well versed the author is in this field, as it takes an expert to bring a complicated theme as genetic privacy back to insightful proportions. Yet, the academic in me also wants to challenge every single list: why are there four types of activities in biobanking and not five, how does the author arrive at the categorisation of five different

substances in biobanks, why does he distinguish between three links between collected substances and research subjects, etc. Almost every page contains a list or categorisation which is provided as a given, while they are, of course, not a given. It is how the author structures the world, there are choices behind those categorisations and lists (what to include and what not, which criteria to use for making distinctions and which not, etc.); these choices are not made explicit nor grounded in any theory nor based on other authors/sources. This makes the book a work written based on an authority-argument, rather than a reflection of an academic investigation; Hallinan knows best, which is probably true.

All in all, this is nevertheless an (almost) perfect book on the topic of genetic privacy, biobanking and the GDPR warmly recommended to anyone interested in this topic.